



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

MISCELLANEOUS ELR APPLICATION CAUSE NO. 3 OF 2020

KENNEDY SHIKUKU/ T/A ESHIKHONI AUCTIONEERS.....APPLICANT

VERSUS

CHINA NATIONAL AERO- TECHNOLOGY INTERNATIONAL ENGINEERING...RESPONDENT

RULING

1. The Appellant, Kennedy Shikuku / T/A Eshikhoni Auctioneers being aggrieved by the decision of the Taxing Master /Deputy Registrar dated 25th September 2020 filed appeal, against the decision vide chamber summons dated 29th September 2020.
2. The Chamber summons Application is supported by Affidavit of Kennedy Shikuku sworn on the 29th September 2022. The Appellant seeks the following orders:-
 - a. That the Honourable Judge be pleased to set aside the assessment and award of the taxing master concerning item c,d,e,f,g,h,I,j,k l, & m of the Appellant's bill of costs dated 4th March 2020 to scale and facts.
 - b. The Honourable Judge do issue a certificate of costs as per time re- assessed costs.
 - c. The Honourable Judge do enter judgement in favour of the Appellant in terms of certificate of assessment issued.
 - d. The Respondents do shoulder the costs of this Appeal.
 - e. The honourable Judge be pleased to grant such further and/other orders as the court may deem fit and expedient.
3. The grounds of the Application are listed and are also supported by the Affidavit by Appellant.
4. The Respondent is opposed to the Appeal and filed Notice of Preliminary objection to the appeal dated 22nd November 2021 for dismissal of the Appellant's Application dated 29th September 2020 on the grounds that the same is filed in total violation of the mandatory provisions of paragraph 11 of the Advocates (Remuneration) order 2009.
5. The Respondent also filed statement of grounds of opposition under order 51 Rule 14 (1) (c) of the civil procedure Rules 2010 on the grounds:-
 - a. That the Application is frivolous, vexatious and an abuse of the due process of the court and must fail with costs to the Respondent.
 - b. That the Application is filed in total violation of the mandatory provisions of paragraph 11 of the Advocates (Remuneration) Order 2009.
 - c. That the Application is incompetent on value and the same is for dismissal with costs.
6. The Court gave directions that the Application be canvassed by way of written submissions.
7. The Appellant's written submissions are dated 3rd December 2021 and filed on the 14th December 2021. The Respondent's written

submissions are dated 22nd November 2021 and filed on 29th November 2021.

DETERMINATION

8. The Preliminary Objection dated 22nd November 2021 by the Respondent stated that the Appeal is filed in total violation of mandatory provisions of paragraph 11 of the Advocates (Remuneration) Order 2009.

9. The said provisions of paragraph 11 of the Advocates (Remuneration) Order provides that:-

“(i) should any party object to the decision of the taxing master he may within fourteen days after the decision give notice in writing to the taxing master of the items of taxation which he objects.

(ii) The taxing matter shall forthwith record and forward to the objector reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to Judge by chamber summons which shall be served on all parties concerned setting out the grounds of the objection”.

10. The Respondent to buttress its position relies on the decision in *Nyakundi & Company Advocates -vs- Kenyatta National Hospital Board (2005) eKLR* where the court had “under rule 11 (2) of the Advocates (Remuneration) order quoted above , a definite time frame for filing a reference is given – it is fourteen (14) days from receipt of the reasons. If an objection is delayed in making his /her reference he/she may apply for enlargement of time to make the reference under Rule 11 (4) of the same order’.

11. The Respondent further relies on similar holding in *Twiga Motors Limited -vs Hon. Raimas Otieno Anyango (2015) eKLR* and urges the court to find that the Chamber summons filed are incompetent due to the fact that no reference was ever made to the taxing master before instituting this summons.

12. The Appellant/Applicant in response to the objection submits that the Preliminary Objection is frivolous and that the Respondent’s position is not the law. That the Appellant appealed to this court against the decision of the taxing master’s decision provided under Rule 55 (4) of the Auctioneer’s rules which states as follows:-

Rule 55 (4) of the Auctioneer’s rules:- “ An appeal from a decision of a Registrar or Magistrate or Board under sub- rule (2) and (3) shall be to a judge in chambers”.

13. The Applicant submits that the Auctioneer was not a party in the suit that gave rise to the Appellant’s bill of costs. The Auctioneer was an agent of a party (decree holder). Therefore the Auctioneer was not a party to invoke paragraph 11 of the Advocates (Remuneration) Order of 2009. That there was no requirement for the Appellant to issue notice to the taxing master requesting for reasons and in any event the taxing master gave reasons of his decision in the ruling and to buttress this point relied on the decisions of *Hon. Justice Odunga in National Oil Corporation Ltd -vs Real Energy & Another (2016) eKLR* where the court held :- “ In my view there is no magic in requiring the taxing officer to furnish reasons before making reference where the reasons are contained in the decision a party ought not seek the same”.

