



REPUBLIC OF KENYA



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Opportunity Kenya v Margaret Wanjala t/a Mako Auctioneers (Civil Appeal 71 of 2020) [2024] KEHC 2883 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 71 OF 2020**

DK KEMEL, J

MARCH 19, 2024

BETWEEN

OPPORTUNITY KENYA APPELLANT

AND

MARGARET WANJALA T/A MAKO AUCTIONEERS RESPONDENT

(Being an appeal against the Ruling of CAS Mutai-SPM Bungoma dated and delivered on the 28th May 2020 in the original Bungoma Principal Magistrate's Court Misc. Civil Application No. 165 of 2019)

JUDGMENT

1. This matter comprises of a series of files being HCCA Nos. 59, 60,61,62,63,64,65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76 and 77 all of 2020. For the purposes of this Judgement, HCCA No. 59 of 2020 shall be the lead file.
2. This is an appeal by the Appellant brought by the way of Chamber Summons dated 12th June 2020 filed on 15th June 2020, in which she seeks to set aside the ruling and order of the Taxing Master delivered on 28th May 2020 with costs. The Appellant as well prayed that this Court be pleased to refer the matter back to the Taxing Master to dispense with the issue of authenticity of letter of instruction dated 23rd November 2015 presented by the Respondent in line with directions the trial Court issued on 27th February 2020.
3. The Chamber Summons was filed in accordance with Rule 55 of the Auctioneers Rules 1996, Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act CAP 21, and Article 159 of the Constitution of Kenya.
4. The appeal is supported by the grounds premised on the face of the Chamber summons and the annexed Affidavit of Christopher Ochieng, Counsel for the Appellant, wherein he deponed inter alia; that the Taxing Master erred in law and in fact when he proceeded to tax the Respondent's Bill of Costs



dated 29th April 2019 without first addressing the issue of authenticity if the letter of instructions dated 23rd November 2015 in accordance with the directions he had issued on 27th February 2020 directing that he will issue a ruling to that effect on 27th March 2020; that the Taxing Master proceeded to tax the Respondent's Bill of Costs dated 29th April 2019 without taking into account the response filed by the Appellant in opposition to the same; that the Taxing Master erred in fact and law by proceeding to issue a Ruling on 28th May 2020 without prior notification to any of the parties; that the Taxing Master erred in law and fact in proceeding to tax the Bill of Costs without giving reasons for arriving at his decision and conclusion; that the matter was before the Taxing Master on 27th February 2020 when Counsel for the Appellant examined the Respondent of the authenticity of the letter of instructions dated 23rd November 2015. The same was scheduled for Ruling on 27th March 2020 and after the Court was to issue direction on how to proceed with the Respondent's Bill of Costs; that the Ruling was not delivered on 27th March 2020 as scheduled due to the notice issued on 15th March 2020 by the NCAJ downscaling the activities of the Courts; that efforts to find more information from the relevant Court Registry proved futile and due to the restrictions during the Covid-19 period Counsel could not travel; that on 12th June 2020, Counsel for the Appellant learnt from the Registry that the Ruling was delivered on 28th March 2020 taxing the Respondent's Auctioneer's Bill of Costs in the absence of both parties; that there was no notice issued to the parties on the Ruling despite the filed pleadings bearing the Appellant's email contacts.

5. The appeal was unopposed.
6. Vide Court directions issued on 5th July 2023, Parties were ordered to canvass this appeal by way of written submissions. On my perusal of the Court record none of the parties complied with this directive.
7. I have duly considered the appeal before me. A synopsis of that rule shows that the fees payable to an auctioneer for the attachment, repossession and sale of movable and immovable property shall be charged in accordance with the Auctioneers Rules, 1997. Rule 55 of the Auctioneer's Rules provides as follows:

“ 55 (2) where a dispute arises as to the amount of fees payable to an auctioneer –

- a. in proceedings before the High Court; or
- b) where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar, as defined in the Civil Procedure Rules (Cap 21, Sub Leg), may on the Application of any party to the dispute assess the fee payable.

