



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**MISC. APPLICATION NO. 2 OF 2015**

**KAMENE MUKUTI MUSILL.....1<sup>ST</sup> APPLICANT**

**JOHN MUINDI MUTIA.....2<sup>ND</sup> APPLICANT**

**(Both as legal representatives of the estate of Mutia Muindu (Deceased) T/A Mutibra Auctioneers)**

**VERSUS**

**CFC STANBIC BANK LIMITED (FORMERLY STANBIC BANK OF KENYA LIMITED)**

**GARNISHEE.....1<sup>ST</sup> RESPONDENT**

**MAURICE M. MUNYAO & 148 OTHERS.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 10<sup>th</sup> December, 2021)

**RULING**

The applicants filed on 19.07.2021 an application by way of the amended notice of motion dated 08.07.2021 and through Munyithya, Mutugi, Umara and Muzna Company Advocates. The application was under sections 1A, 1B, and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya; Section 51(2) of the Advocates Act and all enabling provisions. The application prayed for orders:

- 1) That the certificate of taxation dated 02.04.2015 for an amount of Kshs. 21, 763, 126.00 be deemed the decree of this Honourable Court.
- 2) That interest of 14% to accrue from the date of certificate of taxation till payment in full.
- 3) That costs of the application be provided for.

The application was based on the annexed affidavit of John Muindi Mutia and upon the following grounds:

- a) The applicant Mutia Muindu (Deceased) trading as Mutibra Auctioneers filed its auctioneer Bill of Costs dated 16.01.2015 against the respondents.
- b) The respondents herein were served with the requisite notice of taxation and the bill was taxed inter-partes.
- c) The 1<sup>st</sup> respondent challenged the bill of costs before the Judge and the said application was dismissed.
- d) The certificate of costs has been outstanding since 02.04.2015 and the Court should allow interest to accrue at 14% per annum till payment in full.
- e) That on 11.05.2020 the applicant died and the personal representatives were granted leave on 15.06.2021 to continue this matter.
- f) That the application is made in the best interest of justice.

The application came up for hearing on 18.10. 2021 in presence of counsel for all the parties and it was ordered:

- 1) The 2<sup>nd</sup> respondent may comprise the application or to file replying affidavit in 7 days.
- 2) As between the 1<sup>st</sup> respondent and the applicants, by consent, the amended notice of motion as filed on 19.07.2021 is hereby allowed in terms of prayers (1) and (2) with no orders on costs and the 1<sup>st</sup> respondent is released from further proceedings on the application.
- 3) The consent between 1<sup>st</sup> respondent and applicant dated 06.10.2021 and filed on 13.10.2021 be availed on Court file.
- 4) Mention on 28.10.2021 at 9.00am to record compromise between 2<sup>nd</sup> respondent and the applicant or further directions on the application.

The consent filed for the applicants and the 1<sup>st</sup> respondent on 13.10.2021 and dated 06.10.2021 stated as follows:

**“BY CONSENT**

**Pursuant to the ruling of Hon. Justice Abuodha dated 11<sup>th</sup> July 2019 in Nairobi ELRC Cause No. 1262 of 2015 Maurice M. Munya & 148 Others V CfC Stanbic Bank Limited (Formerly Stanbic Bank of Kenya Limited) that allowed the Garnishee’s Notice of Motion dated 26<sup>th</sup> November 2014 and, *inter alia*, set aside and nullified the proclamation by Mutibra Auctioneers against the bank, the Applicant and the 1<sup>st</sup> respondent hereby enter into the following consent:**

**1) The amended Notice of Motion dated 8<sup>th</sup> July 2021 be allowed with the following variation:**

**a) The Certificate of Costs dated 1<sup>st</sup> April 2015 and issued on 2<sup>nd</sup> April 2015 be amended to exclude any reference to the Garnishee CfC Stanbic Bank Ltd (Formerly Stanbic Bank of Kenya Limited).**

