



REPUBLIC OF KENYA



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**Diamond Trust Bank Limited & another v Oscar Otieno Odongo t/
a Odongo Investment Auctioneers & another (Miscellaneous Cause
174 of 2021) [2023] KEHC 3647 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CAUSE 174 OF 2021**

JN KAMAU, J

APRIL 24, 2023

IN THE MATTER OF THE AUCTIONEERS ACT, 1996

AND

IN THE MATTER OF THE AUCTIONEERS RULES, 1997

AND

IN THE MATTER OF THE AUCTIONEER'S BILL OF COSTS

BETWEEN

DIAMOND TRUST BANK LIMITED 1ST APPLICANT

DIAMOND TRUST BANK LIMITED 2ND APPLICANT

AND

ODONGO INVESTMENT AUCTIONEERS 1ST RESPONDENT

OSCAR OTIENO ODONGO T/A ODONGO INVESTMENT

AUCTIONEERS 2ND RESPONDENT

*(Being an Appeal against the taxation of the Auctioneers Bill of Costs in
Miscellaneous Application No E048 of 2021 delivered on 3rd December 2021)*

RULING

Introduction

1. In its Chamber Summons dated 15th December 2021 and filed on 20th December 2021, the Applicant herein sought that the time limited for lodging its appeal against the Ruling of the Learned Trial Magistrate Hon E. A. Obina that was delivered on 3rd December 2021 in respect of the Respondent's



Bill of costs dated 8th November 2021 and filing of the Memorandum of Appeal be extended from 10th December 2021 and the Appeal be deemed as duly lodged within the prescribed time, that the aforesaid Ruling be set aside and the matter be remitted to a different magistrate for taxation and/or in the alternative this court be pleased to tax the said Respondent's Bill of Costs. Its prayer that the aforesaid Ruling and the execution of any Certificate of Taxation arising therefrom be stayed pending the hearing and determination of this application was spent.

2. Jeniffer Thiga, a Legal Officer of the Applicant swore an Affidavit in support of the said application on 15th December 2021. Francis Kariuki, another Legal Officer of the Applicant subsequently swore a Supplementary Affidavit on 10th May 2022. The same was filed on 12th May 2022.
3. The Applicant averred that vide a Ruling delivered on 3rd December 2021, the Taxing Master, Hon E. A. Obina taxed the Respondent's Bill of Costs in the sum of Kshs 205,307.60. It pointed out that it had justifiable grounds for the said Ruling to be set aside by this court. It contended that among other several grounds, the Learned Trial Magistrate erred when he failed to correctly apply the principles as set by the Court of Appeal in the locus classicus case of Phemchand Raichand Ltd & Another vs Quarry Services of East Africa Ltd and Another {1972} EA 162 when taxing the said Bill of Costs.
4. It asserted that the decision of the Learned Trial Magistrate was made on the basis of matters which were improperly considered therefore leading to an incorrect assessment of the Respondent's Bill of Costs. It therefore stated that in the circumstances the interference of the aforesaid decision by this court would be warranted. It pointed out that the order for stay of execution that was granted by the Learned Trial Magistrate was about to lapse and that if an order for stay of execution was not granted, the Respondent would execute against it thus occasioning it substantial loss. It stated that it was in the interest of justice that its application be allowed.
5. On 24th February 2022, the Respondent filed Grounds of Opposition dated 23rd February 2022 in opposition to the present application. It contended that the application was bad in law, malicious, vexatious, mischievous and a gross abuse of the court process as the Applicant had come to court with unclean hands. It asserted that the application was fatally defective as the same was lacking material or crucial information to support the same and no amount of amendments could cure the defects. It pointed out that this court lacked jurisdiction to hear and determine the application as drawn.
6. The Applicant's Written Submissions were dated and filed on 6th June 2022 while those of the Respondent were dated 5th August 2022 and filed on 4th August 2022(sic). This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

