



**Isaac Maino Ngethe t/a Principal Auctioneers v Directline Assurance
Company Limited (Commercial Miscellaneous Application E689 of 2022)
[2024] KEHC 6633 (KLR) (Commercial and Tax) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E689 OF 2022**

MN MWANGI, J

MAY 24, 2024

BETWEEN

ISAAC MAINO NGETHE T/A PRINCIPAL AUCTIONEERS APPELLANT

AND

DIRECTLINE ASSURANCE COMPANY LIMITED CLIENT

RULING

1. The appellant filed a Chamber Summons application on 6th April, 2023 pursuant to the provisions of Rule 55 (4) & (5) of the Auctioneers Rules, 1997 seeking the following orders -
 - i. The Court be pleased to review and/or set aside the Taxing Officer's ruling dated 31st March, 2023 on the disputed items 3, 4, 5, 6, 12, 13, 14, 15, 16, &, 20 with respect to the appellant's bill of costs dated 20th September, 2022;
 - ii. This Court be pleased to assess costs due to the appellant at Kshs. 250,861.40 or at such sum as it deems reasonable and just;
 - iii. In the alternative to order 1 and 2 above, this Court be pleased to remit the appellant's bill of costs dated 20th September, 2022 for taxation before a different Taxing Officer to be taxed afresh on the disputed items; and
 - iv. The costs of this application be provided for.
2. The application is premised on the grounds on the face of the Summons and is supported by an affidavit sworn on 6th April, 2023 by Isaac Miano Ng'ethe, the appellant herein. In opposition thereto, the respondent filed grounds of opposition dated 4th May, 2023 raising the following grounds –



- i. It does not meet the threshold for setting aside a taxation award;
 - ii. Where there has been an error in principle, this Court will interfere but questions solely of quantum are regarded as matters within which the Taxing Officer is particularly fitted to deal and this court will intervene in exceptional cases;
 - iii. This court will interfere when the award of the Taxing Officer is so high or so low as to amount to an injustice to one party and the award herein has not been shown to fall in that category;
 - iv. The applicant has not disclosed any meritorious ground in support of the application to disturb the Taxing Officer's decision on taxation; the Taxing Officer considered all the relevant factors in arriving at her decision hence she did not err in principle;
 - v. The Taxing Officer's judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of the proper application of the correct principles of law which is not the case here; and
 - vi. There are no grounds to warrant setting aside the taxation award.
3. The application herein was canvassed by way of written submissions. The appellant's submissions were filed on 30th May, 2023 and 27th October, 2023 by the law firm of Hamilton, Harrison & Mathews Advocates, while the respondent's submissions were filed by the law firm of Kamau Kuria & Company Advocates on 12th July, 2023.
 4. Mr. Muiyuri, learned Counsel for the appellant relied on the case of *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR, where the Court established the principles for setting aside the decisions of the Taxing Master and submitted that in striking off item No. 3, the Taxing Master erred in principle by failing to apply the provisions of paragraph 4 of part 11 of the Fourth Schedule of the Auctioneers Rules, by holding that a proclamation of attachment is not the same as attachment. He cited the Court of Appeal case of *National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer* [2005] eKLR and further submitted that it is fair and just for the assessment of the Taxing Master to be substituted with the sum of Kshs.121,629.83 based on the value of the goods proclaimed as per the schedule attached thereto.
 5. Counsel contended that on item No. 4, the Taxing Master erred in principle in failing to apply the provisions under Section 4 of the *Auctioneers Act* on transport costs and paragraph 11 of the Auctioneers Rules. He argued that the current rate provided by the Automobile Association is Kshs. 42 per kilometer. Mr. Muiyuri asserted that in taxing off item No. 5, the Taxing Officer failed to consider the provisions on disbursements being costs towards the labour incurred in the exercise of proclamation, the sum of Kshs. 6,000/= was the cost incurred for the 3 days that the attachment took place. Counsel stated that the Taxing Master erred in principle by failing to consider relevant factors while taxing off item Nos. 12, 13, 14, 15, 16 & 20 and holding that these are futuristic events despite the fact that they will eventually happen.
 6. Mr. Munyori, learned Counsel for the respondent submitted that the appellant filed a bill of costs dated 20th September, 2020 for Kshs. 250,861.40, costs arising from work done in relation to execution of warrants of attachment for Kshs. 6,081,491.70, issued against the respondent in High Court Civil Case Misc. No. E1003 of 2020. He further submitted that Auctioneer's fees are calculated under the Fourth Schedule of the Auctioneers Rules, 1997. Counsel contended that in furtherance of its instructions, the appellant only proclaimed the respondent's goods, but there was no carting away of the said goods since the respondent paid the decree holder who had instructed the appellant the decretal sum due to it. Counsel contended that the appellant is only entitled to Kshs. 4,000/= as instruction fees.