**b) The Certificate of Costs dated 1<sup>st</sup> April 2015 for Kshs. 21, 763, 126 be and is hereby set aside and nullified as against the the Garnishee CfC Stanbic Bank Ltd (Formerly Stanbic Bank of Kenya Limited) pursuant to the Ruling dated 11<sup>th</sup> July 2019 in Nairobi ELRC Cause No. 1262 of 2015 Maurice M. Munya & 148 Others –V- CfC Stanbic Bank Limited (Formerly Stanbic Bank of Kenya Limited).**

**2) There be no orders as to costs.”**

The 2<sup>nd</sup> respondents filed on 28.10.2021 an application by way of the notice of motion dated 27.10.2021 and through Tindika & Company Advocates. The application was under Article 40 and 159 of the Constitution of Kenya, 2010, Sections 1A, 1B, and 3A of the Civil Procedure Act and Order 12, Rule 7 of the Civil Procedure Rules, Rule 55 of the Auctioneers Rules and all other enabling provisions of the law. The 2<sup>nd</sup> respondents prayed for orders:

- 1) That the Honourable Court be pleased to stay any further proceedings in this matter and specifically the hearing of the amended notice of motion dated the 10<sup>th</sup> February, 2020 and amended on the 8<sup>th</sup> July, 2021 pending the hearing and determination of this application.
- 2) That the decision of the taxing master in this matter relating to the reasoning and determination with regard to the auctioneer’s bill of costs and specifically the certificate of costs dated or issued on 2<sup>nd</sup> April 2015 be set aside in its entirety and the Court be pleased to refer the said bill back for re-taxation within the clear provisions of the Auctioneers Rules and all other applicable provisions of law.
- 3) That in alternative, the Honourable Court does exercise its inherent jurisdiction and re-tax the Bill of Costs herein and within the strict confines of the provisions of the Auctioneers Rules and all other applicable provisions of law,
- 4) That further to the foregoing and without prejudice thereof, the Honourable Court be pleased to set aside the taxation of the auctioneer’s bill of costs and specifically the certificate of costs dated or issued on the 2<sup>nd</sup> April, 2016 *ex debito justitiae*.
- 5) That the Honourable Court does make such other or further orders so that the ends of justice may be met.
- 6) That costs of the application be provided for.

The application was based on the annexed supporting affidavit of Randolph M. Tindika Advocate and upon the following grounds:

- a) The 2<sup>nd</sup> respondents were never notified of nor involved in the taxation of the auctioneer’s bill of costs herein.
- b) Throughout the proceedings in the taxation of the auctioneer’s bill of costs, only the applicant and the 1<sup>st</sup> respondent thus the applicant did not serve the 2<sup>nd</sup> respondent.
- c) The taxation was not within the confines of the provisions of the Auctioneers Rule and applicable law and thus the Honourable

Court has unfettered discretion to interfere with the same and ensure due compliance with the law.

- d) The proceedings show negotiations to pay the auctioneers fees were being held between the applicant and the 1<sup>st</sup> respondent who had agreed to pay the same.
- e) If the amended notice of motion dated 10.02.2020 and amended 08.07.2021 is heard before the hearing and determination of this application, the 2<sup>nd</sup> respondents will be contemned unheard.
- f) The taxation herein was commensurate with the services rendered nor within the parameters provided for in the applicable law and thus the Honourable Court has jurisdiction to interfere with the same.
- g) The application be allowed in the interests of justice.

In the supporting affidavit, it is urged as follows:

