



**Kennedy Shikuku t/a Eshikoni Auctioneers v Life Care Hospital (Miscellaneous Application E093 of 2023) [2024] KEHC 7124 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 7124 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
MISCELLANEOUS APPLICATION E093 OF 2023**

**REA OUGO, J**

**APRIL 26, 2024**

**BETWEEN**

**KENNEDY SHIKUKU T/A ESHIKONI AUCTIONEERS ..... APPLICANT**

**AND**

**LIFE CARE HOSPITAL ..... RESPONDENT**

**RULING**

1. The application before the court has been brought pursuant to section 89 of the *Civil Procedure Act* and Schedule 4 of the Auctioneers Rules 1997, Order 21 Rule 9A, 9B and 9C of the Civil Procedure Amended Rules, 2020. The applicant seeks to have the decision of the assessed costs in Bungoma High Court Civil Suit No. E002 of 2022 Formerly Bungoma ELRC No. 50 of 2018 Doctor Apolo Mulianga v Life Care Hospital and Kennedy Shikuku t/a Eshikoni Auctioneers delivered on 11/10/2023 with respect to items (e) and (g) be set aside and taxed afresh.
2. The grounds on the face of the application are that there is no legal basis for the award and the award is punitive in nature and not compensatory. It was advanced that the taxing officer erred in principle in assessing item (e) as the commission is netted from the total value of the judgment debtor-proclaimed property as indicated in the proclamation notice. It was also submitted that the taxing officer misdirected herself in taxing item (g) at Kshs 25,230.79/- as the same should be taxed at Kshs 139,488/-. The application was accompanied by the supporting affidavit of Paul S. Juma dated 17/10/2023. It was averred that the taxing officer failed to take into account the scale fees prescribed under schedule 4 of the Auctioneers Rules 1997 in awarding items (e) and (g) respectively.
3. The respondent was served with the application but elected not to respond.
4. The application was canvassed by way of written submissions. The applicant submits that he proclaimed/attached the respondent's property worth Kshs 43,590,000/-. Taxation of the auctioneer's fees is based on the value of the attached property. He relied on the case of Oscar Otieno v Sukari



Industries Ltd Migori High Court Misc Application No 293 of 2018. Under paragraph 4 part II of the Auctioneer's Charges, Practice Rules, where the value of the property is over Kshs 1,000,000/- the commission applied shall be 2%. There is no restriction on the value of the property to be proclaimed and neither is there a requirement that the proclaimed property should be proportional to the decretal sum. The suggestion by the taxing officer that the auctioneer ought to have proclaimed property equivalent to the decretal sum is unreasonable and without legal foundation. He urged the court to quash the decision of the taxing officer. The correct amount to be awarded as commission on item (e) was Kshs 860,000/- and therefore item (g) ought to have been Kshs 137,600/-.

5. In his further submissions he cited the case of National Industrial Credit Ltd v Majani Mingi Sisal Estate Ltd, where the court held that once goods or property have been proclaimed under rule 12 (b) and the prescribed procedure followed, the process of attachment takes effect and it does not subsequently matter at what stage it is terminated. Once goods are proclaimed, they become attached and seized by law.

## ANALYSIS AND DETERMINATION

6. I have considered the application, the submissions and the applicable laws. The taxing officer in her ruling regarding item (e) observed as follows:

“In respect of item number e, the auctioneer has not given any explanation as to why it proclaimed goods worth Kshs 43,590,000 whereas the decretal sum was Kshs 7,884,624. Item e is therefore taxed at Kshs 157,692.48 being 2% of the decretal sum.”

7. It is not in dispute that the applicant attached the respondent's goods the question before the court is how should the fees on attachment be calculated.
8. The applicant has extensively relied on the holding of the court of appeal in National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer [2005] eKLR the Court of Appeal stated that:

“The main object of paragraph 4 is clear. It is intended to provide values on the basis of which the auctioneer's charges 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. That is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative.”

9. However, the Court of Appeal decision in the National Industrial Credit Bank Limited Case (supra) was on the consideration that it would be unjust to base the fee on attachment on the decretal amount because in some cases, the value of the attached goods may be many times less than the decretal amount shown in the warrant of attachment and sale.
10. The circumstances of this case are different. In this case, the decretal amount was Kshs 7,884,624/-, and since the purpose of the attachment is the execution of the decree, the applicant's fees should be determined based on the decretal sum rather than the value of the proclaimed goods, which was six (6) times the value of the decretal amount. The decretal sum was Kshs 7,884,624/- and therefore according to paragraph 4 of part II of the Fourth Schedule under the *Auctioneers Act*, 2% is applicable for an amount above Kshs 157,692.48/-. The V.A.T would therefore be Kshs 25,230.79/- (16% of Kshs 157,692.48).



11. In conclusion, I find that the taxing master was correct in the calculation of items (e) and (g). The application dated 17<sup>th</sup> October 2023 is hereby dismissed with costs. It is so ordered.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26<sup>TH</sup> DAY OF APRIL 2024.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Applicant - Absent

Mr. Mongeri For the Respondent

Wilkister - C/A