4. An appeal from a decision of a registrar or a magistrate or Board under sub rules (2) and (3) shall be to a judge in chambers.
5. 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 or Magistrate”
8. It is clear from the above provision and in particular Rule 55(5) that an appeal from a decision of a Registrar or a Magistrate or the Board under sub-rules (2) and (3) shall be to a judge in Chambers and that the Memorandum of Appeal, by way of Chamber Summons setting the grounds of the appeal shall be filed within 7 days of the decision of the Registrar or Magistrate. This provision clearly prescribes the procedure to be followed where one challenges the decision of the Taxing Officer. That is, the only prescribed way is through a memorandum of appeal by way of Chambers Summons. This



procedure was termed mandatory by Court in Ezekiel Kiminza t/a Auto Land Auctioneers v Mistry Valji Naran Mulji [2017] eKLR.

9. Subject to the Ruling of this Court as delivered by my Learned Colleague S.N. Riechi J, the Appellant was granted leave to lodge its appeal against the Taxing Master's decision out of time. This simply means that the appeal by way of Chamber Summons before this Court is properly filed rendering the same competent for this Court to deliberate on.
10. The only issue for determination before this Court is whether I should set aside the ruling delivered on 28th May 2020 by the Taxing Master.
11. On setting aside the Taxing Officer's assessment case-law as elucidated in Oscar Otieno Odongo T/ A Odongo Investment Auctioneers versus Sukari Industries Limited [2019] eKLR That the Taxing Officer's assessment or taxation can only be interfered with when it is demonstratable that the decision was based on an error of principle or the fee awarded was manifestly high as to justify an interference.
12. I have perused the availed grounds, supporting affidavit sworn by Counsel of the Appellant and the ruling of the taxing officer, the subject of this Appeal. The core issue of the Appellant is the fact that the Taxing Master failed to consider the issue of the authenticity of the letter of instructions dated 23rd November 2015 in accordance to the directions he had issued on 27th February 2020.
13. On my perusal of the Court record, I was able to establish that the Respondent herein vide a correspondence dated 15th September 2017 did an introduction to the Appellant herein stipulating the kind of services her agency offered. The same is marked as CM 3 (page 21 of the record of appeal). Subsequently, on 30th October 2017, the Appellant did a correspondence to the Respondent stipulating that the said was an addendum to the Service Legal Agreement dated 19th September 2017 and that it wished to clarify that the Respondent's fees would be as stipulated in clause 18.0 and the same shall be recoverable as follows: where collateral is recovered and disposed to clear the outstanding loan and costs of recovery the company shall pay fees in full; where the collateral cannot be recovered or sold; where the debtor or collateral cannot be traced; where the debtor has agreed to make partial payments which is accepted by the company; where collateral is recovered and sold but the amount realized is insufficient to settle the outstanding loan and the agency's fees. Further, the correspondence indicated that the debtor in each of the above cases shall be solely responsible for payment of the Respondent's fees and the Respondent is entitled to demand full payments from the debtor. Finally, the Appellant noted that it shall not be liable to pay fees in the above circumstances. The same was duly executed by the Respondent and the representative of the Appellant, Christopher Mutisya. It is imperative to note that on my perusal of the Court record, I did not see and Service Legal Agreement.
14. On 28th April 2018, the Appellant vide Christopher Mutisya did an official email correspondence to the Respondent noting that its contract was terminated in January due to breach of operation and noting that there was no instruction written by the Appellant to the Respondent.
15. From the email correspondence of Christopher Mutisya (CM-4), the Appellant alleged that the Respondent was still duping clients in its name. Further, he noted that the Respondent's contract was terminated in January due to misconduct in its operations.
16. The Respondent availed a Letter of Instructions to her agency dated 23rd November 2015 stipulating that the amount to be recovered as of that date was Ksh. 31, 304/= . One Moses Wandera, former Branch Manager at the Appellant swore an affidavit stipulating that during his tenure in September 2008 to September 2016, the Respondent herein was not part of the Appellant's panel of auctioneers. He alleged that the Letter of Instructions dated 23rd November 2015 was forged it did not bear his true signature. He further alleged that the manner in which the purported Letter of Instructions was



