



REPUBLIC OF KENYA



Mazop Enterprises Limited v Wainaina (Miscellaneous Application E013 of 2025) [2025] KEHC 5202 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS APPLICATION E013 OF 2025**

RK LIMO, J

APRIL 29, 2025

BETWEEN

MAZOP ENTERPRISES LIMITED APPLICANT

AND

RICHARD WAINAINA RESPONDENT

(Being an appeal from the Ruling by Hon I. Kabuteh, Resident Magistrate Kitale Chief Magistrate's Court Misc.Civil Application No. e047 of 2024 delivered on 21st March, 2025)

RULING

1. This is an appeal by way of a reference in respect to the assessment of auctioneer's costs done by the taxing officer on 21/3/25. The reference/challenge has been brought by way of chamber summons dated 25/3/25 and the applicant, Mazop Enterprises Ltd, is seeking the following reliefs namely;
 - a. Spent
 - b. Spent
 - c. That this honourable court be pleased to set aside the decision of the taxing officer delivered on 21/3/25 in relation to the respondent's bill of costs dated 7/10/24.
 - d. That this honourable court be pleased to re-assess/re-tax the said bill of costs dated 17/10/24.
 - e. That in the alternative to prayer(c), the said bill be remit back for re-taxation/re-assessment.
 - f. Costs of this application.
2. The grounds upon which the applicant has sought for the above reliefs are listed as follows;
 - i. That the taxing officer taxed the auctioneers fees at Kshs.335,908/-.



- ii. That the applicant had made further payment of Kshs.150,000/- to the respondent and not 40,000/- as found by the Taxing Master.
 - iii. That there was no legal basis to assess the costs at Kshs.335,908/-.
 - iv. That the taxing master allowed advocates fees of Kshs.30,000/- where the same was not taxable.
 - v. That the taxing officer erred in law in not finding that the auctioneers bill of costs dated 17/10/24 was defective by failing to slot his fees in one band and instead slotted himself in all the 3 bands contrary to Part II of paragraph 4 of the 4th Schedule of Auctioneers Act/Rules.
 - vi. That the taxing master erred by assuming the role of a valuer.
 - vii. That the taxing officer never took into account the applicant's replying affidavit and his submissions.
 - viii. That the taxing officer erred by not finding that the respondent had been paid Kshs.190,000/- which was adequate to cover his fees for the work done.
 - ix. That taxing officer failed to find that the 2nd proclamation issued on 3/8/24 was about interests only as there was no decretal balance owing.
 - x. That the magistrate erred by valuing the proclaimed properties at higher amount than the decretal sum claimed in the warrants of attachment issued.
3. The applicant through its director Joseph Nzomo, has sworn a supporting affidavit sworn on 25/3/25 where he has majorly reiterated the above grounds.
 4. The applicant basically faults the taxing officer for applying wrong principles in the impugned assessment of respondent's costs based on the bill of costs dated 17/10/2024.
 5. He faults the respondent for slotting his fees on all the 3 bands in the 4th schedule instead of choosing one applicable band to his chargeable fees.
 6. He asserts that he applicant had paid Kshs.190,000/- to the respondent before he filed his bill of costs dated 17/10/25. According to the applicant the amount paid should have been adequate to cover for the work done by the respondent.
 7. It contends that there was an error by the taxing officer when she failed to note that the 2nd warrants of attachment showed a balance of decretal sum of Kshs.1,701,500/- and yet she went ahead and fixed the value of property at Kshs.3.5Millin in her impugned assessment.
 8. That items 4 and 9 of the bill of costs dated 17/10/24 were not drawn to scale and are in breach of paragraph 4 of the 4th schedule of the Auctioneers Rules and ought to have been struck out.
 9. The applicant further submits through learned counsel Mr Onyancha, that there was no physical attachment or seizure of its property. He submits that the respondent was paid Kshs.150,000/- which was duly acknowledged and that the respondent was paid a further 40,000/- which amount was acknowledged by the taxing officer leaving out Kshs.150,000/- paid earlier.
 10. The applicant faults the taxing officer for assessing advocates fees (Item No.10) under auctioneers fees which was irregular in its view because advocates fees should be taxed independently under Advocates Remuneration Order.
 11. It also faults the taxing officer for valuing the applicant's property at 11 Million under Item No.4 and basing its assessment on that figure when the amount owing was Kshs.10 Million.



12. It contends that under Item 9 of the bill the taxing officer valued the attached property at 3 Million when the 2nd warrants were in respect to Kshs.1,701,500. Mr Onyancha contends that even then the sum reflected of Kshs.1,701,500/- as owing was erroneous because by then the only sum owing was interests of Kshs.332,776/- which was paid according to him.
13. He submits that by placing values of properties proclaimed to be more than what was reflected in the warrant, the taxing officer unjustly enriched the respondent. He reiterates that the amount of Kshs.190,000/- paid to the respondent was adequate in their view.
14. The respondent has opposed this application vide a replying affidavit sworn on 26/3/25.
15. The respondent challenges the applicant's procedure of challenging the decision of the taxing officer. He submits that the applicant should have filed an appeal rather than a miscellaneous application.
16. He justifies the advocates fees taxed at Kshs.30,000 in the impugned assessment stating that the taxing officer exercised her discretion under Order 21 Rule 9(1) (b).
17. The respondent faults the applicant for raising the issue of valuation of the attached property at this forum claiming that this court lacks jurisdiction.
18. He contends that the amount of Kshs.150,000/- paid to him was in respect to the 1st execution and that the amount of Kshs.40,000/- was in respect to 2nd execution which was the subject of the impugned assessment. He submits that the taxing officer never made any error in that regard.
19. The respondent through counsel submits that whether the attachment is physical or documentary, the auctioneer is entitled to costs. He clarifies that the Auctioneer's Bill dated 17/10/24 was based on the 2nd proclamation which proclamation was in respect to interests.
20. This court has considered both the applicant's case and the respondent's position.
21. The respondent has taken issue with the option taken by the applicant to file a miscellaneous application rather than an appeal.
22. This court has looked at the Rule 55(4) and (5) of the Auctioneers Rules and finds that the respondent's objection is procedural and based merely on semantics because this is what the cited Rules state.