7. To buttress this submission, Counsel relied on the case of Agricultural Development Corporation v James Onkundi Omakori t/a Lifewood Auctioneers [2020] eKLR. In the alternative, Counsel argued that from the warrants of attachment referred to above, the decretal amount is Kshs. 6,081,491.00, but the proclamation notice dated 1st February, 2022 indicates that the total value of the attached goods was Kshs. 199,000/=. Mr. Muniyori cited the case of National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer [2005] eKLR and asserted that the law provides for Auctioneer's fees to be based on the value of the goods attached and not on the decretal sum. He stated that would make the fees chargeable under instruction fees to be Kshs.19,900/=:, which is equivalent to 10% of Kshs.199,000/=:, being the value of the attached goods.
8. Counsel argued that in as much as the appellant claims travelling and labour expenses under item Nos. 4 & 5 of its bill of costs, it did not provide any documentary evidence such as receipts in support of the said claim. He referred to the Court of Appeal case of John Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR and stated that he who asserts must prove, but in this case the appellant had failed to discharge its burden of proof. On the issue of drawings and service of the proclamation notice indicated under item No. 6, Mr. Muniyori stated that it could not be granted by the Deputy Registrar since it is not provided for in the Auctioneer's rules. Counsel submitted that Item Nos. 12, 13, 14, 15, 16 & 20 relate to futuristic events which could not be quantified. Further, the Deputy Registrar had no jurisdiction to deal with them since they are not provided for under Part II of the Fourth Schedule of the Auctioneer's Rules, 1997.
9. In a rejoinder, Mr. Muiyuri relied on the Court of Appeal case of National Industrial Credit Bank Limited v S.K. Ndegwa Auctioneers (supra) and submitted that proclamation of movable goods is legally and effectively an attachment. In further submitting that the Taxing Officer erred in principle by holding that proclamation is not attachment and striking out the appellant's claim for fees on attachment in the sum of Kshs,121,629.83, he cited the case of KANU National Elections Board & 2 others v Salah Yakub Farah [2018] eKLR. Counsel contended that the total value of goods proclaimed from the respondent's various branches was Kshs.1,835,500/= as opposed to Kshs.199,000/= as alleged by the respondent. He contended that the figure of Kshs.1,835,500/= is what informed the attachment fees of Kshs.121,629.83.

Analysis And Determination.

10. On consideration of the instant application, the grounds on the face of it and the affidavit in support thereof, the grounds of opposition by the respondent as well as the written submissions by Counsel for the parties, the issue that arises for determination is whether taxation of the appellant's bill of costs dated 20th September, 2022 was sound in law.
11. The appellant in his supporting affidavit deposed that on 25th January, 2022 he received from Court a warrant for attachment and sale for execution against the respondent's movables in HCC Misc. No. 1003 of 2020 for Kshs.6,081,491.70. That on 1st February, 2022, he proceeded to the respondent's Rongai, Naivasha, and Nakuru branches and took inventory of the respondent's assets, but since the assets in the said offices were not sufficient to satisfy the decretal sum, he went to the respondent's branches in Machakos, Kitengela, and Nairobi on 2nd February, 2022, and on 3rd February, 2022 he went to its Thika and Kiambu town branches and also took inventory.
12. The appellant stated that on 3rd February, 2022 the respondent indicated that it had settled the decretal sum due as per the warrants of attachment but declined to pay his fees, causing him to file the bill of costs dated 20th September, 2022. A ruling on the said bill of costs was thereafter delivered by the Taxing Officer on 31st April, 2023 wherein the appellant's bill of costs was taxed at Kshs.35,705.00.



