



REPUBLIC OF KENYA



Muthee v Onsongo t/a Hegeons Auctioneers (Miscellaneous Application E201 of 2024) [2024] KEHC 13297 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E201 OF 2024
HI ONG'UDI, J
OCTOBER 31, 2024**

BETWEEN

PETER KARIUKI MUTHEE APPLICANT

AND

**HEZRON GETUMA ONSONGO T/A HEGEONS
AUCTIONEERS RESPONDENT**

RULING

1. In the Notice of Motion dated 20th July 2024 the applicant prays for the following orders;
 - i. ii- Spent.
 - ii. That the decision of the Taxing Officer as evidenced in the Ruling dated 9th July 2024 with respect to items 2,4,5,6.11,12,13,14,15,16,17,18 & 19 plus VAT in the Bill of Costs dated 23rd January 2024 be set aside and taxed afresh by this honourable Court with input by both parties.
 - iii. That the costs of this application be provided.
2. The application is premised on the grounds on its face as well as the affidavit sworn on even date by applicant's advocate. He deponed that the contents of the items in the bill of costs dated 23rd January 2024 were too excessive in the circumstances and without any justification as per the law. Further, that the honourable Court failed to tax the said bill of costs on merit as per the provisions of the law and considered extraneous evidence in allowing some of the items in the said bill of costs.
3. He further deposed that the taxing officer erred in law in failing to be bound by the law of precedent. That the taxing officer misdirected herself in taxing the plaintiff's Bill of costs at Kshs.142, 900/= which was grossly and/or manifestly excessive as to be indicative of an error in principle and warrants setting aside.



4. In response the respondent filed a replying affidavit dated 17th September 2024. He averred that the application offended the provisions of Rule 55 sub rule 5, since it was filed outside the statutory time provided for by the law without leave of the court. Further, that on the 1st December, 2023 he was issued with warrants of attachment and sale of the applicant's property. He therefore proceeded to properly proclaim the applicant's properties in accordance with his duties under the [Auctioneers Act](#).
5. He further averred that upon proclaiming the applicant's property, the applicant reached out to the decree holders advocates and entered in to a consent which provided that they would settle the auctioneer's fees but the same has not been complied with to date. Further, that upon the applicant failing to settle his rightful dues he invoked the provisions of Rule 55 (3) of the [Auctioneers Rules 1997](#) and his bill was taxed at Ksh. 142,900/=.
6. The application was canvassed by way of written submissions.

Applicant's submissions

7. These were filed by Kimondo Gachoka & Company advocates and are dated 14th October, 2024. Counsel cited paragraph 7 of the [Advocates Remuneration Order](#) and submitted that the said paragraph gave a window for any aggrieved party to file an appeal within 14 days after the decision was delivered with matters being objection to itemize. Further, that pursuant to rule 55 (4) of the [Auctioneer's rules](#) an appeal from a decision of a registrar or magistrate or board under rule 2 and 3 shall be judge's chambers.
8. He submitted further that the application had been filed in good time. The court's attention was drawn to the decisions in [Machira & Co. Advocates v Arthur K. Magugu & Another](#) [2012]eKLR, [Zabaria Barasa v Dubai Bank Kenya Limited](#) [2015]eKLR as cited in [Kennedy Shikuku T/a Esbikboni Auctioneers v China National Aero Technology Internal Engineering](#) [2022]eKLR and [Oscar Otieno Odongo t/a Odongo Investment Auctioneers v Sukari Industries Limited](#) [2019] eKLR.
9. He urged the court to review the award issued on the ruling dated by the taxing master.

Respondent's submissions

10. These were filed by D.C Ngeno & Company advocates and are dated 7th October, 2024. Counsel identified two issues for determination.
11. The first issue is whether this court has jurisdiction to hear the applicant's application. Counsel submitted in the negative and cited rule 55 (4& 5) of the Auctioneers Rules, the decisions in [Owners of Motor Vessel "Lilian S" v Caltex Oil \(K\)Ltd](#) [1989]KRL and [Ocheja Emmanuel Dangana v Hon. Attai Alo Aidoko A/o Usman & Other](#), SC 480/2011 and SC 11/2012 (Consolidated).
12. He further submitted that the application before this court was incompetent as the same was time barred and no cogent explanation had been given for the late filing of the same. Further, that the procedure prescribed and the time within which to file an appeal under Rule 55 (4&5) of the [Auctioneer's Rules](#) was mandatory.
13. He placed reliance on the case of [Kiminza t/a Auto Land Auctioneers -vs Mists Vali Naran Muli](#) 201 eKLR in which the Judge when faced with a similar-scenario struck out the appellant's application with costs in favour of the respondent expressing himself as follows:

“in addition, Rule 55 (5) of the *Auctioneers Rules* only allows a window of 7 days within which to file an appeal after the decision is made. There & no doubt that the procedure



prescribed and the time within which to file an appeal is mandatory. In this the Respondent has approach the Court what is referred to as a “Reference” filed on 16th March 2017. This is obvious an unknown procedure under the Rules and certainly one filed outside the time permitted and without leave.”

