



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC APPEAL NO. 33 OF 2021

TRANSMARA SUGAR COMPANY LIMITED.....APPLICANT

VERSUS

J.N. MARWA IKIMWANYA AUCTIONEERS LIMITED.....1ST RESPONDENT

SAMUEL OUMA..... 2ND RESPONDENT

RULING

This matter comprises of a series of files being Misc. Applications Nos. 33, 34,35,36,37,38,39 and 40 all of 2021. For the purposes of this ruling, Misc. Application No. 33 of 2021 shall be the lead file.

This ruling is in respect to the Notice of Preliminary Objection (**the “Objection”**) dated 6/7/2021 and filed in court on 7/7/2021 by the firm of Apondi & Co. Advocates, Counsel for the 1st respondent. The objection raises a point of law to the instant appeal premised on the following grounds:-

- i. The appeal offends the provisions of rule 55 (4) & (5) of the Auctioneers Rules as the ruling assessing the auctioneers bill of costs was delivered on the 16/2/2021 and as such this appeal was filed out of time without leave of court.**
- ii. This appeal offends the provisions of Order 42 Rule 1 of the Civil Procedure Rules, 2010 as the appeal herein was brought via chamber summons when the same ought to have been via memorandum of appeal as the order appealed from issued on the 3/6/2021 was one dismissing an application seeking to set aside the ruling on the auctioneers bill of costs and not one assessing the auctioneers bill of cost as alleged herein.**

In opposing the objection, the applicant filed a replying affidavit dated 14/9/2021 sworn by Mr. Wekhomba Victor, Counsel for the appellant who deponed as follows:-

- i. That the 1st respondent is alleging that the ruling on the assessment of the auctioneer’s bill of costs was delivered on 16/2/2021 yet the applicant filed an application dated 26/1/2021 seeking to arrest the ruling on the bill of costs that was scheduled to be read on 28/1/2021.
- ii. That in response to the said application, the 1st respondent filed grounds of opposition dated 18/3/2021 in which they acknowledged that a ruling was pending delivery hence the 1st respondent was also unaware of the alleged ruling delivered on 16/2/2021.
- iii. That the ruling on the taxation was delivered after the ruling on the applicant’s application that was delivered on 3/6/2021 and it is on that ground that the applicant filed an appeal against the taxation within 7 days as allowed under the Auctioneers Act.
- iv. That the assertion that the ruling was delivered on 16/2/2021 is a disputed fact which can only be confirmed through perusal of the lower court records; and this court should call for the file to ascertain when the ruling was delivered.
- v. That there is a pending ruling before this court on an application dated 15/6/2021 on the legality of the attachment process as the warrants of attachment and proclamation notices were extracted before payment of further court fees.
- vi. That should this court make a ruling on the pending application, then there would be no need of proceeding with the appeal as the 1st respondent would not be entitled to payment.
- vii. That in response to the allegation that the appeal offends the Civil Procedure Rules, the same was filed by way of Chamber

Summons in line with Section 55 (4) and (5) of the Auctioneers Rules 1997 and not the Civil Procedure Rules 2010 as alleged by the 1st respondent.

viii. That the objection should be dismissed.

ix. That owing to the fact that there is a pending ruling on the application dated 15/6/2021, the court should stay the hearing of the appeal until its determination.

On 28/9/2021, directions were given that the objection be canvassed by way of written submissions and both parties complied. The appellant filed its submissions in Misc. Application No. 36 of 2021 while the 1st respondent filed its submissions in Misc. Application No. 33 of 2021.

The appellant submitted that the appeal herein is from the taxation decision of the Rongo Principal Magistrate that was delivered on 3/6/2021 which emanates from the 1st respondent's bill of costs that was filed under Rule 12 of the Auctioneers Rules; that the appeal on the decision was filed on 10/6/2021 within the statutory period allowed of 7 days as provided under Rules 55 (4) and (5) of the Auctioneers Rules. To buttress this position, the appellant relied on the decision of **Oscar Otieno Odongo T/A Odongo Investment Auctioneers vs Sukari Industries LTD (2019) eKLR**.

The appellant further submitted that the application seeking stay of delivery of the taxation ruling by the magistrate was disposed of by way of written submissions and delivered on 3/6/2021 and thereafter the rulings on the taxations were delivered; that there are two contradicting dates as to when the ruling on the taxation was delivered and the only way to ascertain it is by calling for the lower court file and examining the same to make a determination; that the notice of preliminary objection is unmerited and should be dismissed.