The court agrees with this holding by Justice Odunga and finds in the instant case the taxing master gave reasons in his ruling appealed against.

14. On whether rule 11 of the Advocates (Remuneration) Order is applicable in the instant appeal, the Applicant/ Appellant submits that Auctioneers are governed by the Auctioneers Act Rules and relies on among others the *decision by Ringera Judge (as he then was)in Machira & Co. Advocates v Magugu (2002) 2 EA 428* where it was held “ as regards the point that the client’s objections to the taxation itself having been overruled, the proper remedy to adopt was an appeal to the High Court and not reference under Paragraph 11 of the Advocates (Remuneration) Order, I have the following to say:-

First the Advocates (Remuneration) Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. It does not provide for an appeal from any sort of decision by the taxing officer..’

In *Sino Hydro Corporation Limited v Samson Tonde Tumbo T/A Dominion Yards Auctioneer (2021) eKLR* the court held that reference for taxation pursuant to paragraph 11 of the Advocates Remuneration order is not synonymous with an appeal pursuant to Rule (55) (5) of the Auctioneer Rules’.

15. Consequently this court rules that the governing law of the impugned bill of costs is the Auctioneers Act Rule 55(4) of the Auctioneers rules being an appeal to the Judge in chambers and not a reference under paragraph 11 of the Advocates (Remuneration) Order as submitted by the Respondents Advocates.

16. The instant appeal vide chamber summons Application is properly before the court. Rules 55 (4) of the Auctioneer Rules provides “ an appeal for a decision of a registrar or magistrate or Board under sub rule 2 and 3 shall be to a Judge in chambers.....”.

17. The preliminary objection by the Respondent is overruled and dismissed.

18. On timelines, Rule 55 (5) of the Auctioneer Rules provides that a memorandum of appeal by way of chamber summons setting out the grounds of appeal shall be filed within 7 days of the decision of the registrar. The decision herein by the Deputy Registrar was delivered on the 25th September 2020 and the instant Application filed on 1st October 2020. The instant application was therefore filed within the 7 days

provided under the rules.

19. Consideration of the Appeal on merit. The question for determination being whether the taxing master, Hon E. N. MWENDA erred in law when he taxed the Auctioneer's Bill of costs dated 4th March 2020 and whether the same should be set aside. The Appellant is aggrieved with the decision of the taxing master concerning items c,d,e,f,g,h,i,j,k l & m.

20. The court is guided by the law in making its decision on the appeal being Rule 55 of the Auctioneers rules and the Fourth schedule therein and case law. In the case of *Zacharia Barasa -vs Dubai Bank Kenya Limited (2015) eKLR Justice L Gacheru* has outlined the case law which I adopt and rely on as follows:-

In *First American Bank of Kenya -vs - Shah & Others (Nairobi Milimani) HC civil case No. 2255 of 2000* court held that:- “The court cannot interfere with the taxing master's decision on taxation unless it is known that either the decision was based on error of principle or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principles”.

In the same decision it was further held that:-

“ it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary”.

21. Further in the case of *M/S Behan and Otieno -vs Pan African Insurance Company, Kisumu High court, Misc. Case No. 229 of 2003* the court held that:- “Each taxation master has the sole discretion and responsibility to decide the amount payable when a dispute arises as to the amount payable”.

Further in the case of *Bank of Uganda -vs Benco Arabe Espanal (199) Z EA 45 (2020) Z EA 297 (SCU)* it was held that:- “ Even if it is shown that the taxing officer erred in principle, the Judge should only interfere on being satisfied that the error substantially affected the decision on quantum and that upholding the amount would cause injustice to one of the parties”.

22. The Appellant has alleged that the taxing master erred in law and fact when he entertained the Respondent's allegation that the execution was unprocedural while the learned Judge (Justice Nderi) had issued a ruling that the execution was both procedural and lawful hence arriving at the wrong decision. That the taxing master erred in law and fact to entertain the issue of illegality when his role was to assess the bill of costs as provided for under the law. The holding of the taxing master is under paragraph 11 of his ruling which I cite in part “ however I have noted that the proclamation notice filed in an affidavit by the decree holder indicates the proclaimed vehicle was KCM 2387 valued at Kshs. 2,000,000.00. What they seized was a different vehicle KCM 465T valued at Kshs. 1,000,000/-. Which vehicle was not proclaimed clearly therefore an unlawful action and one for which the court cannot suborn and countenance by suffering the Auctioneer to receive payment for the said action. Consequently all expenses related to the seizure are disallowed and taxed off being items f, g,h,i& k.”

