



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

MISCELLANEOUS APP. NO. E001 OF 2021

JAMES O'MAKORIT/A LIFEWOOD

TRADERS AUCTIONEERS.....APPLICANT/RESPONDENT

VERSUS

THE STAR PUBLICATIONS LTD.....RESPONDENT

RULING

1. On 2/6/2021, the taxing Officer of this court delivered a ruling on the Applicants (Auctioneers) Bill of costs dated 14/1/2021. However the respondent was aggrieved and by chambers summons dated 29/7/2021 sought leave to challenge the said decision by way of reference out of time. Upon hearing the application. I granted the leave sought by my ruling delivered on 9/12/2021.

2. The respondent, then brought the instant chamber summons dated 9/12/2021 seeking the following orders, that: -

(a) spent

(b) spent

(c) This appeal be allowed and the Applicant/Respondent's Notice of Motion dated 14/1/2021 be determined on its merit by a taxing Master other than Hon S.K. Ngetich,

(d) Costs of this Appeal be provided for

3. The grounds upon which the reference stands on are that; the Notice of Motion dated 14.1.2021 was not determined on its merits; that the Taxing Master did not consider the respondent's Replying Affidavit and Submissions which were filed before the impugned ruling; that the taxing master restricted himself to taxing the Bill of costs only and ignored the other issues raised in the Notice of motion and the replying Affidavit sworn by Linda Musta on 19/2/2021.

4. The issues raised in the said Replying affidavit and not determined were that; the Bill of costs was premature and that it was in respect of an irregular execution of a decree on 9.12.2016. The Auctioneer was served with the Reference as shown by the Affidavit of service sworn on 19.1.2022 by Mr. Lawrence Gichana, a private process server but he never filed any response. Therefore, the reference has not been controverted.

5. The issues for determination are:

(a) Whether the Taxing Maser erred by only taxing the Bill of costs and left the other issues undetermined

(b) Whether the costs certified by the taxing master in the impugned ruling should be set aside.

Whether Issues raised by the notice of Motion were not determined

6. The Notice of Motion dated 14/1/2021 sought the following orders:

(a) The applicant's Bill of Costs arising out of the execution in **Kericho ELRC No 240 of 2015 namely John WafulaSimiyu v The Star Publications Limited** be taxed as drawn and be paid by the respondent.

(b) That the court issues a certificate of costs and adopts the same as its order/judgment for execution purposes.

(c) Costs of this Application be borne by the respondent.

7. There is no doubt that the above application asked for costs to be determined and secondly for a determination that the respondent (applicant herein) be held liable to pay the same.

8. The Auctioneer confirmed by the supporting affidavit he swore on 14.1.2021 that the Bill of costs was in respect of Warrants of Attachment issued on 8/12/2016 **in Kericho ELRC No. 138 of 2012; John Wafula Simiyu v The Star publications limited**, which Warrants were executed against the respondent on 9/12/2016 by proclamation of movable assets of the respondent valued at Kshs 196,800. The Auctioneer then gave a Notification of sale dated 19/12/2016 after the respondent (judgment debtor) failed to satisfy the decree.

9. The said sale was never done after the respondent challenged the said execution vide application dated 20/12/2016 and a ruling was delivered on 21/2/2017. The ruling nullified the order issued on 28/11/2016 which had vacated the earlier order of stay dated 28/9/2016. The court found that the stay order had been vacated through mischief on the part of the Decree-holder and nullified all the actions appurtenant to the orders made on 28.11.2016 and reinstated the stay order dated 28.9.2016.

10. The Auctioneer was instructed by the Decree-holder to carry out the execution, which was nullified. There is no evidence that the trial court made orders in the primary suit that the auctioneer was entitled to payment of costs for the said nullified execution.

11. Even if the court had made such orders, which was not shown to the Taxing master or this court, there is no evidence that the trial court directed that the judgment debtors (applicant herein) was liable to pay costs for the improper execution.

12. The foregoing issues about irregular execution were raised by the respondent in the notice of Motion dated 14/1/2016, but the taxing master did not determine the same. Instead, he only dealt with the taxation of the bill of costs and ignored the protest by the respondent in the bill. The taxing master never made any determination that the respondent (applicant herein) was the one liable to pay the taxed costs. With due respect, the taxing master was obliged to determine the issue of the party to pay the auctioneer's costs for the nullified execution, and especially after the opposing party protested that the bill of costs was prematurely filed.

13. Evidently, the taxing master ignored crucial prayer by the auctioneer in the Notice Motion and also the preliminary issues raised by the respondent, and instead dealt with the taxation of the bill of costs. Consequently, I agreed with the respondent (applicant herein) that the bill was brought prematurely and the taxing master fell into error by entertaining it before establishing whether it was filed against the correct respondent.

Whether the taxed Costs should be set aside

14. In view of the foregoing finding, I am convinced that the Taxing Master ought not to have just taxed the Bill of costs and left undetermined, the other prayers and issues raised by the parties and especially whether the respondent to the bill was the proper party to pay the auctioneer for the irregular execution that was nullified by the court.

15. Consequently, I allow the chamber summons dated 9/12/2021 by setting aside the ruling of the taxing master dated 2/6/2021 and any certificate of costs made thereunder and substitute therewith an order referring the Notice of Motion dated 14.1.2021 for hearing by a Taxing Master of this court other than on S.K. Ngetich after being satisfied that the Bill of costs is brought against the correct party. The auctioneer is condemned to pay costs of the reference. Hon S.K. Ngetich. The respondent (auctioneer) is condemned to pay costs of the reference to the applicant.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 3RD DAY OF FEBRUARY 2022.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE