



**Busia Sugar Industry Limited v Shikuku t/a Eshikhoni Auctioneers
(Reference E03 of 2023) [2024] KEHC 5344 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
REFERENCE E03 OF 2023**

REA OUGO, J

MAY 2, 2024

IN THE MATTER OF TAXATION UNDER THE AUCTIONEERS RULES, 1997

AND

IN THE MATTER OF TAXATION OF COSTS

BETWEEN

BUSIA SUGAR INDUSTRY LIMITED APPELLANT

AND

KENNEDY SHIKUKU T/A ESHIKHONI AUCTIONEERS RESPONDENT

RULING

1. This is an appeal against the decision of the taxing master on the respondent's bill of costs. The appellant in its application seeks the following orders:
 1. That the honourable court be pleased to strike out the supplementary costs dated 28th March 2022.
 2. That the bill of costs dated 8th March, 2022 be referred back to the taxing master for taxation or be dealt with as the honourable court deem fit.
 3. That the honourable court be pleased to vary/set aside the decision of the taxing master delivered on 21st June 2022 on items no. a, b, c, d, e, f, g, h, I, j, k, l, m and n on the respondent's bill of costs dated 8th March 2022.
 4. That the honourable court be pleased to vary/set aside the decision of the taxing master delivered on 17th June 2022 on items no. a, b, c, d, e, f and g on the respondent's bill of costs dated 28th March 2022.
 5. That the costs of the reference be borne by the respondent.



2. The application is on grounds that the taxing master erred in taxing a supplementary bill of costs which is unknown in law and that a bill of costs once filed cannot be amended by way of a supplementary bill of costs. The taxing master failed to tax the Bill of Costs dated 8th March 2022 as required in law and failed to give reasons or indicate the amount taxed off on each and every item. He allowed some of the items in the respondent's bill of costs which are not provided for under the Auctioneer's Act 1997.
3. Joseph N. Ngigu, the appellant's advocate, avers that the respondent was instructed to carry out the execution of the decree in Bungoma CMCC No. 399 of 2022 for warrant amount in the sum of Kshs 291,975/-. Upon proclamation of the goods the respondent filed the bill of costs dated 8th March 2022 for sum of Kshs 368,807/= which amount was way above the decretal amount and a supplementary bill of costs dated 28th March 2022 for the sum of Kshs 113,636/-. The bill of costs dated 8th March 2022 was taxed to the sum of Kshs 344,732/- but the taxing master did not give reasons on how the taxed amount was arrived at. At the time of filling the bill of costs dated 8th March 2022 the attachment of goods had not taken place and therefore item no. d and e should be struck off. That despite the fact that the warrant amount was Kshs 291,975/- the respondent alleges that he proclaimed goods worth Kshs 10,300,000/- which makes the action of the respondent malicious.
4. Items f, g, l, k, j, l, m and n were not supported by any documentation as required and should be disallowed. Item h is inapplicable since the commission payable has not been determined. Upon attachment, the respondent filed a supplementary bill of costs for a sum of Kshs 113,636/- which sum was taxed off for the sum of Kshs 84,636 without any reasons given. The bill of costs dated 28th March 2022 is unknown in law and ought to be struck out in its entirety. Item a, b, c, d in the supplementary bill of costs dated 25/3/2022 are not supported by any documents and should be disallowed. In the supplementary bill of costs dated 28/3/2022, the respondent quotes the value of the seized property in the sum of Kshs 800,000/- which is clear disconnect from the value quoted on the attached goods in the bill of costs dated 8/3/2022. Items f and g in the supplementary bill of costs are not supported by any documents and should be disallowed.
5. The respondent opposed the appeal and filed his replying affidavit dated 9/2/2023. He avers that on 21/2/2022 he was assigned relevant warrants of attachment and sale by the court in Bungoma CMCC No 399 of 2019 to levy execution against the appellant and he proceeded to the debtor's office in Busia and proclaimed their property. He seized the debtor's tractor, KTCP918B and when they were driving it into their yard in Bungoma, the debtor's employees blocked them and forcefully snatched and drove the seized tractor to Busia.
6. Thereafter he was informed by the instructing advocate that the debtor had served him with a stay order and therefore the respondent should not proceed with the attachment. He filled his bill hoping that the parties would resolve the matter but on 14/3/2022 he received a letter from an instructing advocate requiring him to proceed with attachment since orders of stay had lapsed. The respondent applied for orders for security to attach the appellant's movable property and he proceeded and seized the debtor's tractor KTCA214A. on 25/3/2022 they were served with an order for stay and on 31/3/2022 he was served with a consent order requiring him to release the tractor and that his charges be agreed upon or taxed by the court. He filed a supplementary bill of costs and the two bills were assessed to scale and no foreign item was allowed. The bill was neither high nor excessive. He explained that he filed the supplementary bill of costs to cushion him for the service rendered and to cover the cost of the subsequent seizure. He avers that KTCA214A new Holland was not amongst the proclaimed property yet leave for the seizure of the same was obtained.



7. It is trite law that the assessment of the auctioneer's charges on commission is based on the value of the property proclaimed/attached. He avers that there is no requirement that the proclamation should be proportional to the decretal sum.
8. It was further averred that the appellant's appeal is incurably defective as it is mixed up between a reference and chamber summons and contravenes the requirements of rule 55 subrule 5 of the *Auctioneers Rules*. The court lacks jurisdiction to entertain the same. He claims that there is no affidavit to sustain the appellant's chamber summons or reference.

