



Kenya Scientific, Research International, Technical and Institutions Workers’ Union v Kenya Agricultural and Livestock Research Organisation (Sugar Research Institute) & 2 others (Cause 281 of 2016) [2023] KEELRC 1142 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1142 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 281 OF 2016**

**S RADIDO, J
MAY 11, 2023**

BETWEEN

KENYA SCIENTIFIC, RESEARCH INTERNATIONAL, TECHNICAL AND INSTITUTIONS WORKERS’ UNION CLAIMANT

AND

KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANISATION (SUGAR RESEARCH INSTITUTE) RESPONDENT

AND

STEPHEN JUMA ONYANGO T/A INTIME AUCTIONEERS AUCTIONEER

AND

KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANISATION RESPONDENT

RULING

1. For determination is a Summons dated January 26, 2023 by Kenya Agricultural and Livestock Research Organisation (the applicant) against Stephen Juma Onyango t/a Intime Auctioneers (the auctioneer) seeking orders:
 1. That the Taxing Officers decision dated November 2, 2022 allowing the Respondent’s application dated March 4, 2022 to the tune of Kshs 633,494/36 to be set aside.
 2. That the Respondent’s application dated March 4, 2022 be and is hereby struck out with costs to the applicant.
 3. That in the alternative and without prejudice to prayer 2 hereinabove:



- (a) Upon grant of prayer (1) hereinabove, the Respondent's application dated March 4, 2022 and the attached Bill of Costs to be remitted for fresh taxation before a different Taxing Officer.
 - (b) In the alternative to prayer (3)(a) hereinabove, this Court does proceed to exercise its inherent discretion and determine the Respondent's application dated March 4, 2022, and tax the Bill of Costs.
4. That the costs of this application be borne by the Respondent.
2. In support of the application, the applicant contended that the auctioneer was not a party to this Cause and therefore, he did not have the locus to file the application in the Cause; the Taxing Officer erred in awarding commission based on the decretal sum rather than work done by the auctioneer; the Taxing Officer erred in awarding Kshs 180,000/- as tracing fees when there was no proof that private investigators were hired; that the award of the Kshs 180,000/- was manifestly excessive; the Taxing Officer erred in allowing Kshs 5,000/- as transport expenses; the Taxing Officer erred in allowing Kshs 60,000/- cost of hired security without proof of such hiring and without evidence that attachment was effected and that the Taxing Officer did not consider or apply the law and precedent.
3. The auctioneer filed a replying affidavit in opposition to the Summons on February 15, 2023.
4. The auctioneer asserted in the affidavit that the application lacked merit because the Court had directed that his fees be paid; the applicant had deliberately failed to attend the taxation to raise the instant objections; the value of the proclaimed goods was Kshs 37,800,000/- above the decretal sum of Kshs 22,177,167/-; that tracing and verification was done in over 4 stations and receipts produced; that security had been procured during proclamation/attachment and receipts produced; that transport was hired at Kshs 5,000/-; that the objection in relation to the filing of the bill of costs in the parent file was a technicality and that the taxation was in tandem with the [Auctioneers Rules, 2009](#).
5. Pursuant to Court directions, the applicant filed its submissions on February 17, 2023, and the auctioneer on February 20, 2023.
6. The submissions mirrored the contentions in the affidavits. The parties filed case law which the Court has considered.
7. The Court took oral arguments on February 21, 2023.

Whether the Court can strike out the auctioneer's motion dated March 2022

8. One of the main prayers by the applicant called upon the Court to strike out the auctioneer's application dated March 4, 2022 which culminated in the Ruling of November 2, 2022.
9. The application sought the Taxing Officer to tax the auctioneer's bill of cost. The application was served upon the applicant and after addressing her mind to it, the Taxing Officer delivered the Ruling on November 2, 2022.
10. The effect of the Ruling is that the application was determined with finality at the level of the Taxing Officer and it would be legally illogical for this Court to strike it out. It cannot be struck out as it is not pending.



Locus standi of the auctioneer

11. The applicant objected to the competency of the Bill of Costs filed by the auctioneer in this particular Cause (file) on the argument that since the auctioneer was not a party to the Cause, it was not open to him to file his bill in this particular file.