23. The Respondent cites the ruling by Justice Mathews N. Nderi dated 13th May, 2020 in which an application had been placed before the Judge challenging the impugned proclamation and attachment and in paragraph 25 the Judge held, ‘Accordingly the court equally dismisses the Application dated 6th January 2019 and holds that the attachment of motor vehicle registration number KCM 465 C was both procedural and lawful”.

24. This court finds that the taxing master erred in law in making the finding on the illegality of the proclamation and attachment when there was an existing holding by a Judge that the proclamation and attachment was procedural and lawful. Only the Judge himself or the Court of Appeal can change that finding whether or not the taxing master or even this court is of contrary opinion. To that extent the court sets aside the decision of the taxing master on items g,h,i & k and orders for the bill to be returned to the taxing master for assessment of fees on those items.

25. ON ITEM C on taking of inventory the Appellant base their claim on the value of the Motor Vehicle. The taxing master gave reasons of the award of Kshs.2000/- under the item based on physical work done in which in this case was taking inventory of 2 motor vehicles. The court finds that it has no basis of interfering with the discretion of the taxing master under item C.

26. On Item D it is alleged that the taxing master erred in law and fact when he pronounced that commission is not calculated on the value of goods proclaimed but on decretal sum. That the value of the proclaimed property was MV KCM 238T TIPPER HOWO Kshs 2,000,000/-. The Appellant relies on decision of the High Court Nairobi No. 1392 of 2005 *Ostrich Lion Auctioneers -vs- Paul Muchuri (2007) eKLR* where the court held:- ‘we think it is reasonable that the auctioneers charges for the attachment should be based on the value of goods attached and not on decretal sum. The Court cited court of Appeal Nairobi 195 of 2004 *National Credit Bank Ltd -vs- S.K Ndegwa Auctioneers* in which the superior court held that auctioneers fees ought to be calculated based on the value of property or properties attached. The court also determined that the auctioneers fees/ commission arise on proclamation.

27. The appellant court also determined that proclamation is also effectively as attachment. The court of Appeal decision is binding and therefore I hold the taxing master erred in law in assessing auctioneer fees/Commission on attachment based on decretal sum. The bill is returned for reassessment of Item D attachment commission based on value of attached Motor Vehicle.

28. On Item E it is alleged that the taxing master erred in law by pronouncing that the auctioneer was not entitled to fee/commission on sale. It is submitted that paragraph 5 of the fees schedule provided that fees for sale of property is at 7% if above Kshs. 100,000/- . The Appellant submits that under paragraph 7 of the fees schedule where requisite notices are served and sale is stayed or postponed a half of the fees of which the Auctioneer would have been entitled to after sale plus expenses. It is submitted in the instant case the sale was stayed after seizer. Under paragraph 9 of the ruling the taxing master states that “ both parties were in agreement execution terminated before sale but after

proclamation and attachment. The schedule is clear that where the attachment or repossession is taxed or postponed or money tendered after attachment or repossession, but before sale, the auctioneer is entitled to the attaching and reposing charges. In addition to expenses. Therefore item "e" is taxed off. '

The court finds the reasoning by the taxing master on ITEM E sound in law and reasonable. It is the opinion of the court that the Auctioneer is only entitled to ½ commission on sale if he proves evidence of costs incurred towards the sale after repossession of advertisement of sale of the repossessed motor vehicle. There was no evidence before the taxing master. The court dismisses appeal on the ½ claim for commission on sale as sought.

29. On Item f –travelling expenses I find no basis to interfere with assessed costs. It is my view those are special damages which required prove of use of the motor vehicle before the taxing master. The court upholds the finding of the taxing master in awarding traveling costs of kshs.8000/-.

30. On Item "H" security, item 1 storage charges, Item J insurance fee, Item K is returned to the taxing master for re assessment based on my earlier holding.

31. Item L Advocates instruction fees I find the holding of the taxing master to be sound in law and no basis to interfere with its discretion.

IN CONCLUSION AND DISPOSITION

32. I have held that the fees/commission on attachment should be based on the value of the attached motor vehicle. I have also held that there was a ruling by Justice Nduma Nderi that the proclamation and attachment was procedural and lawful.

33. Consequently, I remit the bill of costs to the taxing master Deputy Registrar E.N. Mwenda to re-assess fees on items d, g, h,i, j and k.

34. Other items remain as taxed.

35. Certificate of costs to issue by Deputy Registrar after re-assessment.

36. Each party to bear own costs in this Application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY, 2022

J. W. KELI

JUDGE

In the Presence of :-

Brenda Wesonga - Court Assistant

Respondent :- Absent

Applicant :- Absent