14. On the second issue which is whether the orders sought are tenable under the Auctioneer Rules 1997, counsel submitted in the negative and cited the case of Jafred Wamukoya & Gideon Osundwa v Kennedy Shikuku t/a Eshikboni Auctioneers & Ibrahim Mubumed [2021] eKLR.
15. In conclusion, he urged the court to dismiss the present application with costs to the respondent.

Analysis and determination

16. I have carefully considered the application, the affidavits and the submissions by both parties. I find that the main issue for determination to be whether the application dated 20th July 2024 is merited.
17. It is the applicant’s contention that the taxing officer misdirected herself in taxing the applicant’s Bill of costs at Kshs.142, 900/= which was grossly and/or manifestly excessive as to be indicative of error in principle and warrants setting aside. Further, that paragraph 7 of the Advocates Remuneration Order gave a window for any aggrieved party to file an appeal within 14 days after the decision was delivered with matters being objection to itemize.
18. On his part the respondent argued that this court lacks jurisdiction to determine the present application since it offended the provisions of Rule 55 sub rule 5. That the same was filed out of the statutory time required by the law without leave of the court, yet the same was mandatory under the Auctioneer’s Rules.
19. Rule 55 of the Auctioneer’s Rules provides as follows:
 - 55(2)where a dispute arises as to the amount of fees payable to an auctioneer –
 - a) in proceedings before the High Court; or
 - b) where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar, as defined in the *Civil Procedure Rules* (Cap 21, Sub. Leg.), may on the Application of any party to the dispute assess the fee payable.
 - 4) An appeal from a decision of a registrar or a magistrate or Board under sub rules (2) and (3) shall be to a judge in chambers.
 - 5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the Registrar or Magistrate
20. It is clear from the above provision and in particular Rule 55(5) that an appeal from a decision of a Registrar or a Magistrate or the Board under sub-rules (2) and (3) shall be to a judge in chambers and that the memorandum of appeal, by way of chamber summons setting out the grounds of the appeal shall be filed within seven days of the decision of the Registrar or Magistrate. This provision clearly stipulates the procedure to be followed where one challenges the decision of the Taxing Officer. That is, the only prescribed way is through a memorandum of appeal by way of chamber summons. In addition, Rule 55 (5) of the Auctioneers Rules only allows a window of seven days within which to file an appeal after the decision is made.



21. In *Ezekiel Kiminza t/a Auto Land Auctioneers v Mistry Valji Naran Mulji* [*Supra*] also relied on by the respondent the Court in handling a situation where an applicant approached Court via a reference held that:

“In this case, the Respondent has approached the Court by what is referred to as a “Reference” filed on 16th March 2017. This is obviously an unknown procedure under the Rules and certainly one filed outside the time permitted and without leave. These are both procedural and substantive issues which go to the jurisdiction of the Court. It is clear that the Respondent has not only failed to come to Court under the prescribed form but also failed to come to court within the time specified by the law.”

22. What is filed herein is clearly a reference under paragraph 11 of the *Advocates (Remuneration) Order*. This clearly reveals lack of compliance with the provisions of Rule 55(5) of the *Auctioneers Rules*, 1997, which expressly provides for the filing of a memorandum of appeal by way of a chamber summons and not a reference. In view of the foregoing, it is my opinion that a reference from taxation pursuant to paragraph 11 of the Advocates Remuneration Order is not synonymous with an appeal pursuant to rule 55(5) of the *Auctioneers Rules*.

23. I am therefore in full agreement with the respondent that a “reference” is not contemplated under Rule 55 of the *Auctioneers Rules* and that the only way to lodge an appeal is by memorandum of appeal through a chamber summons.

24. Secondly, even if that were to be overlooked, the chamber summons ought to have been filed within seven (7) days of the decision by the registrar/deputy registrar. In this case the ruling was delivered on 9th July, 2024. The application dated 20th July, 2024 was filed on 24th July, 2024 which is clearly outside the time frame allowed. The applicant never sought leave of the court to file his application.

25. The upshot is that the application dated 20th July 2024 is incompetent and is hereby dismissed with costs.

Orders accordingly.

DELIVERED, VIRTUALLY DATED AND SIGNED THIS 31ST DAY OF OCTOBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