12. In support of the argument, the applicant cited the High Court decision in [*KTDA \(Ogembo Tea Factory\) v Charles Nyaundi Okemwa*](#) (2009) eKLR where the Court stated:

If the auctioneers intended to recover their costs before the finalisation of the pending applications, they ought to have filed a suit based on the agreed costs and obtain judgment and thereafter process a decree. Only then would they have lawfully proceeded to attach the appellant's property towards recovery of their charges. Mr Minda's contention was that the auctioneer did not require to file a separate suit, he rightly proceeded pursuant to the provisions of section 34 of the [*Civil Procedure Act*](#). I think counsel misapprehended the provisions of that section. The section states as follows:

34(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

For purposes of that section, an auctioneer is not a representative of a party.

It follows therefore that the auctioneer's move was unlawful. He purported to execute a non-existent decree.

13. The auctioneer herein took the position that objection on locus and competency raised by the applicant was a mere technicality.

14. The Court has looked at section 34 of the [*Civil Procedure Act*](#) as well as Rule 55 of the [*Auctioneers Rules*](#).

15. The Rules states:

55 Fees and disbursements payable to an auctioneer

(1) Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.

(2) Where a dispute arises as to the amount of fees payable to an auctioneer –

(a) in proceedings before the High Court or

(b) Where the value of the property attached would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar, as defined in the Civil Procedure Rules (Cap. 21, Sub. Leg.), may on the application of any party to the dispute assess the fee payable.

16. The Rule does not prescribe the mode of approaching the Registrar, whether by a fresh suit or miscellaneous application in the substantive Cause by filing of a Bill of Costs for assessment by the Registrar.



17. In this Court's view, therefore, the issue of an auctioneer's bill of costs which has not been assessed by the Registrar cannot and should not be the subject of a substantive recovery suit, since Registrar (Taxing Officers) do not deal with substantive suits.
18. In other words, the rules and practice do not envisage that applications over disputed costs to a Registrar as a taxation officer should be commenced by way of a substantive suit.
19. Further, it is the view of this Court that section 34 of the [Civil Procedure Act](#) only applies where a primary party to a suit and who has obtained a judgment intends to execute the decree.
20. The Court is of that mind because of the use of the terms: treat a proceeding under this section as a suit, or a suit as a proceeding in section 34(2) of the [Civil Procedure Act](#).
21. The Court, therefore concludes that the mode used by the auctioneer to have his fees assessed in the main Cause through the application and attached bill of costs was lawful and without defect.
22. In this regard, the Court endorses the statement in [Co-operative Bank of Kenya Limited v Joefrick N Muinde t/a Kimu Auctioneers](#) (2019) eKLR that:

I reject the Bank's arguments that the Auctioneer was required to file suit to recover its fees and commissions from the Debtor. Nothing in Rule 7 supports that argument. Moreover, there is no privity of contract between the Auctioneer and Debtor and the Auctioneer being an agent of the Bank as a disclosed principal cannot sue the Debtor for his fees and commission. I therefore dismiss this ground of appeal.

Execution before adoption of Certificate of Costs

23. The Taxing Officer delivered her Ruling on the auctioneer's bill of costs on November 2, 2022. A Certificate of Costs was issued on November 7, 2022.
24. The applicant argued that execution could not flow from the Certificate of Costs before it had been adopted as an order or judgment of the Court.
25. The practice and procedure of adopting a Certificate of Costs as an order or judgment of the Court before execution has its antecedents in section 51(2) of the [Advocates Act](#).
26. The provision relates to advocates' bill of costs.
27. The [Advocates Act](#) does not regulate the taxation of bills of costs by auctioneers. It is the [Auctioneers Act](#) and the Auctioneers Rules which govern charges and bill of costs by auctioneers. This legal framework does not contemplate the adoption of a Certificate of Costs arising from bill of costs by auctioneers.
28. Even in cases of disputes, the framework envisages an appeal rather than a Reference
29. Consequently, in the Court's view, a Certificate of Costs on an auctioneer's bill of costs does not require to be adopted as a judgment before execution can issue.

Reference or Appeal

30. Where a party to a suit is dissatisfied with the decision of a Taxing Officer under the [Advocates Act](#), the party should file a Reference.
31. However, under Rule 55(4) and (5) of the Auctioneers Rules, a party dissatisfied with an assessment of costs should lodge an appeal with the Court.



32. On January 25, 2023, the Court in error granted leave to the applicant to file a Reference. Despite that error, the Court notes that the applicant approached the Court under the Rules which provide for an appeal.

Conclusion and Orders

33. In light of the above, the Court declines to allow the Summons. It is dismissed with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 11TH DAY OF MAY 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

Auctioneer in person

For Respondent Millimo Muthomi & Co Advocates

Court Assistant Chrispo Aura

