



**Population Services Kenya & another v Samson Itonde Tumbo t/ a Dominion Yards Auctioneers
(Appeal E021 of 2022) [2024] KEELRC 2213 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2213 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E021 OF 2022
CN BAARI, J
SEPTEMBER 19, 2024**

BETWEEN

**POPULATION SERVICES KENYA 1ST APPELLANT
SENIOR MANAGER, TRADE DEVELOPMENTS, POPULATION SERVICES
KENYA 2ND APPELLANT**

AND

**SAMSON ITONDE TUMBO T/ A DOMINION YARDS
AUCTIONEERS RESPONDENT**

JUDGMENT

1. This judgment relates to an appeal arising from a decision rendered on 15th February, 2022, on the Respondent’s Bill of costs taxed in the sums of Kshs 244,092.20, Kshs 265,190.20 and Kshs 266,448.40 in favour of the Respondent/Auctioneer.
2. The Appellants being dissatisfied with the decision of the Taxing Officer, lodged this appeal/refence on 14th July, 2022.
3. The appeal is premised on the grounds that:
 - i. The Learned Deputy Registrar (Taxing master) erred in Law in failing to appreciate that the Appellants were inadvertently absent at the Hearing of the Respondent's Bill of Cost consequently denying the Appellant its right to be heard as guaranteed under the *Constitution*.
 - ii. The Learned Deputy Registrar (Taxing master) erred in Law in passing Ruling devoid of proof that the Appellants had been served with a Ruling Notice, given that the Appellants was absent during the Hearing of the Bill of Cost.



- iii. The Learned Deputy Registrar (Taxing Master) erred in law by not appreciating that Hon. Justice Mathews Nduma in the substantive suit had consolidated three appurtenant files and consequently only one Bill of costs ought to have been filed as opposed to three.
 - iv. The Learned Deputy Registrar (Taxing master) erred in Law in giving three Rulings in relation to three appurtenant files which had been consolidated in the substantive suit by Hon. Justice Mathews N. Nduma.
 - v. The Learned Deputy Registrar (Taxing master) erred in Law and misconstrued the Ruling and Judgement of Hon. Justice Mathews N. Nduma and aided the unjust enrichment of the Respondent.
 - vi. The Learned Deputy Registrar (Taxing master) erred in Law by not applying the rules of natural justice of fair hearing and that the same occasioned a grave injustice to the Appellants.
 - vii. The Learned Deputy Registrar (Taxing master) erred in Law and in fact by allowing the sums of the Auctioneers Bills of Costs in ELRC Numbers 253, 254 and 256 of 2016 at Kshs 244,092.20, 265,190.20 and Kshs 266,448.40 respectively yet the same was not drafted as per the auctioneer's scale of remuneration.
 - viii. The Learned Deputy Registrar (Taxing master) erred in Law and in fact by not taking into consideration the Auctioneers rules at paragraph 4 of Part II of the Fourth Schedule in which the same stipulates how an Auctioneers bill of cost should be drafted.
 - ix. The Learned Deputy Registrar (Taxing master) erred in Law by not taking into consideration Rule 55 (1) of the *Auctioneers Rules* while taxing the auctioneer bill of cost in ELRC Numbers 253, 254 and 256 of 2016 at Kshs 244,092.20, 265,190.20 and Kshs 266,448.40 respectively.
 - x. The Learned Deputy Registrar (Taxing master) erred in fact by allowing item 4 of the bill of cost for the sum of Kshs 58,412 yet no goods of the Appellants were attached.
 - xi. The Learned Deputy Registrar (Taxing master) erred in fact by allowing item 6 of the bill of cost for the sum of Kshs 177,876.4 for traveling cost of serving proclamation notice yet no proclamation was served upon the Appellants in Nairobi
 - xiii. The Learned Deputy Registrar (Taxing master) on the whole misapplied the Law and failed to do Justice to the detriment of the Appellants.
4. The Appellants pray that their appeal be allowed with costs and the ruling of the Taxing Officer be set aside, together with the Auctioneer bill of cost in ELRC Numbers 253, 254 and 256 of 2016 at sum of Kshs 244,092.20, 265,190.20 and Kshs 266,448.40 respectively.
 5. The appeal was canvassed by way of written submissions, and both parties filed their submissions.

The Appellants' Submissions

6. It is the Appellants' submission that The Learned Taxing Master disregarded a material fact that resulted to the Appellants inadvertent absence at the hearing, thus denying the Appellants an opportunity to be heard. The Appellants submit that despite directing the Respondent to issue a Ruling Notice, the Learned Taxing Master delivered a Ruling devoid of proof that the Appellants had been served with a Ruling Notice.
7. It is the Appellants' submission that the Learned Taxing Master failed to take into consideration that the Auctioneers bills of costs in ELRC 253, 254 & 255 of 2016 ought to have been charged in



accordance with the Auctioneers Rules and allowed Auctioneers fees/commission whereas no goods of the Appellants were attached.

8. The Appellants submit further that the Learned Taxing Master acted on a wrong principle by issuing three separate Rulings for files that had been consolidated in the substantive suit, thus aiding in the unjust enrichment of the Respondent and unfair exploitation of the Appellants.
9. It is submitted that if the Court finds that there was any error on the part of the Appellants, the error was that of Counsel and the same should not be visited upon the innocent Appellants. They sought to rely in *Joseph Gikonyo t/a Garam Investments v National Social Security Fund Board of Trustees* [2014] eKLR to support this position.
10. The Appellants submit further that the Learned Taxing Master erred in principle fact by allowing sums of the Auctioneers Bills of Costs in ELRC Nos. 253, 254 and 255 of 2016 in the sum of Kshs 244, 20, 265, 190. 20 and 266, 448.40 respectively, yet the same were not drafted as per the auctioneers' scale of remuneration in that by allowing item No 4 of the bill of costs for the sum pf Kshs 58, 412 yet no goods of the Appellants were attached, and further by allowing item No 6 of the bills of costs yet no proclamation notice was served upon the Appellants in Nairobi.
11. The Appellant had reliance in the Court of Appeal decision in *National Industrial Credit Bank Limited v S K Ndegwa Auctioneers* [2005] eKLR for the holding that;

“It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had be attached goods equivalent in value to the decretal sum. That is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative. We are, however unable to assess the auctioneer's fees since there is no or not sufficient evidence of the value of the goods attached.”