7. The Applicant invoked Order 23 Rule 10 of the *Civil Procedure Rules* and placed reliance on the cases of *Maurice M. Munya & 148 Others vs Stanbic Bank Limited* [2019] eKLR and *Equilab Technologies Limited vs Attorney General & 4 Others; Co-operative Bank (K) Limited (Garnishee)* [2020] eKLR where the common thread was that the costs of the garnishee application ought to be borne by the Judgment-debtor. It asserted that the relevant party to bear the costs of the garnishee proceedings was the Judgment debtor and the Learned Trial Magistrate ought to have held so.
8. It further cited Rule 55(1) of the Auctioneer Rules and relied on the cases of *Kenya Tea Packers Company Limited vs Hezron Getuma t/a Hegeons Auctioneers* [2021] eKLR and *Co-operative Bank of Kenya Ltd vs Jeofrick N. Muinde t/s Kimu Auctioneers* [2019] eKLR where the common thread was that the Auctioneers charges were provided for at Part II of the Fourth Schedule. In that regard, it pointed out that items no 3, 4, 8, 9 and 10 of the Respondent's Bill of Costs were not provided for



- under Part II of the Fourth Schedule of the Auctioneers Rules and that the Respondent could not therefore purport to charge for items that were not provided for by the said schedule.
9. It contended that the Respondent did not tender any proof to legitimise the amounts charged for disbursements, postage, stationery and telephone that were itemised under Nos 5, 6 and 7 of the said Bill of Costs. It asserted that the Learned Trial Magistrate ought not to have awarded the Respondent the aforesaid items.
 10. It placed reliance on the case of *Premchand Raichand Ltd vs Quarry Services of East Africa Ltd and Another* [1972] EA 162 where the court elucidated the principles governing assessment of costs as being that the costs should not be allowed to rise to a level as to confine access to justice as to the wealthy, that a successful litigant ought to be fairly reimbursed for the cost he has had to incur, that the general level of remuneration of Advocates must be such as to attract recruits to the profession, there should be consistency in the award made and that the court will only interfere when the award of the taxing officer was so high or so low as to amount to an injustice to one party.
 11. It was its contention that that the Learned Trial Magistrate taxed the Respondent's Bill of Costs very high as to amount to an injustice to it. It added that the Bill was exaggerated by a total sum of Kshs 200,307.60 which if it was compelled to pay, it would amount to unjust enrichment by the Respondent.
 12. On his part, the Respondent submitted that the Applicant's application herein was an appeal from the decision of the Learned Trial Magistrate that was delivered in 3rd December 2021 which his application dated 8th November 2021 and by taxed his Bill of Costs of even date at Kshs 205,307.60. He asserted that upon the expiry of the Proclamation, he went to carry out the attachment and tried to negotiate his fees with the Applicant's Legal Manager, one Ms Jenniffer Nthiga who took the position that the Applicant would only negotiate payment of his fees upon the same being taxed/assessed by court.
 13. He submitted that the Applicant only filed Grounds of Opposition on 25th November 2021 in opposition to his application and hence, the contents of his application remained uncontested and deemed to have been admitted. He invoked Rule 55 of the Auctioneers Rules, 1997 and argued that the Applicant filed its appeal out of time because the present application was filed on 20th December 2021 while the decision being appealed against was delivered on 3rd December 2021.
 14. It was his case that when a matter was statute barred or where any other law that imposed a timeline for the undertaking of any legal proceedings, the court was barred from dealing with the same outside the statutory timeline. In this regard, he relied on the cases of *Thuranira Karauri vs Agnes Ncheche* [1997] eKLR, *Bosire Ogero vs Royal Media Services* [2015] eKLR and *Harrison Ndung'u Mwai & 500 Others vs Attorney General* [2018] eKLR. However, he did not elucidate the particular holdings in the aforesaid cases that he was referring to.
 15. He also placed reliance on the case of *Lilian S (sic)* where it was held that jurisdiction was everything and that it was so central to the power of the court that it could be raised at any time and by any party including by the court on its own motion. He contended that when a court discovered that it did not have jurisdiction to deal with a matter, it had to immediately down its tools by dismissing or otherwise terminating the proceedings.
 16. He pointed out that the filing of this application for leave to appeal out of time together with the appeal was irregular and was emphatic that the court ought not be asked to address a case in such a messy fashion. It was his submission that the Applicant ought to have sought leave to file the Appeal herein out of time whereupon the court would then have decided whether to reject it or allow it on terms.