Submissions

9. The appellant submits that the proclaiming goods were worth Kshs 10,300,000/- on warrant amount of Kshs 291,975 is unreasonable, unjustifiable, malicious/vexatious and unfair. In the *National Industrial Credit Bank Ltd case* (*supra*) the auctioneer proclaimed goods that were of lower value than the decretal amount. He contends that there is a disconnect in the respondent's bill of costs as regards the value of the attached goods i.e. whereas the Bill of Costs dated 8/3/2022 mischievously quotes 10,300,000/-, the supplementary bill of costs dated 28/3/2022 quotes Kshs 800,000/- as the value of the proclaimed goods.
10. They submit that the appeal has rightfully been brought by way of Chamber Summons pursuant to Rule 55 (5) of the *Auctioneers Rules*. They relied on the decision of *Sinohydro Corporation Limited v Samson Itonde Tumbo t/a Dominion Yards Auctioneers* [2021] eKLR.
11. They submit that the respondent is not entitled to item d in their bill of costs being fees on attachment, since the attachment of goods had not taken place at the time the respondent filed its bill of costs.
12. It was submitted that the *Auctioneers Act* does not provide for a supplementary bill of cost and it is therefore unknown in law. They urged the court to consider the holding in *Otieno Ragot & Co. Advocates v Kenindia Assurance Co. Ltd* [2017] eKLR where the court held that the Advocates Remuneration Order prohibits the amendment of a bill of costs once filed and the supplementary bill being an amendment to the initial bill is struck out.
13. The respondent submits that the taxation of the auctioneer's fees is based on the value of the attached property. The commission is payable under paragraph of the auctioneer's charges and is netted from the value of the proclaimed property in the proclamation. He cited the decision in *Oscar Otieno v Sukari Industry Ltd* Migori High Court Misc Civil Application No. 239 of 2018 and the decision in *National Industrial Credit Bank Ltd v Ndegwa Auctioneer* C.O.A Civil Appeal No 195 of 2004. The appellant has not demonstrated that there was an error of principle by the taxing officer to warrant the interference of taxation by this court.
14. The respondent submits that it is a mandatory requirement that the memorandum of appeal should be by way of chamber summons setting out the grounds of appeal and that it should be filed within 7 days of the decision of the registrar. He argues that no appeal under the *Auctioneers' Rules* is capable of being adjudicated upon by this court and as such the same should be dismissed.

Analysis and Determination

15. I have carefully considered the pleadings, the evidence on record and the submissions by the parties. The respondent has challenged the court's jurisdiction to handle the matter. However, I note that the appeal was filed by way of chamber summons and it challenges the decision of the taxing master. It was filed out of time but the appellant sought leave and the same was granted by the court on 26/1/2023 in High Court Misc Application No. E077 of 2022. The appeal is, therefore, properly before the court.



16. I will first deal with the auctioneer's fees on attachment which is item (d) on the auctioneer's bill of costs dated 8th March 2022. The is evidence that the auctioneer did proclaim the appellant's good and seized the appellant's motor vehicle KTCP918B. Halsbury's Laws of England 10th Edition has defined "Attachment" as follows;

“the seizing of a person's property to secure a judgement or to be sold in satisfaction of a judgement”

17. There was also consent between the appellant and Alex Juma Chivilili where the parties agreed that the motor vehicle registration number KTCA 214 make tractor type New Holland attached by the respondent be released to the appellant on running attachment. The court in Al-Riaz International Limited v Ganjoni Properties Limited [2017] eKLR explained that:

“I understand running attachment to connote that the person to whom the property is released holds it on condition that it is subject to the attachment without the liberty for dispose of it so as to remove it from attachment.”

18. Therefore, the circumstances of this case provide clear evidence of attachment and the respondent was therefore entitled to fees on attachment.

19. According to the warrant of attachment of movable property in execution of a decree for money issued to the respondent, the warrant amount was Kshs 291,975/-. However, the respondent argues that his fees on attachment should be based on the value of the property on proclamation while the appellant argues that it should be calculated based on the decretal amount. The question before the court is, how should the auctioneer's fees on attachment be calculated? The respondent relied on the holding of the Court of Appeal in National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer [2005] eKLR where 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.”

20. 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.

21. The circumstances of this case are different. In this case, the amount in the warrants of attachment was Kshs 291,975/-. 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. Therefore the taxing master erred by taxing the fees on attachment based on the value of the proclaimed goods which was Kshs 10,300,000/-.

22. The appellant submits that item c is only paid when transporting movable goods and the respondent proved that they had begun transporting the appellant's truck to Bungoma when they were served with orders of stay. The appellant's argument can therefore not stand. The appellant also submits that items



h, i, j, k, l and f are not provided for under Part II of the Fourth Schedule of the *Auctioneers Rules* No.5 of 1996. However, the items are disbursements which the taxing master should consider reasonable and whether they are supported by evidence before taxing.

23. I now turn to consider the supplementary bill of costs. The Auctioneer's Act does not provide for a supplementary bill of costs and should be taxed off.
24. Consequently, I remit the bill of costs to the taxing master to re-assess the respondent's bill of costs dated 8th March 2022.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 2ND DAY OF MAY 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Wanyama -For the Applicant

Respondent - Absent

Wilkister - C/A