13. The appellant stated that the Taxing Officer failed to apply the provisions of Rules 12 & 14 of the Auctioneer's Rules, 2007 and erred in holding that proclamation of attachment, is not attachment. He further stated that the said Taxing Officer also failed to apply the provisions under Paragraph 4 of Part II of the Auctioneer Rules, 2007, thus holding that the appellant is only entitled to Kshs.4,000/= under Paragraph 3 for fees before attachment.
14. He contended that the Taxing Officer erred in assessing item No. 4 at Kshs. 20,000/= and taxing off the sum of Kshs.40,000/= by failing to consider the provisions under Paragraph 4 of Part II of the Auctioneers Rules, 2007 which provides for transport costs, and paragraph 11 which provides the rates applicable to mileage as published by the Automobile Association from time to time.
15. The appellant asserted that the Taxing Officer erred by taxing off item No. 5 on grounds that it is not provided for under the Auctioneers Rules, 2007 and ignoring the provisions on disbursements provided for under Paragraph 4 of Part II of the Auctioneers Rules, 2007.

Whether taxation of the appellant's bill of costs dated 20th September, 2022 was sound in law.

16. This Court can only interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job. A Court can only interfere with the decision of the Taxing Officer if he/she considered factors that ought not have been considered in the first place or failed to consider facts which he ought to have considered. This was the position taken by the Court in Kanu National Elections Board & 2 Others V. Salah Yakub Farah (supra) where the Court held that -

“The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court Visser vs Gubb 1981 (3) SA 753 (C) 754H – 755C as follows:-

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

17. The fees and disbursements payable to an Auctioneer are provided for under Rule 55(1) of the Auctioneers Rules, 2007 which states that -

“Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment repossession and sale of moveable and immoveable property under court warrants or letters of instructions shall be charged in accordance with these Rules.”



18. Under item No. 3 of its bill of costs, the appellant is seeking fees for attachment. The respondent asserted that what was done by the appellant is proclamation and not attachment since its goods were not seized and removed from its possession to warrant fees for attachment. In her ruling, the Taxing Officer relied on the Halsbury Laws of England 10th Edition's definition of the word attachment and stated that it involves seizing of goods, whereas proclamation involves notifying the judgment debtor of the intention to seize the goods after the lapse of a specified period of time, thus giving the judgment debtor an opportunity to redeem himself. The Taxing Officer went on to find that the appellant is only entitled to Kshs.4,000/= under this head since there was no attachment or actual seizure of the respondent's goods.
19. The question therefore that arises for determination is at what point an Auctioneer is entitled to fees for attachment/repossession/distrainment and expenses. Proclamation of movable property is provided for under Rule 12(1) of the Auctioneer's Rules, 2007. It states that -
- “Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock:
- a. record the court warrant or letter of instruction in the register.
 - b. Prepare a proclamation in Sale Form 2 of the schedule indicating the value of specific items and condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory auctioneer shall sign a certificate to that effect.
 - c. In writing give to the owner of the goods seven days' notice on Sale Form 3 of the schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction.
 - d. On expiry of notice without payment and if goods are not to be sold in situ remove the goods to safe premises for auction.
 - e. Ensure safe storage of the goods pending their auction.
 - f. Arrange advertisement within seven days from date of removal of the goods and arrange sale not earlier than seven days after first newspaper advertisement and not later than fourteen days thereafter.
 - g. Not remove any goods under the proclamation until the expiry of the grace period.”
20. Pursuant to the provisions of Rule 12(1)(b) of the Auctioneer's Rules, 2007, once a judgment-debtor's property has been proclaimed and the prescribed procedure followed, the process of attachment takes effect and the goods proclaimed become attached and seized by the law. Further, it is noteworthy that the heading of the prescribed Sale Form 2 referred to in the rule reads, Proclamation of Attachment/Repossession/Distrainment Of Movable Property. The main purpose of the aforementioned form is to notify the judgment-debtor that its goods described therein have been attached but left in its custody for a period of seven days, thereby giving the judgment-debtor an opportunity to redeem the said goods before they are removed from its custody. I believe this is the reason as to why Rule 14 of the Auctioneer's Rules, 2007 make it a criminal offence to remove attached and/or proclaimed goods from the judgment-debtor's custody before the elapse of seven days from the date of proclamation.



21. The Court of Appeal in the case of National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer (Supra) in addressing the said issue held that the following-

“It is true that the manner and the procedure of attachment stipulated in Order 21 Rule 38 Civil Procedure Rules appear to be in conflict with the procedure prescribed in Rule 12 of the Auctioneers Rules. However, it is clear that the *Auctioneers Act* is a modern statute and the procedure contained in Rule 12 of the Auctioneers Rules is indeed intended to be a reform of the old procedure contained in Order 21 Rule 38 of the Civil Procedure Rules which clearly needs to be amended to remove any inconsistencies.

The actual words used in the two rules is not decisive of whether an attachment has taken place. One has to consider the essence and purpose of the attachment. The purpose of the attachment is the execution of the decree. The essence of the attachment is to remove the goods from the possession of the judgment-debtor and place them in the custody of the law so that they can be sold to satisfy the judgment debt if the judgment-debtor does not pay the debt. To place the goods in the custody of the law it is not necessary, as Mr. Gatonye correctly submitted, that the goods must be carried away from the premises of the judgment-debtor. In the commentary to Order 21 Rule 43 of the Indian rule which is in pari materia to Order 21 Rule 38, the authors of Mulla, The Code of Civil Procedure 16th Edition state in part at page 2667:

“where a warrant of attachment is executed by affixing it to the out door of the warehouse in which goods belonging to the judgment debtor are stored, it amounts to “actual seizure” within the meaning of the present rule”.

It is clear from Rule 12 as read with Rule 14 of the Auctioneers Rules and the contents of the prescribed form, that is, Sale Form 2 that the proclamation of the movable goods is legally and effectively an attachment. From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the court through the auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods.”

22. Bound by the above decision, this Court departs from the decision of the Taxing Officer on what constitutes attachment and finds that the appellant in this case was entitled to charge his fees under Paragraph 4 of Part II of the Fourth Schedule of the Auctioneers Rules, 2007, once it served a proclamation notice on the respondent.
23. The question that then arises from the above is what value is to be used in determining the fees to be charged under this head. In National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer (supra) the Court of Appeal held 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...

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 be 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.”

24. In this case, the appellant averred that once he received from Court a warrant for attachment and sale for execution against the respondent's movables in HCC Misc. No. 1003 of 2020 for Kshs.6,081,491.70, he proceeded to the respondent's Rongai, Naivasha, and Nakuru branches on 1st February, 2022 and took inventory of the respondent's assets, but since the assets in the said offices were not sufficient to satisfy the decretal sum, he went to the respondent's branches in Machakos, Kitengela, and Nairobi on 2nd February, 2022, and on 3rd February, 2022, he went to its Thika and Kiambu town branches and also took inventory. He averred that the total value of the attached goods from all the above named respondent's branches was Kshs.1,835,000/=. This figure has been supported by proclamation notices attached to the appellant's affidavit sworn on 21st September, 2022 in support of its bill of costs dated 20th September, 2022.
25. In view of the foregoing, this Court finds that the appellant's fees under Paragraph 4 of Part II of the Fourth Schedule of the Auctioneers Rules, 2007 ought to be based on the value of the attached goods being Kshs.1,835,000/=. Paragraph 4 of Part II of the Fourth Schedule of the Auctioneers Rules, 2007 provides as follows-

“ Fees on attachment/repossession distraint and expenses

Kshs. 4,001 to Kshs. 100,000.00 - 10%

Kshs. 100,001 to 1,000,000 - 5%

Over Kshs.1,000,000 - 2%.