17. He asserted that under the court's general appellate jurisdiction set forth in Order 42 Rule 13 (2) of the Civil Procedure Rules, parties were required to raise issues of jurisdiction before directions were given. He was emphatic that the court could not be invited to deal with the substantive appeal before addressing the question of jurisdiction.
18. He further averred that the Applicant did not explain why it filed its appeal late and thus there was no basis for this court to exercise its discretion to enlarge time to file the Appeal out of time. He urged the court to down its tools in the event it found that the said prayer was not merited. He added that the Appeal was not merited and should be dismissed.
19. Both parties herein delved into the merits or otherwise of the Appeal. However, this court found it prudent to first address itself to the question of whether or not the Applicant had provided sufficient ground upon which the leave to lodge an appeal out of time could be granted in the first instance. Indeed, this court could only delve into the merits or otherwise of the appeal if there was an appeal on record.
20. Notably, Rule 55 (4) and Rule (5) of the Auctioneers Rules provides as follows:-
 4. An appeal from a decision of a registrar or a magistrate or the Board under subrules (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.
21. It was evident that the Applicant was dissatisfied with the Ruling that was delivered by the Learned Trial Magistrate on 3rd December 2021. It therefore ought to have filed its appeal by way of a chamber summons within seven (7) days of the date of the Ruling. It did not do so and only filed the present application on 20th December 2021.
22. The criteria for extension of time was discussed by the Supreme Court in *Nick Salat vs Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR where it was held that such extension was not a right but an equitable remedy that was available to a deserving party, that a party had to furnish a plausible reason to the delay to the satisfaction of the court, that the court ought to consider if the opposite party would suffer prejudice if the extension was granted and whether the application had been brought without undue delay.
23. Notably, the Applicant mainly focused on the merits of the appeal herein. It did not give any explanation of the delay in filing its appeal, a major argument when presenting an application to file any pleading out of time. It ought to have first sought leave to file the appeal out of time but not seek leave to have an appeal that had been filed out of time deemed to have been filed within the period stipulated in the law in the same application.
24. This court agreed with the Respondent that there had to be order in the manner proceedings were instituted in court as the prayer seeking leave to file any pleading out of time was not automatic. It was a discretionary power that was exercised by the court if an applicant had furnished it with sufficient grounds to exercise its discretion in favour of that applicant.
25. The Applicant could not seek orders whose intention was to act retrospectively. The omission was not a procedural technicality that could be cured by Article 159 (2)(d) of the *Constitution* of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities.
26. However, in the same spirit of administering justice without undue regard to procedural technicalities, this court could have perhaps considered if the Applicant had met the criteria that was set out in the case



of Nick Salat vs Independent Electoral & Boundaries Commission & 7 Others (Supra) in considering its prayer to be granted leave to file an appeal out of time had it furnished it with a plausible explanation why it did not file its appeal within the prescribed period under Rule 55(5) of the Auctioneers Rules.

27. Unfortunately, it proceeded to argue its appeal as if leave had already been granted and an appeal was already on the court record. It proceeded un procedurally by seeking to have the time for lodging its appeal being extended from 10th December 2021 to 20th December 2021. Instead, it ought to have sought leave to lodge its appeal out of time and not make assumptions.

Disposition

28. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Chamber Summons dated 15th December 2021 and filed on 20th December 2021 was not merited and the same be and is hereby dismissed. The Applicant shall bear the Respondent's costs of this application.

It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL 2023

M. S.SHARIFF

JUDGE

