



REPUBLIC OF KENYA



Musoni Microfinance Limited v Wanjala t/a Mako Auctioneers (Miscellaneous Reference Application E035 of 2020) [2023] KEHC 22927 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS REFERENCE APPLICATION E035 OF 2020**

**DK KEMEL, J
SEPTEMBER 29, 2023**

BETWEEN

MUSONI MICROFINANCE LIMITED APPLICANT

AND

**MARGARET NANDAKO WANJALA T/A MAKO
AUCTIONEERS RESPONDENT**

RULING

1. The applicants filed an application by way of a chamber summons dated May 29, 2023 seeking the following orders; -
 - i. Spent;
 - ii. That the Applicant be granted leave to file an objection and a taxation reference to this Honourable Court against the ruling of the Honourable Court's taxing officer over Bungoma Chief Magistrate's Court Civil Misc No139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157 and 041 all of 2023;
 - iii. Spent;
 - iv. That the Honourable Court be pleased to set aside and review the ruling delivered by the Honourable Court's taxing officer over Bungoma Chief Magistrate's Court Civil Misc No139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157 and 041 all of 2023;
 - v. In the alternative, the Honourable Court be pleased to order the Auctioneers Bill of costs be taxed afresh;
 - vi. That the Honourable Court be pleased to grant any other orders it may deem fit.



- vii. That costs of this application be provided for.
2. The application is supported by the affidavit of Rose Wainaina as well as the grounds on the face of the summons wherein she deponed that the trial Court delivered its ruling on May 18, 2023 directing the Applicant to pay Auctioneer fees and or costs and on May 19, 2023, the Applicants Advocates requested for the certified copies of the proceedings and ruling which were availed on May 25, 2023 which was after the lapse of seven days' statutory period of appealing.
 3. In response to the application, the Respondent filed a notice of preliminary objection dated June 19, 2023, on grounds that the reference before this Court is statutorily barred having been brought contrary to Rule 55 (5) of the [Auctioneer Rules 1997](#) and revised 2017 [Auctioneers Act](#) No5 of 1996. She further claimed that the application offends section 79G of the [Civil Procedure Act](#), 2010; Order 42 Rule 2, 6 and 12 of the [Civil Procedure Rules, 2010](#) and that the application without leave of Court makes it fatally incompetent and incurable and thus is ripe for dismissal.
 4. The application was canvassed by way of written submissions. Both Counsel filed and exchanged their respective submissions.
 5. Vide submissions filed on 29th June 2023, Counsel for the Applicant in a nutshell submitted that the application seeks leave to file a tax reference and/or appeal against the ruling delivered by the Taxing Master. He relied on section 79G of the [Civil Procedure Act](#) and section 55 of the [Auctioneers Act](#). According to him, Counsel for the Respondent misquoted section 79G as the same clearly indicates the appeal ought to be filed within 30 days. Counsel further relied on the case of [Salat vs IEBC & 7 others](#) (2014) eKLR; [Leo Mutiso vs Rose Wangari Mwangi](#) CA No251 of 1997 and [Paul Wanjohi Mathenge vs Duncan Chicane Mathenge](#) (2013) eKLR.
 6. On issue of stay of execution, Counsel submitted that without the same the subject matter will be diminished and that the application dated May 29, 2023 will be rendered nugatory. He argued that the 30 days' stay issued by the Taxing Master lapsed on May 19, 2023 and that the Respondent's agent already proceeded to proclaim their business assets on May 21, 2023. Counsel relied on Order 42 Rule 6(2) of the [Civil Procedure Rules, 2010](#) and the case of [RWW vs EKW](#) (109) eKLR.
 7. Counsel urged this Court to allow the application and proceed to grant them costs.
 8. Opposing the application, Counsel for the Respondent vide submissions filed on June 26, 2023 in a nutshell submitted that the Chamber Summons dated May 29, 2023 has been filed outside the stipulated period as per the provisions of Rule 55 (5) of the [Auctioneers' rules of 1997](#). Counsel relied on the case of [Sino Hydro Corporation Limited vs Simon Itonde Tumbo t/a Dominion Yards Auctioneers](#) Kisumu Civil Appeal NoE105 of 2021 and the case of [Joel Titus Musya t/a Makuri Enterprises versus Southern Credit Trading Corporation](#) Misc. Application 544 of 2004.
 9. On stay of execution, Counsel submitted that the Applicant has not demonstrated and proved that it is worthy of the orders sought. Security a key determinate in stay of execution application makes it clear that the Applicant did not meet this requirement. According to the Counsel, the whole application did not mention any commitment by the Applicant that it is willing to provide security for due performance of the ruling.
 10. Counsel submitted that the application before this Court fails to meet the requisite ingredients for grant of the prayers sought. He urged this Court to dismiss the same with costs to the Respondent.
 11. Having carefully considered the application, the submissions made and the authorities cited, it is my view that the issue for determination is whether the applicant's application has merit.



12. The Respondent contends that the application is not proper since it is time-barred having been filed outside the time period provided under Rule 55 (5) of the [Auctioneers Rules](#). On the other hand, the Applicant contends that the application is proper because the ruling was issued on May 18, 2023 and that the application was filed on June 2, 2023 and that the same was made in a timely manner despite the challenges of acquiring the certified copy of the ruling and proceedings on time.

13. 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”

14. 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 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 Chambers 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. This procedure was termed mandatory by the court in [Ezekiel Kiminza t/a Auto Land Auctioneers v Mistry Valji Naran Mulji](#) [2017] eKLR.

15. The Court of Appeal in [Aprim Consultants vs Parliamentary Service Commission & another](#), Civil Appeal NoE039 of 2021 held to the effect that where terms of a provision are couched in terms that are plain and unambiguous, it leaves no interpretive wiggle room. The provisions of Rule 55 in my view are couched in clear terms with strict timelines for Applicants. The timelines have also been set in a sequential manner. Considering therefore that the above provisions are clear statutory commands, it is the province of the courts to interpret and give effect to the express language of the above provision.

16. In the instant application, the Respondent submitted that the provisions of Rule 55 do not contemplate what is referred to as ‘reference’ but contemplates that the appeal is by way of memorandum of appeal made vide Chamber Summons. In [Ezekiel Kiminza t/a Auto Land Auctioneers](#)



v Mistry Valji Naran Mulji [Supra], the Court faced with 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.”

17. I am therefore in full agreement with the Respondent that a “reference” is not contemplated under Rule 55 of the *Auctioneers Rule* and that the only way to lodge an appeal is by memorandum of appeal through a Chamber Summon.
18. In the circumstances, it is clear that the Applicants application was not filed within the stipulated seven day’s period as prescribed under Rule 55(5) of the *Auctioneer’s Rules*. The ruling of the Taxing Master was issued on May 18, 2023 and that the Applicant’s application was filed on June 2, 2023, three days after the lapse of seven days. A litigant well aware of the strict timelines of the provision of Rule 55 would be expected to hurry and file the appeal within those strict and mandatory timelines. That is, he or she must take steps to show that there was no delay in any way on their part. There is no explanation offered as regards this delay and further that there is no leave sought to lodge the application out of time. The applicant merely seeks for leave to lodge the reference which ordinarily ought to be granted by the trial court upon delivery of the impugned ruling. Clearly, the application is incompetent in all respects.
19. In view of the above, it is my finding that the applicant’s application dated May 29, 2023 lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF SEPTEMBER 2023.

D. KEMEI

JUDGE

In the presence of:

Miss Odhiambo for Juma for Applicant

No appearance for Musundi for Respondent

