IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & MWILU, JJ.A)

CIVIL APPEAL NO 212 OF 2006

BETWEEN

RICHARD MUCHAI t/a RICHARD MUCHAI AUCTIONEERS.....APPELLANT

AND

KINGSWAY TYRE AND AUTOMART LTD.....1ST RESPONDENT

COMMISSIONER OF VALUE ADDED TAX.....2ND RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Milimani

(Waweru, J.) dated 2nd December 2005

in

Misc Application No. 676 of 2005)

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JUDGMENT OF THE COURT

Richard Muchai, trading as Richard Muchai Auctioneers, the appellant herein, was instructed by the 2nd respondent, the Commissioner for Value Added Tax, to levy distress for unpaid taxes and penalties estimated in the sum of Kshs 260,229,000.00 being the value of the goods distrained. The 1st respondent then entered into an agreement with the 2nd respondent by agreeing to pay the sum of Kshs 9,000,000.00 million in full and final settlement of the whole claim. The appellant proceeded to levy distress on various goods belonging to the 1st respondent. It was then that the 2nd respondent instructed the appellant to release the goods of the 1st respondent. On receipt of the said instructions, the appellant demanded the sum of Kshs 9,290,606.00 from the 1st respondent, which he based on the value of the goods that had been proclaimed.

A dispute arose as to the amount of fees due to the appellant, prompting the appellant to bring an application before the deputy registrar for assessment of his charges. At first, the deputy registrar struck out the application, but the same was subsequently reinstated on appeal by Emukule, J. The assessment of charges was done by Hon. Wamae, who assessed the fees payable to the appellant at Kshs 9,231,788.00.

The 1st respondent was aggrieved with the assessment and filed an appeal by way of a chamber summons application before the High Court. In that appeal, the 1st respondent faulted the Deputy Registrar in her assessment on the grounds that the she ought not to have assessed the fees on the basis of the sum of Kshs. 272 million; that the appellant was not an authorised officer within the meaning of section 18 of the VAT Act; that the Deputy Registrar erred in failing to appreciate that the appellant had not conducted a sale as required by regulation 15 of the VAT (Distraint) Regulations; and that the assessment of Kshs. 272 million was merely an estimated figure which was contested.

The appellant opposed the application, arguing that the application was an abuse of the court process; that it was incompetent being a fresh suit and thus ought not to have been considered by the court; and that there was no requirement for an auction to be held before fees were to be assessed under the Value Added Tax (Distraint) Regulations, 1990. The 2nd respondent submitted that the 1st respondent had in fact only paid the sum of Kshs 9 million in taxes and thus the Deputy Registrar ought to have assessed the amount payable on the said sum. It further submitted that in view of the fact that the 1st respondent stopped the distress, the appellant should not have proceeded to physically attach and keep the goods of the 2nd respondent.

This application was heard by Waweru, J, who confined himself to two issues: the first was whether there were any charges due from the 1st respondent to the appellant, and the second issue was whether the charges, if any, were properly assessed by the Deputy Registrar. On the first issue, the learned judge stated that:

> ***"The distraint agent must demand his remuneration from the distrainor. So the Auctioneer under this regulation must demand his charges from the 2nd respondent's authorised officer (distrainor) who instructed him to assist in levying distress against the applicant or from the principal (the 2nd respondent). He cannot look to the applicant for payment of these charges."***

The learned judge then stated that:

> ***"The effect of all the above is that the Auctioneer's charges are really a matter between the Auctioneer and the 2nd Respondent. It cannot be between the Auctioneer and the Applicant. The law, as we have seen, provides that the 2nd Respondent recovers such charges from the Applicant and then pay (sic) the Auctioneer. The Auctioneer cannot demand his charges directly from the Applicant. I so rule."***

After that, the learned judge addressed himself on the assessed costs, and rendered himself in the following manner:

> ***"The court has not been told if the Applicant paid the KShs. 9 million within ten (10) days of attachment or after. If indeed he paid it within ten (10) days of attachment the Auctioneer will not be entitled to any more charges than KShs. 270,000/=, except under subparagraph (e) of paragraph 2 of the Schedule. On the other hand, if the Applicant paid the KShs. 9 million after expiry of ten (10) days from attachment the Auctioneer shall be entitled, for each additional day or part thereof, to ¼% of the value of the goods attached (up to a maximum of KShs.60/=) (see sub-paragraph (d)). He will also be entitled to reasonable expenses incurred in transporting the goods attached and such traveling expenses by car or a ratable proportion thereof as the 2nd Respondent may approve. All those are matters to be worked out as between the Auctioneer and the 2nd Respondent.***
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> ***The Deputy Registrar was therefore clearly wrong to assess the Auctioneer's charges based on the estimated back taxes of KShs.272 million odd that was never paid and that appears to have been found not to be due. This was an error of principle that entitles me to interfere. She should have assessed the charges as I have indicated above."***

Based on these findings, the learned judge set aside the decision of the Deputy Registrar, and in its place,

assessed the sum payable to the appellant to be Kshs 270,000.00, together with such costs as would be agreed between the appellant and the 2nd respondent. Definitely, the appellant was aggrieved with the findings and the assessment of the Honourable Judge.

