



**SBM Bank Kenya Limited v George Arunga Sino t/a Maywood Auctioneers (Commercial Miscellaneous Application E09 of 2023) [2023] KEHC 25703 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25703 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL MISCELLANEOUS APPLICATION E09 OF 2023  
RE ABURILI, J  
NOVEMBER 22, 2023**

**BETWEEN**

**SBM BANK KENYA LIMITED ..... APPELLANT**

**AND**

**GEORGE ARUNGA SINO T/A MAYWOOD AUCTIONEERS ..... RESPONDENT**

**RULING**

1. On November 15, 2023, the Appellant/Applicant SBM Bank Kenya Limited filed these proceedings vide Chamber Summons under Rule 55 (4) and (5) of the [Auctioneers Rules, 1997](#), Section 3A of the [Civil Procedure Act](#) and all other enabling laws.
2. The Chamber Summons is the form of appeal seeking to challenge the assessment of the Auctioneer's Bill of Costs vide ruling of October 31, 2023.
3. Simultaneous with the Chamber Summons, the Appellant filed a Notice of Motion dated November 14, 2023 seeking for stay of execution of the taxed bill of costs pending hearing and determination of the appeal and in the interim, pending hearing and determination of the application interpartes.
4. The application which was placed before me under certificate of urgency and which I certified as urgent on November 15, 2023 with an interim stay was slated for November 22, 2023. However, as I handled the certificate while out of station and offline, I did not know that the matter had initially been handled by Justice M. S. Shariff on November 7, 2023 and slated for directions on November 21, 2023 after the learned Judge declined to certify as urgent the initial application dated November 7, 2023.
5. Therefore, when the application came up before me on November 21, 2023 which was yesterday for directions, the Respondent had also been served with my directions given on November 15, 2023 and the application dated November 14, 2023.



6. The Respondent informed the court that he had filed a Preliminary Objection on a point of law and a Reply to the Reference Application.
7. The parties then agreed to canvass the Preliminary Objection orally and in his submission, Mr. Arunga the Auctioneer submitted that the Appellant had come to court under wrong provisions of the law; that the appeal had been filed out of time of 7 days of the date of the impugned taxation without leave of court and that therefore the appeal should collapse as it is not arguable with probability of success.
8. He further argued that this court has no jurisdiction to hear an appeal which is filed out of time without leave contrary to Rule 55 (5) of the [Auctioneers Rules, 1997](#) and that the appeal should have been filed by November 6, 2023 yet it was filed on November 7, 2023. It was submitted that the appeal should have been lodged by way of Memorandum of Appeal Chamber Summons and not Chamber Summons since the operative words in the [Auctioneers Rules](#), at Rule 55 is 'shall'.
9. Opposing the Preliminary Objection, Mr. Bwire counsel for the Appellant submitted that time is computed under The [Interpretation and General Provisions Act](#), Cap 2 Laws of Kenya, at Section 57(a) hence the time for filing of the appeal excluded October 31, 2023 date of ruling and that therefore the appeal was filed within time.
10. Further, that the appeal was filed by way of Chamber Summons as per Rule 55 (4) and (5) of the [Auctioneers Rules 1997](#).
11. In a rejoinder, Mr. Arunga reiterated his submissions that the appeal should be by way of Memorandum of Appeal and Chamber Summons and that the [Rule](#) provides for the filing of the appeal with seven (7) days from the date of the decision hence the application is defective and should therefore be dismissed.

### **Analysis and Determination**

12. I have considered the preliminary objection as argued orally and the issue for determination is whether the preliminary objection has any merit.
13. From the onset, it is correct to say that the Preliminary Objection raised is on a pure point of law and meets the test of *Mukisa Biscuit Distributors Limited vs West End* which sets out the threshold for a preliminary objection.
14. Rule 55 of the [Auctioneers Rules](#) provides as follows:
  - (1) Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.
  - (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.



- (3) In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.
  - (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.
15. The question in determining the issue at hand is whether the appeal herein as filed on November 15, 2023 vide Chamber Summons is fatally defective and therefore amenable for striking out. The Respondent Auctioneer claims that the appeal is filed by way of Chamber Summons instead of Memorandum of Appeal by way of Chamber Summons. Second, is that the appeal was filed out of the seven days stipulated in Rule 55(5) of the [Auctioneers Rules](#) which then renders this court to be devoid of jurisdiction to hear and determine it.
  16. On the first limb of the preliminary objection, as reproduced above, Rule 55(4) of the [Auctioneers Rules](#) provides for the specific format by which the appeal under the Act and Rules shall be filed and this is by Chamber Summons. In ordinary civil cases, appeals are lodged by way of memorandum of Appeal while in Criminal Cases, appeals are lodged by way of Petition of Appeal. Parties are therefore expected to lodge pleadings or proceedings in the manner stated by the statute.
  17. In what form was this appeal filed? It was by way of Chamber Summons. So, what is the Respondent saying? He claims that it should have been filed by way of Memorandum of Appeal by way of Chamber Summons.
  18. I find that argument that the appeal is defective and interpretation of the law to be preposterously flawed and it defeats any logical thinking. It is incapable of making any sense and or buy-in by any legal mind leave alone serious legal mind. The appeal having been filed by way of Chamber Summons was sufficient and the appellant was not required to enter into technicalities of thinking how to use the words memorandum of appeal in the framing of the chamber summons appeal as stipulated in Rule 55 (4) of the [Auctioneer Rules](#).
  19. It is in my view ridiculous to imagine that a party would frame their pleading under Rule 55 (4) as Memorandum of Appeal Chamber Summons, as submitted by the auctioneer. In my view, the format of appeal contemplated is chamber summons and not what the auctioneer is stretching by his imagination, which imagination does not make any sense at all.
  20. If anything, want of form should not be fatal to these proceeding which are nonetheless filed in the right or correct format. I hasten to add that the auctioneers should have continuous learning for them to appreciate how the law is interpreted.
  21. It is not enough to know what the Auctioneers statute says. One has to know how that statute is interpreted as they practice the law for their benefit. This type of preliminary objection on how to frame an appeal which appeal is nonetheless properly framed is what Article 159 of the [Constitution](#) abhors and this court will not encourage parties to raise procedural technicalities for argument's sake.
  22. Accordingly, I find the 1<sup>st</sup> limb of the Preliminary Objection on want of form being devoid of merit as the appeal was properly filed in the prescribed form. The preliminary objection on form is hereby overruled.



23. On the second Preliminary Objection that the appeal was filed out of the 7 days statutory period, I will not belabour so much on this point save to remind the good auctioneer to be reading the law as a whole and appreciating other legislation that support the Auctioneers Act and Rules. The preamble to the Interpretation and General Provisions Act provides that this is an Act of Parliament to make provision in regard to the construction, application and interpretation of written law, to make certain general provisions with regard to such law and for other like purposes. The Act shall however not apply for the construction or interpretation of the Constitution, which is not a written law for the purposes of this Act.
24. Section 57(a) of the Act clearly provides for how to compute time in the following words:
- “ 57. In computing time for the purposes of a written law, unless the contrary intention appears -
- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done...”
25. Thus, in computing time, the 1<sup>st</sup> day of date when the decision is made is to be excluded while the last day is included.
26. In this case, the impugned Ruling on taxation was made on October 31, 2023. It follows that excluding October 31, 2023, time starts to run from November 1, 2023 and seven days end on November 7, 2023 and not November 6, 2023 as submitted by the Auctioneer.
27. For the above reasons, I find the second limb of the Preliminary Objection devoid of any merit and the same is hereby overruled.
28. On the whole, I find the preliminary objection to be devoid of any merit and the same is hereby dismissed with an order that each party bear their own costs of the dismissed preliminary objection. Directions on the pending application and appeal to follow:
29. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2023**

**R. E. ABURILI**

**JUDGE**