- executed was unlike the practice in the Appellant's Company as the branch Manager always signed after the loan officer.
17. At this juncture, it is essential to note that only a licensed auctioneer can be used to recover outstanding debt. Failure to do so, the debtor shall have valid grounds to pursue a Court action against the secured creditor, for wrongful disposal of the security property, as the conduct of seizure and sale of security assets falls under auctioneers' business as stipulated under the *Auctioneers Act* of Kenya and it is unlawful for a person other than a licensed auctioneer to engage in auctioneering business.
 18. The *Auctioneers Act* was enacted to, "consolidate and amend the law relating to auctioneers, to provide for licencing and regulation of the business and practice of auctioneers, and for connected purposes." Under Section 2(1) of the Act, "an auctioneer" means a person licence under Section 10". Section 10 of the Act provides for who may be eligible for a licence while Section 12 provides for the manner of application for a licence to the Auctioneers Licensing Board ("the Board") established under Section 3 of the Act. The Board's functions include licencing and regulating the business and practice of auctioneers and supervision and discipline of auctioneers.
 19. The nature of the business of an auctioneer is set out in Section 2(3) of the *Auctioneers Act* which deems any person who does the following to be an auctioneer:
 - a. attaches for sale any movable or immovable property in execution of a court order made pursuant to the provisions of any written law or contract;
 - b. sells or offers for sale any movable or immovable property or any interest therein by auction or by any other mode of sale by competition;
 - c. levies distress for rent or distrains under the provisions of any written law;
 - d. carries out evictions under an order of a court;
 - e. repossesses goods from any person pursuant to the provisions of any written law or contract.
 20. From my perusal of the Court record, it is evident that the Respondent herein was a licensed auctioneer but it is imperative to also note that a secured creditor can hire a licensed auctioneer who practices in his own name or in a firm of auctioneers and provides services to secured creditors. Once the secured creditor has settled on hiring a particular auctioneer, the secured creditor shall issue a Letter of Instruction to the auctioneer in the statutory form under the *Auctioneers Act*.
 21. In this instant appeal the Appellant challenges the validity of the Respondent's Letter of Instruction from them dated 23rd November 2015. The Appellant alleges that the same was brought to the attention of the Taxing Master and was to be addressed first prior to his taxing of the Auctioneer's Bill of Costs.
 22. I entertain grave doubt that the Appellant can impugn Letters of Instructions issued by it. A licenced auctioneer is issued with Letters of Instructions and it is upon those instructions that an auctioneer acts or carries out its duties. The Board which exercises disciplinary authority over auctioneers is empowered under Section 18 of the *Auctioneers Act* to revoke an auctioneer's licence, "if the licenced auctioneer does not comply with any provisions of this Act or any rules made thereunder." Every auctioneer is required to comply with the Act and the Rules and an auctioneer who acts otherwise is liable to disciplinary action which may be brought by any person including the Appellant herein. It is for this reason that I do not wish to comment on the disputed Letter of Instructions. A declaration of the nature sought in prayer No. C does not serve any purpose and only goes to restate the law that parties must comply with the law.



23. Therefore, in drawing a bill of costs the auctioneer is confined to only what is provided for in the Auctioneers Rules. The actual fees due to an auctioneer are provided for in Part II of the Fourth Schedule. The impugned bill of costs was drawn as follows: -

No.	Particulars	Amount Charged	Amount Taxed
1.	Upon receipt of instructions	1,000	
2.	Fees before attachment	4,000	
3.	Inventory	2,000	
4.	Auctioneers commission	3,130	
5.	Insurance	3,680	
6.	Transport upon proclamation to Nalondo	22,815	
7.	Security	NIL	
8.	Storage Charges Kshs. 500 per day	NIL	
9.	Advertisement	NIL	
10.	Sale commission	NIL	
11.	Other disbursements	3,000	
12.	Filing: a. Bill of costs b. Notice of appointment c. Submissions	325 75 75	
13.	Advocates instruction fees	20,000	
14.	Process server fees	2,500	
15.	V.A.T	3,680	
	Total	61,280.00	



24. The manner in which an auctioneer's charges are assessed was settled by the Court of Appeal in the case of *National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer* [2005] eKLR where the Court held: -

“The respondent based his fees on the decretal sum and the Deputy Registrar assessed the fees on the basis of the decretal sum. The wording of paragraph 4 of Part II of the Fourth Schedule does not say that the percentages stated apply to the decretal amount. It would be unjust to base the fee on attachment on the decretal amount because in some case, the value of the attached goods may be many times less than the decretal amount shown in the warrant of attachment and sale.