- a) Counsel for the 2<sup>nd</sup> respondents herein acted for the 2<sup>nd</sup> respondents in Cause No. 116 of 2013 and upon determination of the suit the 2<sup>nd</sup> respondents (As claimants and judgment holders) commenced execution proceedings against the respondent in that suit leading to garnishee proceedings against the 1<sup>st</sup> respondent bank herein.
- b) The only services rendered by the the applicant herein was to serve the warrants and lay a proclamation on 13.11.2014 and the decretal amount was released on 14.11.2014, no further action was taken by the applicant herein with regard to the execution process. Thereafter, negotiations commenced between the applicant and the 1<sup>st</sup> respondent bank with regard to settlement of the auctioneer's charges but the negotiations did not fall through and the 1<sup>st</sup> respondent's erstwhile advocates M/s Sichangi Partners advised the applicant to file his bill of costs for taxation.
- c) The understanding between the applicant and the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent was to effect the payment of auctioneer's charges. On 18.10.2021 the applicant withdrew his claim against the 1<sup>st</sup> respondent and now desires to proceed against the 2<sup>nd</sup> respondent who were never served or involves in the taxation process. The bill of costs was never served upon the 2<sup>nd</sup> respondents and it amounts to abuse of their legal rights to have the certificate of costs converted into a decree against them whereas they were never served the bill of costs or notice of taxation. The taxation proceedings were only between the applicant and the 1<sup>st</sup> respondent bank. The amounts awarded are excessive and the court should intervene as prayed for the 2<sup>nd</sup> respondents. The 2<sup>nd</sup> respondents had instructed the applicant to undertake the execution and the 2<sup>nd</sup> respondents are entitled to be heard on the bill of costs.

The applicants opposed the 2<sup>nd</sup> respondents' application by filing on 09.11.2021 the replying affidavit of John Mwindu Mutia. It was urged as follows:

- a) It was admitted that there were execution proceedings in which the 2<sup>nd</sup> respondents instructed the applicant (deceased) and garnishee proceedings ensued and services rendered by the applicant were as set out in the supporting affidavit.
- b) The wording of the certificate of costs was not ambiguous and the applicant was the applicant (deceased). The 1<sup>st</sup> and 2<sup>nd</sup> respondents are identified as the respondents in the certificate of costs and which was against the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly and severally.
- c) The 1<sup>st</sup> respondent filed an application dated 07.05.2015 seeking orders of stay of execution of the certificate of costs pending hearing and determination of the of an appeal. The 2<sup>nd</sup> respondents were represented by Tindika Advocate in opposing the application dated 07.05.2015. The said Tindika Advocate had filed his replying affidavit (exhibited herein) to oppose that application dated 07.05.2015 and he stated that he had looked at the taxation proceedings and the advocate for the applicant had attended the taxation and opposed all the items in the bill and thereafter the taxing master considered the bill and made the ruling. Further, in that replying affidavit at paragraph 9, Tindika Advocate had stated thus, **"9. That it is trite law once a Bill of Costs has been taxed, the only issue the opposing side can raise is on the amount at which the Bill of Costs has been taxed, either manifestly too high or too low. I believe the Bill of Costs herein was taxed at a fair and reasonable amount and within the confines of the Auctioneers Rules."** It is urged for the applicants that the same Tindika Advocate cannot be heard to say the taxation was outside the confines of law. Further on 24.09.2015 the said Tindika & Company Advocates filed the exhibited submissions in support of the certificate of taxation.
- d) There is a ruling (exhibited) in ELRCC No. 1262 of 2015 at Nairobi delivered on 13.05.2016 in which the role of Tindika & Company Advocates in supporting the certificate of costs herein is widely discussed. Again Tindika & Company Advocates drew documents in ELRC Petition 47 of 2016 and ELRC Petition 47 of 2016 in which the issues surrounding the taxation were canvassed.
- e) The 2<sup>nd</sup> respondents have been aware of the taxation of the bill for over six years and in the ruling on the bill of costs (exhibited as JMM-8) the taxing officer (Deputy Registrar) the 2<sup>nd</sup> respondent did not respond to the bill nor did they attend the taxation proceedings despite due service. The exhibited affidavit of William Mutie Ngangau shows that Tindika & Company Advocates were served the taxation notice on 23.02.2015 and the exhibited affidavit of service by Stephen Muli shows that the taxation notice and attached bill of costs were served upon the same Tindika & Company Advocates on 26.01.2015.
- f) On 11.07.2019 in ELRCC No. 1262 of 2015 at Nairobi the Court nullified execution against the 1<sup>st</sup> respondent and the 2<sup>nd</sup>

respondent did not appeal against the ruling. The effect of the ruling of 11.07.2019 therefore meant that execution could only proceed against the 2<sup>nd</sup> respondent and that formed the basis of the consent filed and recorded in Court as earlier referred to in this ruling.

g) The application dated 27.10.2021 filed for the 2<sup>nd</sup> respondents is therefore *res judicata*, is an abuse of court process, and should be struck out with costs.

The 2<sup>nd</sup> respondents filed on 24.11.2021 the supplementary affidavit of Randolph M. Tindika Advocate and urged as follows. The background information about the garnishee order and execution proceedings leading the taxation proceedings herein were repeated. It was stated that the notices of taxation notices dated 16.01.2013 and 23.02.2015 were to be served upon the 2<sup>nd</sup> respondents but they were not served upon them at all. The bill of costs dated 16.01.2015 was not also served upon the 2<sup>nd</sup> respondents. It is urged that the bill of costs be re-taxed per rule 55 of Auctioneers Rules providing for fees payable to Auctioneers for services rendered; item 1(c) of the bill be re-taxed at a maximum of 2% for sums over Kshs. 1,000,000.00; the award of Kshs. 3, 001, 810,48 VAT was unlawful and manifestly unfair; and the bill be taxed per value of goods the auctioneer had attached. It further urged that the taxing master did not tax the bill but simply stated that it had been drawn to scale and awarded Kshs. 21, 763, 126.00 and the taxing master did not comply with the mandatory provisions of Rule 55 of Auctioneers Rules. Further the party and party bill of costs in Industrial Cause No. 116 of 2013 was taxed at Kshs. 5, 682, 828.00. The Court should therefore exercise discretion and grant the 2<sup>nd</sup> respondents' application.

The Court directed that the two applications be heard and determined together. The applicants' Counsel opted to rely on the material on record without filing submissions. The 2<sup>nd</sup> respondents filed submissions. The Court has considered the parties' respective positions and material on record and makes findings as follows.

**First**, in view of the affidavits of service of the notices of taxation and the bill of costs in issue, the Court finds that the 2<sup>nd</sup> respondents were served accordingly but they opted not to attend taxation proceedings as duly notified. The 2<sup>nd</sup> respondents' case that they were not heard at taxation is unfounded in view that they were granted chance to attend but failed to do so. The notices and the bill while being addressed to the 2<sup>nd</sup> respondents, they were clearly drawn as C/O Tindika & Company Advocates. In such circumstances, the advocates were duly served per the affidavits of service exhibited.

**Second**, the 2<sup>nd</sup> respondents have admitted that they instructed the applicant (deceased) to undertake the execution proceedings in issue and the Court returns that the 2<sup>nd</sup> respondents are indeed, in the circumstances of the case, liable to pay the applicant (deceased) auctioneer's fees or charges. The 2<sup>nd</sup> respondents have not disputed that in view of the ruling of 11.07.2019 in ELRCC No. 1262 of 2015 at Nairobi the Court nullified execution against the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent did not appeal against the ruling with the impact that the 2<sup>nd</sup> respondents thereby became liable, to alone, satisfy the auctioneer's charges herein. The Court returns that they are liable accordingly.

**Third**, it is urged for the 2<sup>nd</sup> respondents that the Court should not be blind to the manifest injustice on record that the bill of costs in issue was not taxed in compliance with Rule 55 of the Auctioneers' Rules. It has not been disputed for the applicant (deceased) that indeed the bill was taxed as was drawn without regard to Rule 55 of the Auctioneers' Rules and the Court finds as much, that the 2<sup>nd</sup> respondents have raised serious triable issue and therefore opposition to the bill of costs as had been taxed and leading to the certificate of costs. The Court finds that failure by the taxing master to comply with Rule 55 of the Auctioneers' Rules amounted to an error of principle and justifying that the Court intervenes for the bill to be remitted to the taxing master for re-taxing. The Court upholds the submission made for the 2<sup>nd</sup> respondents that in the case of Kamunyi & Company Advocates – Versus- Development Bank of Kenya Limited [2015]eKLR the Court of Appeal held that where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred and further, thus, **"21. It is now an accepted principle that a Judge will normally remit the matter to the Taxing Officer for reconsideration where there is an error of principle. Spry. Ag. P. held in Nanyuki Esso Service V Touring Cars Ltd (1974) EA 500 that an error of principle can be inferred where an award is manifestly excessive unless, in the opinion of the Judge, it has not materially affect the assessment."** In the instant case, it has been established for the 2<sup>nd</sup> respondents that the party and party costs in Industrial Cause No. 116 of 2013 was taxed at Kshs. 5, 682, 828.00 and the Court returns that in absence of any other material before the Court the Auctioneer's charges in the same suit as assessed and awarded at Kshs. 21, 763, 126.00 would on the face of it appear to be manifestly excessive. The Court therefore returns that the 2<sup>nd</sup> respondents have established an error in principle, namely failure by the taxing officer to comply with Rule 55 of the Auctioneers' Rules, and, the award of Kshs. 21, 763, 126.00 amounted to a manifestly excessive award. Thus even if the 2<sup>nd</sup> respondents failed to attend at the taxation for no apparent reason, the Court finds that they have established reasonable opposition to the taxation amounting to an error of principle.

**Fourth**, the Court returns that the matters raised in the 2<sup>nd</sup> respondents' present application had not been previously raised and decided by the Court and the Court finds that the application was not *res judicata* or an abuse of court process as urged for the applicants. It just turned out that by reason of the Court's ruling of 11.07.2019 in ELRCC No. 1262 of 2015 at Nairobi, the Court nullified the execution against the 1<sup>st</sup> respondent thereby rendering the 2<sup>nd</sup> respondents solely liable to satisfy the certificate of costs. In that regard, the consent filed for the applicants is found to have been a just progression in view of the said ruling of 11.07.2019.

**Fifth**, in view of the manifest error, the 2<sup>nd</sup> respondents have established a case for the Court to remit the bill of costs for re-taxation between the applicants and the 2<sup>nd</sup> respondents and the ensuing award in the certificate of costs in that regard, to be satisfied by the 2<sup>nd</sup> respondents.

**Sixth**, on costs of the two applications the Court has considered the submission for the 2<sup>nd</sup> respondents that the Court of Appeal in James Nduhiu Macharia – Versus- Mwotia Macharia, Civil Appeal No. 105 of 1985 [1986]eKLR thus, **"There is also a decision of the late Sheridan J in the High Court of Uganda in Sebei V District Administration Gasyali, [1968] EA 300, 301, 302 (U) in which he adopted the words of Ainley, J as he then was, in the same court, in Jamnadas V Sodha V Gordandas Hemraj (1952), 7ULR 11 (U), namely "The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned**

**should be considered and, finally, I think, it should be always be remembered that to deny the subject a hearing should be the last resort of a court.”** The Court has considered the 2<sup>nd</sup> respondents’ failure to attend at the taxation and despite having been duly served. The 2<sup>nd</sup> respondents, and as urged for the applicants, participated in numerous Court proceedings canvassing the certificate of costs and the taxation proceedings in issue. The Court returns that in the circumstances, the 2<sup>nd</sup> respondents will bear the costs of the two applications.

In conclusion, the two applications one filed for the applicants and as amended and the other filed for the 2<sup>nd</sup> respondents are hereby determined with orders:

- 1) The ruling by the taxing officer herein determining the auctioneer’s bill of costs dated 16.01.2015 and the ensuing certificate of costs dated 22.08.2014 are hereby set aside.
- 2) By reason of order (1) above the application filed on 19.07.2021 by way of the amended notice of motion dated 08.07.2021 is determined as overtaken accordingly.
- 3) The auctioneer’s bill of costs herein dated 16.01.2015 is hereby remitted to the taxing officer for re-taxation between the applicants and the 2<sup>nd</sup> respondents and the ensuing award in the certificate of costs in that regard to be satisfied by the 2<sup>nd</sup> respondents.
- 4) The 2<sup>nd</sup> respondents to pay the applicants’ costs of the two applications now determined.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 10TH DECEMBER, 2021.**

**BYRAM ONGAYA**

**JUDGE**