



Joseph Gikonyo t/a Garam Auctioneers v Wainaina (Miscellaneous Application E115 of 2018) [2023] KEHC 17891 (KLR) (Commercial and Tax) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E115 OF 2018**

DO CHEPKWONY, J

MAY 25, 2023

BETWEEN

JOSEPH GIKONYO T/A GARAM AUCTIONEERS AUCTIONEER

AND

JOHN KIHONGE WAINAINA RESPONDENT

RULING

1. This is a determination of the application dated February 28, 2022. However, before delving into the merits of the application, it would be prudent to provide the background of this matter for its context to be appreciated. The suit commenced through the Auctioneers' Bill of Costs dated October 12, 2018. The Taxing Master, Hon. Tanui issued a Ruling on March 22, 2019 whereupon the Bill of Costs was taxed at Kshs 635,625/= .This gave rise to a Reference by way of Chamber Summons Application dated March 29, 2019 whereby the High Court through Lady Justice Okwany ordered the Bill of Costs to be re-taxed by a different Taxing master. The matter was then placed before Deputy Registrar Hon. Wanyama who delivered her ruling on March 15, 2021 and the Bill of Costs was re-taxed at Kshs 1,526,064.50.
2. It is this Ruling of March 15, 2021 that is the point of contention. Still aggrieved by the said Ruling, the Applicant filed yet another reference dated March 29, 2021, which reference was dismissed by Lady Justice Mulwa vide a ruling delivered on January 27, 2022 on the grounds that the application was res judicata since the matter had already been dealt with by the two Deputy Registrars and Lady Justice Okwany. The other ground upon which the reference was dismissed was that it had been filed out of time and without leave of the court, hence could not be considered.



3. It is this Ruling of January 27, 2022 that culminated to the present application dated February 28, 2022 brought under Order 51 Rule 1 and Order 42 Rule 6, both of the [Civil Procedure Rules](#) and it seeks:-
 - a. Spent;
 - b. Spent;
 - c. That the Honourable Court be pleased to grant an order for stay of execution of the taxed costs in accordance with the ruling delivered on March 15, 2021 and all other consequential proceedings thereof pending the hearing and determination of the appeal lodged by the Applicant in the Court of Appeal;
 - d. That costs of this application be in the cause.
4. The Application is based on the grounds set out on its face and Supporting Affidavit of the Applicant, John Kihonge Maina sworn on February 28, 2022. According to the Applicant, he was aggrieved by the Ruling of the High Court delivered on January 27, 2022 and has lodged an Appeal to the Court of Appeal. In the meantime, he seeks stay of execution of the said ruling that was delivered on March 15, 2021 to safeguard himself from being exposed to irreparable loss and harm. He also states that the Auctioneer is likely to move the court to extract Certificate of Taxation and proceed with execution which will be prejudicial to him owing to the pending appeal at the Court of Appeal.
5. In response to the application, the Respondent/Auctioneer opposed the application vide Grounds of Opposition dated April 10, 2022 and Replying Affidavit sworn by Joseph Gikonyo, 'The Auctioneer' on 1st April, 2021.
6. In the Grounds of Opposition, the Auctioneer holds that the Applicant has not established the requirements set out under Order 42 Rule 6 of the [Civil Procedure Rules](#) since he has not shown any substantial or irreparable loss he is likely to suffer or even offered any security for the due performance of the decree. The Auctioneer contends that the Applicant has not shown that the appeal is arguable with a likelihood of success or the Auctioneer's ability to refund the decretal sum in the event the appeal succeeds. According to the Auctioneer, the application is only a delay tactic meant to bar him from getting the fruits of his ruling.
7. In the Replying Affidavit, the Auctioneer holds that the application lacks merit for the reasons that it is seeking a blanket stay of execution of the whole amount of Kshs 1,526,064.50 yet the only disputed amount was Kshs 890,439.00 was the amount of Kshs 635,626.50 was undisputed and had already been acknowledged, though the Applicant has not yet paid it.
8. The Auctioneer states that it is capable of refunding the disputed amount of Kshs 890,439.00 should the appeal succeed and also argues that the Applicant has not offered any security and has also not explained the delay of filing the application more than 30 days after the ruling of January 27, 2022.
9. According to the Auctioneer, the intended appeal against the ruling of Lady Justice Mulwa is not arguable for reasons that the court had ruled that the reference was incompetent since it was filed out of time and without the leave of court, the court declined to deal with the application since the issues raised therein had been dealt by a court of equal jurisdiction, and hence ought to be dealt with at the Court of Appeal. It is the Auctioneer's argument that the application is at a dead end and only an attempt to further deny it the fruits of litigation. The Auctioneer seeks to have the application dismissed with costs.



Analysis and Determination

10. Having carefully read through the application dated February 28, 2021, the grounds upon which it is premised alongside the Grounds of Opposition and Replying Affidavit filed in response thereto together with respective submissions filed by the parties herein, this Court finds that the issues that arise for consideration in this case are as follows:-
- a. Whether the Application is res judicata.
 - b. Whether the orders for stay of execution should be issued.

Whether the Application is res judicata

11. From the background provided earlier, it is evident that this is not the first time the court is dealing with the issue of stay of execution in this case. In the application dated March 29, 2021, the Applicant herein sought among other orders, a stay of execution of the ruling of March 15, 2021, and for Taxing Officer decision delivered then to be set aside and or vacated. And in the Ruling of January 27, 2022, while addressing the issue, the court held at Paragraph 24 that:-

“On the matter of stay of execution of the taxed bill of costs, this court cannot stay the execution process based on the taxed costs. It can however be done in a different litigation wherein the question of stay may be litigated.”

12. In view of this finding, it is clear that the issue was already dealt with by that Court and the only option for the Applicant was to lodge an Appeal at the Court of Appeal or apply for review. In raising this same issue before this Court again, the same is found to be resjudicata.
13. The substantive law on Res Judicata is found under Section 7 of the Civil Procedure Act, Cap 21 which provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

14. The principles of res judicata were discussed in the case of John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015]eKLR which pronounced itself as follows:-

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”



15. Given the history of the matter having been handled by two Deputy Registrars, two High Court Judges and this Court being the third, over the same Bill of Costs. It is clearly a complete abuse of court's process and a waste of judicial time, leading to the conclusion that it is a delay tactic to hinder the Auctioneer from enjoying the fruits of his ruling and denying him access to justice. The Court in the case of Republic v Attorney General & Another, Exparte James Alfred Koroso, held as follows on the issue of access to justice:-

“Access to justice cannot be said to have been ensured when persons in whose favour Judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their Judgments due to road blocks placed on their paths by actions or inactions of others.”

Whether the orders for stay of execution should be issued.

16. Having found that the application is res judicata, this Court will not delve into the prayer for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules as the same will be an exercise in futility as it can no longer issue in the circumstances.
17. In the end, this Court finds that the application dated February 28, 2022 lacks merits and the same is dismissed with costs to the Applicant.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 25TH DAY OF MAY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Githaiga holding brief Mrs. Okullo for Auctioneer

No appearance for and by Applicant

Court Assistant – Martin/Sakina