Rule 55(4) provides;

“An appeal from a decision of a registrar or a magistrate or the Board under the subrules (2) and (3) shall be to a Judge in chambers”.

Rule 55(5) provides;

“The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal shall be filed within 7 days of the decision of the registrar/magistrate”.

23. The matter before me is brought by way of chamber summons and is headed.

“being an appeal against the ruling of Hon. Irene Kabuteh R.M in *Kitale CM's Misc. Application NO.E047/24* delivered on 21/3/25”.
24. This court finds that the applicant is properly before court and in any event even if the applicant had used a different route to approach this court, I would still entertain him because what is important is the access to justice. Access of justice is a right protected under the Constitution and it therefore



matters not what a litigant uses to gain access to justice. What matters is the substance. The law pays less attention to matters of procedure in view of Article 159(d) of the Constitution.

25. Having found that the applicant is properly before this court I will begin with the less contested and straight forward question of whether an Auctioneers bill of costs should contain the advocates fees. The advocates fees are chargeable and taxable under Advocates Remuneration Order. The Auctioneers Rules do not have a window for the advocates fees. It was erroneous for the respondent to itemize the Advocates costs under Item 10 as taxable fee under Order 21 Rule 9 (1) (b) of the Civil Procedure Rules. The taxing officer erred to assess the advocates fees at 30,000/-. The item should have been taxed separately under Advocates Remuneration Order and not as auctioneers fees under Auctioneers Rules.
26. The other issue contested in this matter is the value of property attached and whether the value of the property should have been used in the assessment of auctioneers fees or the amount owing. The applicant has also raised an issue with the amount reflected in the warrants or the proclamation dated 13/8/2024. The applicant claims that the amount had been paid by the time proclamation was done.
27. This court will first address the question of what a court should use as a basis of auctioneers fees. This court finds that the respondent's position that he based his bill of costs on the value of the attached property rather than the decretal amount, is not fair or tenable. The basis should be on the decretal amount on the warrant of attachment. Using the value of the attached property in my view can potentially be used to unfairly enrich oneself at the expense of the economic rights of a judgment debtor under Article 40 of the Constitution.

It makes no sense for example for an Auctioneer to proclaim a property worth say a million shillings and charge his fees based on that value when the amount of decretal sum is say Kshs.50,000/- or less. In that scenario, the auctioneer would be getting much more than the decree holder and in effect in a matter of speaking harvesting more than the sower. That is unfair enrichment and cannot be sustained.

28. I have also considered the contested items 4 and 9 in the respondent's bill dated 17/10/24 and find that the respondent used 3 bands separately in tabulating his fees instead of using one applicable band as required. He was required to choose the band where his fees fell and charge as per the applicable band but he cannot use the 3 bands cumulatively because the same again is not fair. The law provides instructions fees for fees on attachment in 3 bands namely;
 - i. Kshs.4000 to 100,000 – 10%
 - ii. 100,000 to 1 Million – 5%
 - iii. over 1 Million – 2%
29. The above bands applies on proclamation of moveable properties and is distinguished from the auctioneer's fees taxable on sale of immovable property. The law provides that for the first 100,000/- it is 10% and over 100,000/- it is 7%. Fees on sale of movable property on other hand follows the bands as provided.
30. The auctioneer's fees itemized in No.4 and 9 of the impugned bill was erroneous. The respondent ought to have chosen one applicable band because he was just proclaiming and that is how the taxing master should have done in the assessment of costs.
31. On the question of whether or not the payment of Kshs.150,000/- was erroneously left out or whether the payment was in respect to another execution or attachment, this court finds that without evidence it is difficult and unfair to render a decision on the same . It is also hard to tell if the respondent had been paid all his dues by the time he carried out proclamation. Those issues should be addressed by the parties before a Taxing Officer for proper determination.



In the premises this court finds that the application dated 25/3/25 is merited and is allowed to the extent that the assessment of the taxing officer in the ruling dated 21/3/25 is set aside. In the interest of justice, this court will re-submit the bill of costs dated 17/10/2024 for re-assessment/taxation before the same Taxing Officer.

Costs of this application/appeal/reference will be paid by the respondent. The parties can also choose to agree on the fees rather than go back before the Taxing Officer.

DELIVERED, DATED AND SIGNED AT KITALE THIS 29TH DAY OF APRIL, 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Ruling delivered in open court

In the presence of;

Mr Wambua for Respondent

No appearance for Applicant

Court assistants - Duke/Chemosop