The 1st respondent submitted that vide Rongo E011 of 2020, the 1st respondent filed a bill of costs which was taxed and the ruling delivered on 16/2/2021; that as a result of the ruling, the appellant filed an application dated 17/2/2021 seeking stay of execution of the ruling of the Auctioneers bill of costs and vide a ruling dated 3/6/2021, it was dismissed with costs to the 1st respondent; subsequently, the appellant herein filed a chamber summons application which was amended on the same date dated 16/6/2021 and filed in court 18/6/2021; that the 1st respondent filed the objection dated 6/7/2021 opposing the appeal.

As respects the objection under Rule 55 (4) and (5) of the Auctioneer Rules; the 1st respondent submitted that there was a dispute on the fee payable to the auctioneer and vide Misc E010 of 2020, the Magistrate assessed the bill on 16/2/2021 and the appellant has appealed against the decision six months after its delivery instead of 7 days allowed by the law; that the jurisdiction of the court was ousted for failure to comply within time and not failure to seek leave of this court to file the appeal out of time, that the appellant submitted that the ruling on taxation was delivered after the ruling of their application on 3/6/2021 but they do not state when the ruling was delivered neither have they attached the alleged ruling to confirm that they filed the appeal in time in accordance with the law; that the 1st respondent has annexed the ruling dated 16/2/2021 and challenged the appellant to annex the bill they are appealing from, which they have failed to do.

Further, the 1st respondent submitted that the appeal herein is against the ruling dated 3/6/2021, yet the appellant states that the ruling on the taxation which they are appealing from was delivered after the said date; that the application whose ruling was delivered on 3/6/2021 was one of setting aside the magistrate's decision assessing the auctioneer's bill of costs; that sub rule 3 gives a Magistrate powers to assess the auctioneers bill of costs and sub rule 4 grants a party who is not satisfied with the decision to file an appeal; that sub rule 4 does not refer to an application seeking to set aside assessment of the bill of costs but instead refers to the assessment of bill of costs itself; that in any event, the chamber summons was filed 15 days after the ruling was delivered which is beyond the 7 days period allowed for lodging an appeal and, on that ground alone, the instant appeal should fail. The 1st respondent further submitted that on page 4 paragraph 5 of the ruling delivered on 3/6/2021 it is indicated that the ruling on the auctioneer's bill of costs was delivered on 16/2/2021 and not after 3/6/2021 as alleged by the appellant.

On whether this appeal offends the provisions of Order 42 Rule 1 of the Civil Procedure Rules, the 1st respondent submitted that the application dated 17/2/2021 was brought under Rule 12 (7) of the Civil Procedure Rules; that in itself shows that the application was for purposes of setting aside the ruling of the Magistrate which was not granted thus making it the subject of this appeal; that an appeal on the instant ruling should be brought under the provisions of Order 42 Rule 1 & 2 by filing a memorandum of appeal. The 1st respondent submitted that the decision appealed from was that of setting aside an order of court an ought to have been brought by way of a memorandum of appeal and not chamber summons. Therefore, the objection should be allowed accordingly.

I have duly considered the objection dated 6/7/2021, the replying affidavit dated 14/9/2021 and the submissions of both parties. The single issue for determination is whether the objection is merited or not.

A preliminary objection is one which raises a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which when argued, may dispose of the suit. An example is the objection to the jurisdiction of the court or a plea of limitation of time. See the decision in **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors (1969) E.A. 696**

The appellant filed on appeal by way of chamber of summons which was later amended dated 16/6/2021. The amended chamber summons is an appeal against the taxation decision of Hon. R.K. Langat (SRM) delivered on 3/6/2021 in RONGO SRMCC Misc. Application No. E009 of 2020. Whereas the appellant contends that the ruling on taxation was made after the ruling of 3/6/2021 as they had filed an application dated 26/1/2021 seeking to arrest the ruling to which the 1st Respondent filed a reply, the 1st respondent contends that the appeal offends the provisions of Rule 55 (4) and (5) of the Auctioneer Rules as the ruling assessing the auctioneer's bill of costs delivered on 16/2/2021 and this appeal is filed six months after the delivery of the ruling.

What I understand the dispute of the parties to be is, the time when the ruling on the taxation of the bill of costs was delivered. The

appellant's position is that the instant appeal concerns the ruling of 3/6/2021. However that ruling was not in any way related to the taxation of the Auctioneer's bill of costs. Instead the ruling was in relation to the application dated 17/2/2021 which sought to set aside the ex parte taxation. The 1st respondent vehemently opposed this submission and stated that the ruling on taxation was delivered on 16/2/2021 and the instant appeal is in fact in relation to the taxation ruling hence it has been filed six months after the allowed period. Thus, this court has no jurisdiction to determine it.

The 1st respondent, has annexed to the preliminary objection, a copy of the ruling dated 3/6/2021. I am guided by the said ruling of the learned Magistrate dated 3/6/2021 to try and decipher the dispute before me. I have now read the ruling and understood it.

The appellant, in its application dated 17/2/2021, sought orders that the court do set aside its ruling on the ex-parte taxation proceedings and it be allowed to defend the taxation interparties. The appellant's application challenging the assessment of the 1st respondent's bill of costs had been dismissed on 12/2/2012 for want of prosecution.

In order to settle the dispute of when the ruling on taxation was delivered, I find it necessary to extract a part of the ruling of 3/6/2021 at page 4, in which the Magistrate held as follows:-

"I have considered the entire application and the submissions on record. It is clear to me that the controversy herein is on the party and party costs that was assessed by this court and *ruling delivered to that effect*. The Applicant's contention is that the said bill of costs was taxed ex-parte thus the need to set aside so that the Applicant can participate in the said assessment. *What is thus for determination is whether a sufficient cause has been established to warrant the setting aside of the ruling of this court as regards the assessment of the auctioneers bill of costs.* It is not disputed that the bill of costs was served on the Applicant. The said bill of costs was scheduled for assessment on 12/1/2021 and on the said date, the Applicant did not show up, neither was a response to the bill filed in court...*the court retired for the assessment of costs and scheduled ruling on 28/1/2021. On the eve of the ruling, the applicant filed under certificate of urgency an application seeking stay of the ruling on assessment of costs among other orders.* The application was fixed for hearing on 12/2/2021 and on this day, the Applicant did not show up and the same was dismissed for want of prosecution *and court gave ruling date for assessment of costs on 16/2/2021. The ruling was delivered on the said day prompting the Applicant's counsel to file the current application.*"
(Emphasis mine)

Flowing from the above extract, it is clear that, the trial Magistrate delivered his ruling on the assessment of costs on 16/2/2021. The said Ruling is annexed to the Preliminary Objection filed by the 1st Respondent in Misc Application No. 36 of 2021. The ruling of 3/6/2021 was therefore in relation to the appellant's application dated 17/2/2021 which was filed a day after the ruling seeking to set aside the ex parte proceedings of the taxation. The correct position therefore is that there is an already existing ruling on the taxation of the 1st respondent's bill of costs. The ruling of 3/6/2021 was in no way related to the taxation of the bill of costs. Instead, the ruling addressed the appellant's application dated 17/2/2021 which sought to set aside the ex-parte taxation proceedings which were dismissed. There is no evidence that there is a different or another ruling on taxation of the bill of costs other than that delivered on 16/2/2021.

Clearly, the applicant is dissatisfied with the assessment of costs by the trial court and that brings the dispute squarely under Rule 55(3) which provides that if there is a dispute as to the amount of fees payable the magistrate may assess, and the appeal lies to the high court.

Rule 55 (4) and (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.

The appellant in the instant appeal is asking this court to set aside the assessment and award of the 1st respondent's bill of costs and re-assessment of items 4 and 5 of the 1st respondent's bill of costs. In light of the explanations above, the taxation decision was delivered on 16/2/2021. For the prayers of the instant appeal to have merit, the appeal ought to have been filed within 7 days from the date of the decision, that is on or before 19/2/2021 as per the provisions of Rule 55 (4) and (5) of the Auctioneers Rules. The instant appeal is therefore incompetent. It has been filed outside the statutory time allowed and the appellant did not seek leave of the court to file the same.

Jurisdiction is everything and without it, a court cannot make one step for its decision will amount to a nullity. This court lacks jurisdiction to entertain the appeal.

From the foregoing, I am satisfied that the Notice of Preliminary Objection dated 6/7/2021 has merit and the same is allowed. The amended Chamber Summons dated 16/6/2018 and filed in court on 18/6/2021 is hereby dismissed with costs to the 1st respondent. The same orders shall apply to Misc. Applications Nos. 34,35,36,37,38,39 and 40 all of 2021. I find no need to delve into the merits of the other grounds of objection as the above determines the appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 31ST DAY OF MARCH, 2022.

R. WENDOH

JUDGE

In presence of:-

MS. OKOTA HOLDING BRIEF MS. APONDI FOR 1ST RESPONDENT

MR. ODERO HOLDING BRIEF MR. AIM FOR APPELLANT

NYAUKE - COURT ASSISTANT