The appellant now brings this appeal in which he challenges the findings of Waweru, J. The appeal was canvassed by way of written submissions. By way of the submissions dated 26th November 2014, the appellant condenses his appeal into two main grounds: that the appeal before the High Court was improperly instituted as it did not accord with the provisions of Rule 55 of the Auctioneers Rules, 1997. The appellant's position is that it ought to have been filed in the same suit as the previous appeal was heard and determined by Emukule J, but this was not the case, as the 2nd respondent instead chose to file a fresh suit. As a result of this failure, the appellant submits that the jurisdiction of the High Court was not properly invoked, and thus it had no jurisdiction to deal with the matter before it. The 1st respondent's position is that the earlier appeal was spent after Emukule J's determination and that there is no basis or legal requirement that a subsequent appeal arising from a different determination be filed in the said file. The 1st respondent further submitted that it followed the correct procedure in accordance with Rule 55 (7) of the Auctioneers Rules which provides that an appeal from the decision of the registrar shall be to a judge in chambers.

The appellant's second challenge to the decision of the High Court was that the learned judge erred in finding that the distress debt was Kshs 9,000,000.00 and thereafter basing the assessment on costs on this figure. The appellant submits that the '***distress debt***' ought to be construed as ***'the amount of tax, and interest charged thereon, specified in the order'*** and that the amount specified in the order was Kshs 272,370,537.00. Since the estimated sum proclaimed was Kshs 260,220,606.00. The appellant submits that it did not receive instructions to levy distress on the amount of Kshs 9,000,000.00 and therefore the learned judge erred in basing his assessment on the same. On its part, the 1st respondent submitted that the appellant never auctioned its goods, and therefore did not even have a basis in asking for costs. On its part, the 2nd respondent submitted that the amount as assessed by the trial judge was correct, bearing in mind that if the appellant's argument was to prevail, then he would receive more than the 2nd respondent was paid in taxes, yet it is the 2nd respondent who ought to remunerate the appellant

We have considered the grounds of appeal and the submissions filed by all the parties. The first issue for our determination is the jurisdiction of the High Court to hear the appeal. Rule 55 of the Auctioneers Rules, 1997 provides for the fees and disbursements that are payable to an auctioneer. Rule 55 (4) and (5) provide that:

> ***"(4) An appeal from a decision of a registrar or a magistrate or the Board under subrules (2) and (3) shall be to a judge in chambers.***
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> ***(5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate."***

The rule requires that a party aggrieved with the decision of the registrar may file an appeal, by way of chamber summons within seven days of the decision being appealed from. The 1st respondent filed its appeal by way of chamber summons on the 12th August 2005, and the decision to be appealed from was made on the 9th August 2005.

It would not have been possible for the 1st respondent to file its appeal within the appeal that was heard and determined by Emukule, J. The issue before the learned judge was whether the application for assessment had been properly filed, and as pointed out by counsel, that suit was spent once the judge rendered his decision thereon. The procedure for filing the appeal was therefore correct, and it follows that the appellate jurisdiction of the High Court was properly invoked. This ground of appeal therefore fails in entirety.

It is not disputed that the 1st respondent paid the sum of Kshs 9 million to the 2nd respondent which was

in full settlement of the taxes and penalties claimed by the 2nd respondent. In addition, the appellant never conducted any sale. The distress was stopped by the 2nd respondent before any physical attachment could take place. We agree with the learned judge that the correct sum that was payable to the appellant was to be based on the amount that was paid by the 1st respondent to the 2nd respondent, which is Kshs 9 million.

It means that the 2nd respondent confirmed that the amount of Kshs 9 million was the correct and legitimate figure that was owing from the 1st respondent to itself. It also means that the earlier figure of Kshs 272 million was an incorrect assessment of the taxes and penalties that were due to it. It is therefore clear in our minds that the 1st respondent cannot be liable for an estimated figure. It is also crystal clear to us that the appellant cannot base its fees and other charges on an estimated amount, and should it do so, then the party liable to pay those charges would not be the 1st respondent. The amount of Kshs 9 million was paid in full and final settlement of the tax owed and therefore comprises the distress debt.

Regulation 11 of the Value Added Tax Regulations provides that:

> ***"11. (1) Where a distrainee has within ten days of attachment of his goods under these Regulations, paid or given security accepted by the Commissioner for the whole of the tax due from him together with the whole of the costs and expenses incurred by the distrainor in executing the distress, the distrainor shall at the cost of the distrainee restore forthwith the attached goods to the distrainee and return the order to the Commissioner who shall cancel it.***
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> ***(2) Any money paid by a distrainee under this regulation shall be applied by the Commissioner first in the settlement of the cost and expenses incurred by the distrainor and as to the balance in settlement of the distress debt or such part thereof as the Commissioner shall direct."***

Regulation 11 above is what then guides the payment of the fees. The 2nd respondent, having stopped the sale of the goods, entered into an agreement with the 1st respondent where the sum of Kshs 9,000,000.00 was accepted as full and final payment of back taxes, that set the distress debt. This sum however, was after the execution of the distress, and therefore it is the 2nd respondent who is liable to pay the costs of the auctioneer. In this case, the rules under the Auctioneers Act, and specifically Rule 7 of the Auctioneers Rules would not apply because there is a specific rule under the Value Added Tax Regulations that addresses the situation.

Having taken into consideration all the pertinent issues and applicable law, we have come to the irresistible conclusion that the appeal is devoid of merit, and we order it dismissed with costs to the respondents.

Dated and delivered at Nairobi this 23rd day of January 2015

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR