



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

MISC. APPLICATION NO. 2 OF 2015

MUTIA MUINDI

T/A MUTIBRA AUCTIONEERS.....APPLICANT

VERSUS

1. CFC STANBIC BANK LTD GARNISHEE

2. MAURICE MUNYAO & 148 OTHERS.....RESPONDENTS

JUDGMENT

INTRODUCTION

1. This is an appeal by a Garnishee from the decision by the Deputy Registrar (DR) of this court by which he taxed the auctioneers bill of costs at kshs.21,763,126.00. The gist of the appeal is that the DR breached the law and the Rules of National Justice in taxing the bill. In addition the appellant avers that the Taxing Officer wrongfully and unreasonably exercised his discretion and thereby erroneously assessed the auctioneers bill at a sum that was manifestly high *vis-a-vis* the Auctioneers Act and the rules thereunder. The Respondents have vehemently opposed the appeal on grounds that the appeal is time barred and that the DR did not err in taxing the auctioneers bill as he did. The court agrees with the Respondents only on the issue that the appeal is time barred. It is now *trite* law that the courts lack jurisdiction to entertain any time barred suit or appeal unless leave to enlarge time is sought and granted.

BACKGROUND

2. On 7.11.2014 this court granted a Garnishee Order Absolute against the appellant for purposes of execution in Industrial Case No. 116 of 2013 by the court directed the appellant to forthwith pay kshs.267,819,043.20 plus costs of the Garnishee proceedings. When the appellant failed to comply with the said Garnishee order absolute, the Judgment Creditor (2nd Respondent herein) Instructed an auctioneer (1st Respondent herein) to recover the said decretal sum from the appellant. The auctioneer attached the appellants property on 13.11.2014 *vide* a proclamation of Attachment dated the same date. The appellant paid the Judgment debt less auctioneers costs to the counsel for 2nd Respondent's (Judgment Creditor). When the auctioneer demanded for his costs, the appellant's counsel requested the auctioneer by letter dated 21.11.2014, to file his bill for taxation. The auctioneer did so on 16.1.2015 as provided under the Auctioneers Act claiming kshs.21,763,126.00 inclusive of VAT at 16%.

3. The bill was taxed on 27.3.2015 and the court scheduled the ruling for delivery on 31.3.2015. However for reasons not stated, the ruling was delivered on 1.4.2015 in the presence of counsel for the appellant and the auctioneer. The appellant was dissatisfied and applied for certified copy of typed proceedings and the ruling plus stay of execution for 30 days. There is however nothing on record to show that the said typed proceedings and ruling were availed to the appellant in time since the copy attached to the appeal was certified on 27.4.2015. Never the less the appellant lodged this appeal on 13.4.2015.

4. The appeal is brought by way of Chamber Summons supported by affidavit. The grounds of the appeal are:

(a) The Learned Taxing Officer erred in law and fact in taxing the Applicant's Bill of Costs which was based on Industrial Cause No. 116 of 2013 in a separate and distinct cause and/or Application being Miscellaneous Civil Case No. 2 of 2015;

(b) The Learned Taxing Officer erred in law and fact in disregarding serious issues of law and fact that were raised before him by the 1st Respondent which he ought to have considered before arriving at his decision;

(c) The Learned Taxing Officer misapprehended the facts that were placed before him and the applicable law thereby failing to appreciate, consider and weigh the real issues of the fact and law that were put before him for determination;

(d) The Learned Taxing Officer failed to take into account matters he ought to have taken into account in determining the Applicant's Bill of Costs including the fact that the Bill of Costs was based on a proclamation which was a subject of a challenge in Industrial Cause No. 116 of 2013 and which had been stayed by this Honourable Court;

(e) The Learned Taxing Officer's decision violated the principles of natural justice;

(f) The Learned Taxing Officer's decision is arbitrary and unreasonable;

(g) The Learned Taxing Officer's failed to adequately or at all to address himself to the representations made to him and the documents and / ruling supplied to it by the 1st Respondent and/or wrongfully and unreasonably exercised his discretion and taken so many wrong and irrelevant factors into account and omitted so many relevant factors thereby constituting a refusal and/or failure to perform his judicial duty to duly decide upon the 1st Respondent's objection to the Applicant's Bill of Cost;

(h) The Learned Taxing Officer erred in law in directing that the grant of stay/ the issues in Industrial Cause No. 116 of 2013 are only between the 1st Respondent and the 2nd Respondent herein and not the Applicant;

(i) The Learned Taxing Officer erred in evaluation and analysis of the evidence adduced and in not appreciating it properly, equitably, judicially and sufficiently or at all and further erred in drawing the inference it did, adverse to the 1st Respondent case;

(j) The Learned Taxing Officer misdirected himself in making an assessment of the Applicant's Bill of Costs which is so manifestly high so as to arrive at an error of principle with regard to item 1 contrary to the provisions of the Auctioneer's Act and the Rules made thereunder.

5. On 14.5.2015, the Counsel for all the parties herein agreed to have the stay of execution of the taxed costs and to dispose of the appeal by written submissions. The appellant filed her submissions on

10.6.2015 while the 1st Respondent and 2nd Respondent filed their submissions on 18.6.2015 and 19.6.2015 respectively.

APPELLANTS SUBMISSIONS

6. The appellant's counsel merged the grounds of appeal into 3 namely:-

(a) The Taxing Officer failed to take into account matters he ought to have taken into account and as such fell into error in evaluating and analysing the evidence and/or submissions made before him by the appellant.

(b) The Taxing Officer's decision violated the Principles of natural justice and/or was arbitrary and unreasonable.

(c) The Taxing Officer misdirected himself in assessing and awarding costs to the auctioneer which was manifestly excessive and in breach of the provisions of the Auctioneers Act and the Rules thereunder.

Failure to take into Account Relevant Matters.

7. It was submitted for the appellant the Taxing Officer failed to record the reasons put forth by the counsel for in opposing the auctioneer's bill for the appellant the Taxing Officer failed to record the reasons put forth by the counsel for in 'opposing' the auctioneers bill. According to the counsel, the DR only recorded one sentence from her, "we object to the entire bill." She cited H.C.Msc. Appl. No. 47 of 2009 A.D.M. Limited vs Kinyua & Company Auctioneers [2009] eKLR where *Azangalala J* set aside ruling of the Deputy Registrar in a similar appeal to the present because the DR failed to consider the submission made during the hearing or to consider any rule of law and made a blanket finding that the auctioneers bill of costs was drawn to scale.

8. According to the appellant, the DR acted without any evidence that indeed proclamation had been done by the auctioneer. In addition, the appellant urged that the DR failed to consider the fact that the proclamation was the subject of challenge before the court. Lastly on this ground, the appellant submitted that the DR erred in evaluating the evidence adduced and as result he drew inferences which were adverse to the appellant's case.

Violation of the Principles of Natural Justice

9. The appellant submitted that on the day the bill came up for hearing, her counsel sought adjournment on ground that the counsel had another matter before the High Court and secondly, because the bill was premature and irregular because the proclamation was the subject of challenge in Industrial Cause No. 116 of 2013 wherein also stay of proceedings had been made. The adjournment was declined on ground that the stay order in cause No. 116 of 2013 did not stay taxation of the auctioneers costs in this case among other grounds. According to the appellant the refusal to grant adjournment by the DR was arbitrary and unreasonable and amounted to violation of the principles of Natural Justice because it denied the appellant her right to fair hearing.

Manifestly High Award

10. The appellant has relied on **Section 1,2, & 3** of the fourth schedule to the Auctioneers Act to submit that the amount of costs taxed by the DR was manifestly excessive with respect to item 1 in the Auctioneer's bill of costs. In conclusion she maintained that her appeal was not time barred and was filed in the proper form as provided for under **Rule 55** of the Auctioneers rules, 2010.

RESPONDENTS SUBMISSIONS

11. The Respondents have raised objections to the appeal mainly on ground of Time bar and the ground

that the DR did not err in taxing the bill as he did not err in taxing the bill as he did. The Respondents have submitted that under **Section 55(5) the Auctioneers Act** an appeal against the taxation of auctioneers costs cannot be filed after 7 days from the date of the decision. In this case the ruling was delivered on 1.4.2015 and the appeal was filed on 13.4.2015 which according to the Respondents was outside the 7 days limitation period. Consequently the Respondents have urged the Court to strike out the appeal. They have rubbished the submissions made by the appellants that public holidays and Sundays should not be taken into account when computing the 7 days allowed to lodge an appeal on ground that such exclusion of public holidays and Sundays is only allowed when the period of filing the appeal is 6 days or less. They relied on **Joel Titus Musya t/a Makuri Enterprises vs Southern Credit Trading Corporation [2007] eKLR** where the court dismissed the appeal for being filed out of time.