Transport, storage, advertising, insurance - Attaching or
and other disbursements expenses, where repossession charges in
attachment or repossession is stayed or addition to expenses
postponed or money tendered after
attachment or repossession but before sale”

26. In view of the above schedule, fees under Item No. 3 should be taxed at Kshs. 36,700/=.
27. Item Nos. 4 & 5 of the appellant's bill of costs provides for travel and labour expenses. The respondent argued that these are special damages that ought to have been proved by the appellant by way of receipts. The Taxing Officer in her ruling also noted that the travel costs claimed by the appellant were not supported by any receipts, she however took judicial notice of the fact that the appellant had to travel in order for him to be able to serve the proclamation notice on the defendant and awarded him Kshs. 20,000/= to cover his travel expenses. Paragraph 11 of Part II of the Fourth Schedule states that –

“ Travelling expenses as published by the Automobile Association from time shall to time be allowed at three times the scale.”

28. The Taxing Officer however failed to consider that the appellant also travelled to different towns to take inventory of the respondent's assets in various branches. I therefore vary the award for travel expenses from Kshs.20,000/= to Kshs.50,000/= noting that the appellant had to travel for him to serve the respondent with the proclamation notices.



29. The labour expenses were struck out by the Taxing Officer for reasons that they are not provided for by the Auctioneer's Rules and they were also not proved by way of receipts by the appellant. On perusal of the Auctioneers Rules, 2007 it is evident that labour expenses are not provided for. For this reason, in order to successfully claim this item, the appellant had a duty to demonstrate by way of receipts and/or invoices that he actually incurred this cost. In the absence of proof of the labour expenses claimed by the appellant, this Court finds that the Taxing Officer was justified in striking out this item.
30. Item No. 6 on the appellant's bill of costs provides for drawing and serving proclamation and Auctioneer's fee note. On perusal of Part II of the Fourth Schedule of the Auctioneers Rules, I find that this item is not provided for, thus I agree with the Taxing Officer's finding of striking it out. Item Nos. 12, 13, 14, 15, 16, & 20 were taxed off by the Taxing Officer on grounds that they were futuristic events which could not be quantified. It is noteworthy that these items are not provided for in the Auctioneers Rules, however in as much as I agree with the Taxing Officer that they indeed are futuristic events, in my view, item No. 20 can be quantified since it is based on standard Court fees. As a result, I uphold the Taxing Officers finding of striking out item Nos. 12, 13, 14, 15, & 16 and tax item No. 20 at Kshs.175/=.
31. In view of the foregoing, this Court finds that the Taxing Officer erred in law and in principle in striking out item No. 20 of the appellant's bill of costs dated 20th September, 2022.
32. The upshot is that the instant application is partly successful. As a result, this Court makes the following orders –
- i. The ruling by Hon. C. Ng'ang'a delivered on 31st March 2023 taxing the appellant's bill of Costs dated 20th September 2022 at Kshs. 20,705/= is hereby set aside;
 - ii. I set aside the award for travel costs in the sum of Kshs.20,000/= and substitute it with an amount of Kshs.50,000/=
 - iii. Item No. 20 of the appellant's bill of costs dated 20th September, 2022 is hereby taxed at Kshs.175/=;
 - iv. The bill of costs dated 20th September, 2022 is hereby taxed at Kshs. 86,875.00; and
 - v. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of;

Ms Mwangi h/b for Mr. Muiyuri for the appellant

Mr. Munyori for the respondent

Ms B. Wokabi – Court Assistant.

