

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM**

CIVIL REFERENCE NO. 12 OF 2023

*(Arising the decision of the Resident Magistrates' Court of Dar es Salaam, at Kisutu by Hon.
Isaya – SRM (Taxing Master) in Misc. Civil Application No. 136 of 2001)*

ERIC AUCTION MART & COURT BROKER APPLICANT

VERSUS

AFRICAN TERMINALS LIMITED RESPONDENT

RULING.

S.M. MAGHIMBI, J:

The application beforehand was lodged under the provisions of Order 7 (1) and (2) of the Advocates Remuneration Order G.N. No. 263 of 2015 ("the Order"). In her Chamber Summons, the applicant is moving this court order to:

- i. interfere with the proceedings, decision and ruling of the taxing master which struck out the Applicant's bill of costs without justifiable cause in law Misc. Civil Application No. 136 of 2001 ("the Misc. Application").

- ii. be pleased to make an order that the bill of costs was properly filed within the guideline and best practice regulating bill of costs by the Applicant and thus set aside the dismissal order dated 23/02/2022.
- iii. That the Honourable Court be pleased to make an order that bill of costs be taxed as presented by the Applicant and or the Court may exercise its discretionary power by taking the bill of costs as presented by the Applicant.
- iv. Costs of this Application to be provided.
- v. Any other relief(s) deemed just fit to grant thereof.

The Chamber Summons was supported by an Affidavit dully sworn by Mr. Thadei Agathon Hyra, the Applicant's Advocate on the 27th day of June, 2023.

Brief background of the matter is that the Applicant herein was appointed as the Court Broker by Resident Magistrates' Court of Dar es Salaam, at Kisutu to execute the decree vide Misc. Civil Application No. 136 of 2001. The Applicant attached the Judgment Debtor's immovable property which was sold through a public auction conducted on 21st day of August 2011. In the said sale, the Respondent became the highest bidder whereby the property was sold at sum of Tanzanian Shillings Three Billion Only.

Subsequent to the sale, on 26th day of December 2011, the Executing Court confirmed the sale and issued a certificate of sale to the Respondent herein.

Upon conclusion of the processes of sale prior to and subsequent to the sale, the Applicant herein who was the court broker, filed a bill of costs against the respondent herein, before the executing court. In his ruling dated 25th March, 2022, the Taxing Master Struck Out the Bill of Costs on the ground that the respondent is not the property party in the said application. The Taxing Master did not rule out the applicant's entitlement to be paid for the work done, he only struck out the application on the ground that the respondent was not the proper party to be sued. Aggrieved by the decision of the Executing Court, the applicant has filed this application moving the court for the aforementioned prayers.

The applicant's argument in faulting the ruling of the taxing master is that the dismissal orders for bill of costs contain illegality and irregularities on grounds that **one;** the taxing master went beyond its jurisdiction since he is not responsible with determination of the person liable for payment of the bill and the source of the fund. **Two;** was that the taxing master is responsible with taxation process of the bill as presented by the Applicant and thus the said bill was presented in accordance with the names of the parties responsible which was the

practice of the particular time hence the bill of costs was proper in all four corners of law. **Three;** was that it was the duty of the trial court to summon all parties responsible before determination of the bill.

Further that where the parties default in appearance with regards to the presented bill of costs, the taxing master has only one remedy under the rules regulating taxation of bill of costs, that is attending the bill of costs by undertaking taxation of the bill. She concluded that the order for dismissal of the bill of costs dated 23/02/2022 was made erroneously and untenable in law thus the order has errors apparent of the face of the record, which error can be cured by this Honourable Court.

Having considered those submission, I must put the records clear from what I have observed to be the position of the applicant. In his affidavit, the applicant alleged that the Taxing Master dismissed the application while the actual records are that the application was struck out. It must therefore be clear that the contested application was not dismissed, rather it was struck out and that shall so remain the record. Having said that, I will now determine the substance of this application.

Having gone through the affidavit and the records of this application, unlike what was submitted before me, that the respondent does not object to the grant of this application, it was the respondent's

advocate Mr. Ganja who raised the issue of propriety of the respondent to be sued. In the ruling of the Taxing Master, he is quoted that:

"in reply Mr. Mbonje submitted that after going through the Applicant's bill of costs dated 13th day of September 2011 as per the payment receipt issued as well as the Applicant's submission filed on the 06th day of August 2021 they noted some unusual features which the attention of this court is called upon.

Firstly, he submitted that the bill of costs is against Tantrack Agencies Limited and Tanzania Motors Services company Limited and thus the Applicant and the Respondent are not parties to the Application for Bill of Costs. Secondly, he submitted that the submission filed by the Applicant introduce new and different parties from the Application for the Bill of Cost whereby the Applicant is Eric Auction Mart and Court Broker and the Respondent is African Terminals Limited who are not parties to the original bill of costs and thus there is no any order of the court to all or substitute the partes. It is their submissions that the Applicant's submission in chief has been premised wrongly and thus the Respondent is wrongly joined".

It is from those submission that the Taxing Master held that in the original application giving rise to the application in question before me, the parties were Tantrack Agencies Limited ("Decree Holder") and Tanzania Motor Services Company Limited ("Judgement Debtor"). He also held that the respondent herein (African Terminals Limited) had no any connection to the decree executed by the applicant herein as he was neither the decree holder nor the judgment debtor in Land Case No. 257 of 1995 before the defunct Regional Housing Tribunal for Dar-es-salaam. It was further revealed that the respondent was a mere bonafide purchaser of the disputed property. At this point I totally agree with the taxing master that the said bill of costs was preferred against a wrong party. The obvious is that the respondent herein was neither the Decree Holder nor the Judgment Debtor in the Execution proceedings, rather a bonafide purchaser who emerged as a highest bidder in the sale.

In the interest of justice and proper understanding of the underlying holding that the respondent herein is not a proper party, I will elaborate a more detailed fact on which the parties (particularly the applicant) may have had based their claim in. It would so appear that subsequent to the purchase of the suit property by the respondent herein and a certificate of sale having been issued, there were several other subsequent engagements. This includes a Deed of Settlement between Consolidated

Holdings Corporation ("CHC") and African Terminals Limited in which the respondent was refunded his purchase price and the said Tanzania Motor Services Limited through CHC retained the suit property. For this reason, the applicant is claiming the amount from the respondent herein who was the purchaser of the property.

Since the process was concluded at the time when the applicable Rules were Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary), Rules 1997 G.N. No 315 of 2017 and its subsequent Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary), Amendments Rules, 2008, the Taxing Master, referring to the current Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary), Rules 2017 Government Notice No 363 ("the Rules") held that that the proper party to have been sued and who had a duty to pay was the judgment debtor therein. He further held that it will be unjustifiable and unreasonable to charge the bonafide purchaser. In this aspect, I find that even if we were to treat the settlement deed as a successful objection proceedings (of which I am not so concluding) still the obligation to pay the Executing Officer will not be on the purchaser. This is dictated under Rule 27 (1)&(5) of the Rules which provides:

"27.-(1) Fees, charges and allowances prescribed in the Fourth Schedule to these Rules shall be payable for the

execution of warrants of attachment and orders for sale issued by the High Court, a court of resident magistrate or district court.

(5) Charges and allowances of the executing officer in case of successful objection proceedings arising from the attached property shall be paid by the decree holder or any other person who pointed out the property.”

As for the case at hand, as observed the party on whom the duty to pay the charges and allowances of the applicant is burdened on is neither the Decree Holder nor the Judgment Debtor, but the bonafide purchaser. If the application is to be granted, then the court will be imposing a burden to bonafide purchaser contrary to the dictates of law and precedents. In the case of **Msafiri Jumanne Mashaka vs Sololo Jumanne Yamlinga (Admin. of the Estate of the Late Jumanne Yamlinga) and Others (PC Civil Appeal 85 of 2020) [2021] TZHC 3876 (4 June 2021)** when emphasising on the importance of protecting the rights of a Bonafide Purchaser, my Brother Judge Hon. Tiganga had this to say at page 17:

It is trite law that, where the interests of the bonafide purchaser are involved in any matter then that interest must be protected. Now who is a bonafide purchaser?

In answering his question as to who the bonafide purchaser was, Hon. Tiganga, J referred to the case of **Suzana S. Waryoba Vs. Shija Dalawa (Civil Appeal 44 of 2017) [2019] TZCA 66 (11 April 2019)** whereby the Court of cited the definition from Oxford Scholarship Online where at page 6 of the decision it was held:

*"A bonafide purchaser is someone who purchases something in good faith, believing that he/she has dear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller behaves fraudulently, the bona-fide purchaser is not responsible. **Someone with conflicting claim to the property under discussion would need to take it up with the seller, not the purchaser, and the purchaser would be allowed to retain the property.**" (Emphasis is mine).*

On those findings, it is clear that of all the people to re-imburse the Executing Officer/Court Broker, a bonafide purchaser should not be one of them.

It is also trite law that when a broker is conducting an auction or any act in execution of a decree, he is so acting as an agent of the parties to the decree, only that he is endorsed by the court. Therefore the person liable for paying the broker is either the judgment debtor or in cases of a successful objection proceedings, the decree holder but not the bonafide purchaser of the property as is the case in this application. There is no way that the burden can be imposed on the purchaser of the property who was a stranger to the decree and had nothing to do with the costs incurred in execution including sale of the property. He had only one interest, the purchase a property sold in execution by believing that she has a clear right of ownership after the purchase and having no reason to think otherwise.

I must admit that I have noted with surprise the fact that Mr. Ganja did not have an objection to the grant of this application while he was the one who raised the objection at the Executing Court. Be it as it may, since he is allowed to change his mind, the truth in principle remains the same, his no objection does not justify this court's departure from determination of matters according to the law. I cannot set a precedent that will be against the law simply because the other party had no objection to it.

It is my duty as a neutral adjudicator to decide matters on merits based on law and precedents and not according to what parties seem to

have agreed particularly when such an agreement is against the dictates of law. After all, if the parties are at one on the payment of the costs, as to who should pay the applicant, they could amicably do so outside the court without dragging the court into making decisions against the law just to suit their desires. I will stick to the dictates of prescribed laws and procedures.

The above said, I see no reason to fault the decision of the taxing master. This application is hereby dismissed. Since Mr. Ganja had no objection to the grant of this application, I presume he would not have pressed for costs, therefore none is awarded.

Dated at Dar-es-salaam this 29th November, 2023




S.M. MAGHIMBI
JUDGE