The values indicated in paragraph 4 of Part II of the Fourth Schedule on the basis of which the fees for attachment are assessed are no doubt obscure. Nevertheless, it is a canon of construction of statutes, that if possible a statute should be construed in a manner which makes it operative and that where a statutory has several meanings even though there is little to choose between them, the courts must decide what meaning the statute is to bear, rather than reject the provision as a nullity. (See Paragraph 582 Halsbury's Laws of England Vol. 36, 3rd Edition).

The main object of paragraph 4 is clear. It is intended to provide values on the basis of which the auctioneers should be assessed. We think that it is reasonable that the auctioneer's charges for attachment should be based on the value of the goods attached and not on the decretal sum. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum. This is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative.....”

25. That aside, just as the law relating to taxation the segments of the bill of costs as pleaded must be assessed by the taxing master. The bill of costs is never read and granted as a whole without giving reasons for each of the items upon reliance of the *Auctioneers Act* and Rules. Clearly in this case the Taxing Master never gave reasons for the decision of granting the application as prayed being the hallmark of good administration of justice. Indeed, to meet reasons in any ruling or judgment threatens or infringes the fundamentals requirement of fairness. I consider reasons as the link between the decision and the mind of the decision maker. As stated in the case of *Flannery V. Halifax Estate Agencies Ltd* (2000) 1 W.L.R. 337 at 381, Henry LJ stated that “The duty is a function of due process, and therefore justice.” Constitutional justice imposes a requirement of procedural fairness and consequentially this necessitates a duty to give reasons in the very essence of arbitrariness as one's status could be redefined without adequate explanation as to why this was done. Secrecy creates suspicion, justly or unjustly. This secrecy may also be described as the hallmark of inefficient and corrupt administration. Reasons must therefore be disclosed. Besides, the giving of good reasons would inevitably earn respect for the decision maker. Further in *R. V Civil Service Appeal Board, exp.Cunningham* (1991) 4 All E.R 310. “There is a principle of natural justice that a public law authority should always or even usually give reasons for decision. The giving of reasons is necessary to ensure fairness.”
26. In the matter before this Court all the Appellant's complaints and criticism of the Taxing Master is on what was done to the application on assessment of auctioneer's bill of costs presented by the Respondent. Under the sub-heading of the bill of costs the catch word include assessment on the question referred to the Taxing Master. There may be a good reason for the Court to grant the application as prayed but to the aggrieved party who intends to appeal or review is left in a precarious situation in absence of the reasons for the decision.



27. More fundamental to this Court however is the proposed quantum of Ksh. 61, 280/= stated to have incurred by the auctioneer. I am quite clear in my mind that the Taxing Master had a duty to give considerable thought on the evidence in support of the bill of costs. It is noteworthy that in the instant case there exist no means of ascertaining the rationality of the decision in absence of the reasons the taxing master used to arrive at a conclusion that the bill of costs should be granted as drawn. That decision on costs was so important to the Appellant because it deals with a substantial money decree capable of being enforced and executed as a judgment of the Court. It is therefore well entrenched that any decision by a Judicial Officer must be such that it enables both the winner and the aggrieved party to understand the reasons for the decision in sufficient details.
28. The sum total of what I have said means that the ruling of the learned Taxing Master cannot be sustained in law. The result is that the Appellant's appeal is allowed. As far as the bill of costs is concerned it is only fair that it be remitted to another Taxing Master for assessment and determination. Costs to the Appellant.

It so ordered

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF MARCH 2024.

D. KEMEI

JUDGE

In the presence of:

Ochieng for Appellant

Masengeli for Wamalwa Simiyu for Respondent

Kizito Court Assistant

