REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 162 OF 2019

CO-OPERATIVE BANK OF KENYA LTD.................APPELLANT

-V-

JACINTA NKIROTE..1ST RESPONDENT

KENNEDY SHIKUKU T/A

ESHIKONI AUCTIONEERS............................2ND RESPONDENT

Coram:Hon. Justice R. Nyakundi

Mathai Maina & Co. Advocate for the 2nd Respondent

M/S Nyaundi Tuiyott & Co. Advocates for the Appellant

M/S Wanjiku Karuga & Co. Advocates

R U L I N G

Before court is an ex-parte chamber summons filed by the firm of Songok Advocates dated 8/11/2019 seeking the following orders:-

(a) This matter be and is hereby certified as urgent and service be dispensed with in the first instance.

(b) There be interim stay of execution pending the hearing of this application interparties.

(c) This honourable court be pleased to set aside the orders of Honourable Wairimu in Eldoret CMCC Misc Civil Suit No. 76 of 2019, Kennedy Shikuku T/A Eshikhoni Auctioneers –v- Jacinta Nkirote and Co-operative Bank of Kenya Limited made on 5/11/2019 and order for the re-assessment of the Auctioneers Bill of Costs.

(d) In the alternative this honourable court be pleased to set aside the orders of Honourable Wairimu in Eldoret CMCC Misc Civil Suit No. 76 of 2019, Kennedy Shikuku T/A Eshikhoni Auctioneers –v- Jacinta Nkirote and Co-operative Bank of Kenya Limited made on 5/11/2019 and same be substituted by an order of this court re-assessing the bill afresh.

The reference is premised under Rule 55 sub rule 4 & 5 of the Auctioneers Rules 1997 and Section 22 of the Auctioneers Act.

In support of the reference is an affidavit sworn by learned counsel Mr Songok in which he avers inter alia as follows:-

1. THAT the 2nd respondent in Eldoret CMCC Misc Civil Suit No. 76 of 2019, Kennedy Shikuku T/A Eshikhoni Auctioneers –v- Jacinta Nkirote and Co-operative Bank of Kenya Limited filed an application dated 5/8/2019 coming up for hearing on 5/11/2019. (See annexture marked JKS-1 being a copy of application).

2. THAT the honourable court on 5/11/2019 in Eldoret CMCC Misc Civil Suit No. 76 of 2019, Kennedy Shikuku T/A Eshikhoni Auctioneers –v- Jacinta Nkirote and Co-operative Bank of Kenya Limited made an order allowing the applicants application in its entirety. (See annexture marked JKS-2 being a copy of the order).

3. THAT the Appellant/Applicant is aggrieved by the said order which was issued by the Hon. Magistrate in the subordinate court and now seeks that this court do issue stay of execution orders pending this appeal and/or same be substituted by an order of this court re-assessing the bill afresh or issue an order directing the re-assessment of the Auctioneer's Bill of Costs.

4. THAT the honourbale court allowed the said application without considering the fact that the bill as drawn had to be re-assessed by the court in arriving at a fair assessment.

5. THAT non failure by the 2nd respondent in filling its reply/response does not warrant assessment of the said bill as drawn without assessing whether the auctioneers bill meets the requirements as stipulated in the Auctioneers Rules.

6. THAT the appellants/applicants advocate through M/S Maina counsel holding brief requested for more time to enable him file a response while he is still seeking further instructions from his client on a possible negotiation and settlement of the auctioneers costs which application was declined.

7. The Applicant is apprehensive that the Respondent shall move to execute the decree in Eldoret CMCC Misc Civil Suit No. 76 of 2019, Kennedy Shikuku T/A Eshikhoni Auctioneers –v- Jacinta Nkirote and Co-operative Bank of Kenya Limited at any moment in the absence of stay of execution orders.

8. THAT the said appeal is meritorious and has overwhelming chances of success.

9. The execution process the subject of this taxation relates to a matter that is pending for appeal and any further execution in the name of auctioneers fees is tantamount to double jeopardy in the sense that it will be an execution upon an execution.

In opposition to the chamber summons the respondent filed a preliminary objection dated 18/11/2019 to the effect that the application is incompetent as it offends the provisions of Order 42 Rule 1 of the Civil Procedure Rules 2010 as there is no appeal on record.

The application herein was canvassed by way of written submissions which I duly acknowledged as the basis of factoring in the legal perspectives taken by respective learned counsels to the matter.

DETERMINATION

I have appraised the impugned records and the decision by the taxing master.

I have further considered the reasons and the affidavits in support of the taxation undertaken in favour of the respondent as against the applicant. In this reference there are two fundamental issues that arise from the grievances on the part of the applicant.