12. As regards the excessive quantum of costs taxed, the Respondents submitted that the decision of the DR cannot be faulted because it was done within the rules. According to the Respondents, the appellant did not meet the threshold for setting aside decision on taxation of costs. They relied on the **PZ Cussons East African Ltd. Vs. Kenya Revenue Authority [2014] eKLR** which cited the decision in **First American Bank of Kenya Vs Shah & others (2002) EA 64**. where it was held that in an appeal like this one, the court should not interfere with the taxing official's decision unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.

13. Lastly the Respondents have contended that the auctioneer is entitled to his costs because he had done his work by proclaiming attachment on the appellants goods on 13.11.2014. They have defended the procedure followed to claim the costs *vide* a Miscellaneous Application before the Deputy Registrar. Likewise they have contended that this appeal is not the proper forum for the appellant to complain about the denial of an adjournment.

ANALYSIS AND DETERMINATION

14. After careful consideration of the submissions made by the parties, it is clear that the 1st Respondent (auctioneer) received instructions from the 2nd Respondent (Judgment Creditor) to execute against the appellant after the latter defaulted to honour a Garnishee order absolute issued on 7.11.2014. There is also no dispute that the auctioneer proclaimed the appellant's property on 13.11.2014 after which the appellant paid the whole Judgment debt less the auctioneers charges. Lastly there is no dispute that the auctioneer filed the bill of costs under review after the appellant's counsel advised him to do so and hence the impugned decision. The issues for determination are:

(a) whether the appeal is time barred.

(b) whether the costs taxed were excessive

(c) whether the decision by the DR was arbitrary and reached in breach of the Principles of Natural Justice.

Time Bar

15. There is no doubt that the time allowed to file an appeal against the taxing officers decision on taxation of a bill of costs under **Rule 55(5)** of the Auctioneers Rules is 7 days from the date of the decision. In this case the decision by the taxing officer was made on 1.4.2015 and the appeal was lodged on 13.4.2015. The reason given for the delay is that the appellant did not reckon the 2 Easter public holidays plus one Sunday in line with **Section 57 (b)** of the **Interpretation and General Provisions Act**.

16. The Respondent have however asked the court to strike out the appeal for being time barred. The court has carefully considered the arguments advanced by counsel for the 3 parties together the whole record. It is obvious that the appeal was filed out of time. **Rule 55(5)** of the Auctioneers Rules only allows a window of 7 days within which to file an appeal after the decision appealed from. The 7th day after the decision was 8.4.2014 which fell on Wednesday and not a Sunday. In addition under **Order 50**

rule 2 of the **Civil Procedure Rules**, public holidays and Sundays are only excluded if the time allowed to do a thing is limited to 6 days or less. The explanation given by the appellant for the late filing is therefore misconceived and not plausible. No evidence was given to prove that leave to enlarge time was sought and obtained either before or after filing the appeal.

17. Time bar is both procedural and substantive issue which goes to the jurisdiction of the court. The corollary of the time bar is that the authority of the court over the dispute is extinguished. The jurisdiction of this court is provided for under **Section 12** of the Industrial Court Act (ICA) but the procedure for filing appeals is provided for under **rule 8** of the ICPRS. The said rule states that:-

“(1) where any Written Law provides for the appeal to the court, an aggrieved person shall file a Memorandum of appeal with the court within the time specified for that appeal under the Written Law.” (emphasize by the mine).

There is no doubt from the foregoing that the procedure prescribed above is mandatory and if the appellant does not file his appeal within the time specified by the law under which the appeal stands, the court lacks authority to entertain it. In view of the aforesaid clear provision, judicial decisions and the procedural facts of this appeal, this court does have any authority to entertain the appeal on the merits without prior leave for enlargement of time. The court must therefore down its tools and strike out the appeal for being time barred.

18. As a parting shot, the court has also been alerted by the 1st Respondent that the appeal as filed was not complete for want of typed proceedings and the impugned ruling. That submissions is correct. The appellant must always prepare a complete record of appeal. The said default may have been caused by the delay on the part of the DR to avail the typed proceedings and ruling to the appellant in time after the request for the same on 1.4.2015. These are issues of form which are however not the reason for which this appeal must be struck out.

DISPOSITION

19. The appeal herein is struck out for being time barred. Costs to the Respondents.

Dated, signed and delivered at Mombasa this 31st day of July 2015.

O. N. Makau

JUDGE