The Respondent's Submissions

12. The Respondent submits that the Appellants have not demonstrated that they deserve orders of setting aside the taxation of the Auctioneers Bill of Costs dated 21st December 2020, since they did not exercise due diligence in the matter, they exhibited indolent behaviour and now want this Court to give them a helping hand.
13. It is the Respondent submission that the suit was consolidated at some point and that at the time of Judgment, the Honourable Judge rendered a judgment in three different causes. It submits that the Respondent was right in filling three different bills and the Honourable Deputy Registrar did not err in proceeding to tax the Auctioneers bills of Costs as separate as they were filed and presented before her separately.
14. The Respondent submits that the Appellants have not demonstrated that they deserve the prayers sought as no tangible materials were placed before this court to convince it that the Respondent contributed to the misfortune facing the Appellant.
15. The Respondent prays that the Appellants' appeal be dismissed with costs.

Analysis and Determination

16. I have considered the Memorandum and Record of Appeal, together with the written submissions by both parties. Although the Appellants listed a total of ten (10) grounds of appeal, the issues for determination are just two, and which are:



- i. Whether the Taxing Officer erred in issuing three separate Rulings for files that had been consolidated in the substantive suit; and
 - ii. Whether the Appellants were denied their Constitutional Right to a fair Hearing.
17. The Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 set out the appropriate standard of review established in cases of appeal as follows: -
- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and bearing the witnesses testily before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
18. The Appellants' issue is firstly that the Taxing Master ought to have only taxed one Bill since the three suits were consolidated. From the rulings of the Taxing Master presented before Court, it is clear that the Respondent presented three Bills of costs and which were all separately taxed resulting in three rulings now impugned.
19. The simple question is whether the suits subject of the bills were consolidated and a single decree issued, or whether each case was heard separately resulting in three distinct decrees.
20. For starters, the Respondent has in its submissions admitted that the suits subject of the Bills of costs herein, were actually consolidated and a judgment delivered with an award to each of the Claimants. The Respondent however proceeds to postulate that three different decrees were issued in the matter in respect of the awards to the Claimants.
21. As was correctly submitted by the Appellants, the purpose of consolidation of suits is to promote efficient administration of justice and judicial economy by saving costs, time, and eliminate duplicity of trial provided no prejudice is occasioned to any party.
22. This court is not convinced that after the consolidation of the three suits, the Court proceeded to issue three separate decrees. The separate decrees have also not been produced in evidence before this court.
23. In my view, for the Claimants to draw three different applications for execution in three different files, when the main case was consolidated, defeats the purpose of the consolidation. In *Felix Apollo Owuor T/A Victoria Blue Services Auctioneers v Lake Basin Development Authority* [2012] eKLR, the Court had this to say on consolidation of suits:
- “What was the effect then of the consent ordered dated 27-8-2009? As clearly seen from paragraph 1 thereof the same consolidated all the files it is apparent that the same ought to be read cumulatively. Execution therefore would not be issued under separate file. Consequently, the warrants ought to have been issued in one consolidated file for the specific amount due and owing instead of splitting them into various files.”
24. Additionally, as Kuloba, J in *Judicial Hints on Civil Procedure* 2nd Edition stated that where suits or appeals are consolidated, there should be an apportionment of costs, and in the same breathe, the consolidation of the suits subject of the Bills herein, required that the attendant costs could only be



taxed as a single bill and not three separate bills, as to do so would result in the Respondent being paid three times over the same work done under a single file.

25. In the end, I find and hold that the Taxing Master erred in rendering three rulings in relation to files that had been consolidated, and thus uphold the appeal in this respect.

Whether the Appellants were denied their Constitutional Right to a fair Hearing.

26. The Appellants assert that they were condemned unheard by not having been served with hearing and ruling notices in the matter. The record however shows that Taxation Notices dated 20th April, 2021 and 15th June, 2021 were issued to the Appellants' Advocates.
27. The record similarly bears an affidavit confirming service of the Respondent's submissions on the Bills of costs, yet the Appellants did not file their submissions in opposition.
28. Further, the Appellants' reliance on a cause list before a judge of the ELRC as prove that the matter for taxation was not cause listed is lame as they know well that taxation is a mandate of the Deputy Registrar.
29. I conclude by finding that the Respondent has shown that the Appellants were served at every step of the proceedings, but chose not to participate in the taxation process and cannot now claim violation of their right to a fair hearing.
30. In whole, I reach the following conclusion: -
- i. That the appeal succeeds and orders issued as follows: -
 - a. That the rulings of the Taxing Officer be and are hereby set aside together with the Auctioneer bills of cost in ELRC Numbers 253, 254 and 256 of 2016 taxed at Kshs 244,092.20, 265,190.20 and Kshs 266,448.40 respectively.
 - b. That the Respondent files a single bill for the three files for taxation by a different Taxing Master.
 - c. I make no orders on costs.

31. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19TH DAY OF SEPTEMBER, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Mwendwa h/b for Mr. Marete for the Appellants

Mr. Anwar present for the Respondents

Ms. Anjeline Wanjofu - Court Assistant