First whether the so called appeal from the decision of the taxing master falls under the ambit of Order 42 Rule 1 of the Civil Procedure Rules.

Second whether the scope of the decision made by the taxing master is one in which this court can exercise discretion to

interfere and set it aside as of right.

As regards issue number one it was the respondents contention that the law as premised under Order 42 Rule 1 of the Civil Procedure Rules lenders the chamber summons fatally defective. To countenance such a narrative by the respondent learned counsel for the applicant cited and placed reliance the expressed provisions under Rule 55(4) & (5) of the Auctioneers Rules 1977. It is not in dispute that the civil procedure rules are not applicable in matters arising out of a claim on the amount of fees payable to an auctioneer or an advocate of the high court for professional services rendered to a party.

In this case the notice of preliminary objection prescribed by the respondents as to the competency of the chamber summons as herein collectively referred to is primarily not inconsonant with the principles in the following authorities .i.e

In Mukisa Biscuit Manufacturing CO.Ltd –V- West End Distributors Ltd(1969)EA 696, where Law J.A and Newbold P. (both with whom Duffs V-P agreed), respectively at 700 and 701, held as follows:

Law JA:

"So far I am aware, a Preliminary Objection consists of a pure point of law which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of imitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Newbold P:

"A Preliminary Objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and, on occasion, confuse the issues. This improper practice should stop." In addition the court of appeal in **Nitin Properties Ltd –V- Singh Kalsi & Another(1995)eKLR** also captured the legal principle when it stated as follows:

"A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

Starting with the arguments made by the counsel for the respondents and after reading carefully Order 42 Rule 1of the civil procedure rules I find as rightly argued by counsel for the applicant the instant matter is governed by Rule 55 of the Auctioneers Act sub-rule (2) and (3). Therefore the competency of the appeal cannot be challenged under the Civil Procedure Rules. Under the circumstances there is no Preliminary Objection worthy the discretion of this court.

On the second tranche of this contest is the issue of whether the taxing master did assess the Auctioneers bill of costs as intimated by the applicant or as founded by the respondent the purpose of the application allowed was to enable determination of the matter on merit. In my own observation it is very clear from the taxing master's record that the respondent filed an auctioneers bill of costs of assessment dated 5th of August, 2019 and filed in court on 5th August, 2019. The application apparently was placed before Honourable Wairimu on 5th November, 2019 for hearing and determination. The court extract shows that the application dated 5th August 2019 was allowed as prayed. In my view no hard on the fast rule is required to infer from the records that presumably it was respondent's Auctioneers Bill of costs which was granted as prayed. However be that as it may the dispositive of the application as proceeded to trial does not seem to be accompanied with a certificate of costs. 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." It is submitted that 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."

In the matter before this court all the applicant'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. More fundamental to this court however is the proposed quantum of Ksh 404,680/= 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. With profound respect to respondent's submissions the issue of the impugned bill of costs seems to have been dealt with conclusively on 5th November, 2019. 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 applicant 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. In other words the aggrieved party abiding by the decisions will have an opportunity to either lodge an appeal or on the face of the reasons that decision maker complies with the outcome. Although the taxing master had the jurisdiction to enter into the inquiry on the purported bill of costs she failed to do so by the nature of that decision. In every case whatever the character of the bill of costs on the wide range of questions remitted to the taxing master it is essential that the derived authority from the statute is exercised within permissible margin of judicial reasoning. The breakthrough of any taxation is for the taxing master whose jurisdiction to determine the issues raised to exercise discretion on the correct legal basis. It must acknowledged that this question on the facts of this case can be answered in the affirmative.

The way to get things right is to hold that no assessment of the bill of costs dated 5th August, 2019 by the respondent has been assessed in reference to the Auctioneer's Act and Rules. As is apparent from the record and the submissions made by the applicant unless the nature of proceedings are taken at law to determine the precise bounds of the bill of costs. I see considerable force in the observations made by both counsels but legitimizing taxing master's order of 5th November, 2019 would be in support of voidness and ultra vires doctrines. The field of choice of this court is to adopt a course of interfering with the decision by compelling the respondent to move the taxing master for an appropriate assessment of the bill of costs. In this respect I draw inspiration from the principles in the case of **(Cooke –V- Secretary of State for Social Security (2001) EWCA Civ 734; (2002) 3 All ER 279)** in which the court set out the following criteria, **"But no system of decision making is perfect or infallible. There is always the possibility that a judge at any level will get it wrong. Clearly there should always be the possibility that another judge can look at the case and check for error. That second judge should always be someone with more experience or expertise than the judge who first heard the case."**

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 applicant application 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.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 14TH DAY OF FEBRUARY, 2022.

R. NYAKUNDI

JUDGE

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