



**Wiskam Auctioneers v Chaka Limited & 2 others; Jogan Dries Auctioneers
(Interested Party) (Environment and Land Miscellaneous Application
206 of 2019) [2023] KEELC 17688 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17688 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 206 OF 2019

JO MBOYA, J

MAY 18, 2023

BETWEEN

WISKAM AUCTIONEERS APPLICANT

AND

CHAKA LIMITED 1ST RESPONDENT

DAVID KIPRONO SUDI 2ND RESPONDENT

EUNICE KIBULE SUDI 3RD RESPONDENT

AND

JOGAN DRIES AUCTIONEERS INTERESTED PARTY

RULING

1. Vide the Notice of Motion Application dated April 20, 2023, the Respondents (now the Applicants as pertains to the subject Application), have sought for various reliefs, inter alia:-
 - i. That the matter be and is hereby certified as urgent and service of this Application be dispensed with in the first instance.
 - ii. Leave be granted to the firm of Ham and Hamsley Advocates to come on record for the Applicant/ Defendants in place of M/s Ndege and Company Advocates.
 - iii. Leave be granted to the Applicants/Defendants to file a Taxation Reference to the Judge of Environment and Land Court in Milimani.
 - iv. That pending the hearing and determination of this Application, inter-partes, the Warrants of Attachment/ sale by the Respondents in respect of the Toyota Prado KBZ055 K and Mercedes Benz KAM222V make be and is hereby lifted.



- v. The Decree and/or Judgment be set aside Ex-Debito Justitiae.
 - vi. That pending the hearing and determination of this suit, the suit motor vehicles should be released unconditionally.
 - vii. That this Honourable Court be pleased to make such other and or further order(s) it may deem just and necessary in the circumstances.
2. The instant Application is premised and anchored on various grounds, which have been alluded to and enumerated at the foot thereof. Further, the Application is supported by the affidavit sworn by the 2nd Respondent/Applicant and which has been sworn on the April 20, 2023; and in respect of which the Deponent has attached two annexures.
 3. Upon being served with the subject Application the Applicant to the main application and who is the Respondent to the current Application, has responded vide a Replying affidavit sworn on the 5th May 2023.
 4. For good measure, the subject application came up for hearing on the May 16, 2023, whereupon same was canvassed vide oral submission by the Advocates for the respective Parties. Instructively, Learned counsel for the Applicants intimated that same would substantially adopt the grounds at the foot of the Application and contents of the supporting affidavit.

Submissions By The Parties

a. Applicants' Submissions:

5. Learned counsel for the Applicants adopted the grounds contained at the foot of their application and also reiterated the contents of the supporting affidavit and thereafter same made brief submissions, articulating the basis why the instant application should be allowed.
6. Firstly, Learned counsel submitted that the Applicants' herein neither instructed nor retained the Respondent Auctioneer, to levy and/or undertake any Eviction on their behalf. To the contrary, the Applicants' counsel contended that there was a separate and distinct Auctioneer who was instructed and retained by the Applicants. In this regard, the Applicants thus contended that the taxation of the Auctioneer's Bill of costs was mis-conceived and legally untenable.
7. Secondly, Learned counsel submitted that even though the Applicants' herein were represented by an advocate, the advocate in question failed and neglected to keep the Applicants informed and appraised of the outcome of the taxation proceedings; and in particular, the status of the entire proceedings herein. In this regard, Learned counsel thus submitted that the mistake and failure by the erstwhile advocate to relay the information to the Applicants herein, should not be visited upon the Applicants.
8. Thirdly, Learned counsel submitted that the Applicants herein are before the Honourable court and are craving to be afforded an opportunity to be heard on the question pertaining to and concerning the taxation of the Auctioneers charges.
9. Lastly, learned counsel stated that even though same filed the instant application and was seeking, inter alia, an order for leave to come on record in place of the erstwhile advocate, same however did not serve the subject application upon the outgoing advocate. For good measure, Learned counsel conceded that the instant application does not indicate that same was intended to be served upon the outgoing advocate.



10. In addition, Learned counsel also contended and conceded that even though same has filed the subject application seeking for Leave to file a taxation Reference before the Judge, however, same has not appraised himself of the import and tenor of the provisions of Rule 55 of the *Auctioneers Rules, 1997*. Invariably, learned counsel stated that same was not even conversant with what the said provisions entails.

b. Respondent's Submissions

11. On behalf of the Respondent (who was the Applicant to the Main Application), Learned counsel relied on the contents of the Replying affidavit sworn on the May 5, 2023; and thereafter same highlighted, canvassed and amplified four (4) salient issues for consideration by the Honourable Court.
12. Firstly, Learned counsel submitted that current Application has been filed and mounted by an advocate who has not properly come on record. In this regard, Learned Counsel pointed out that the application before the Honourable court contravenes and violates the provisions of Order 9, rule 9 of the *Civil Procedure Rules 2010*, in so far as the subject application was never intended to be served upon the outgoing counsel and in any event, same was never served upon the outgoing counsel.
13. Premised on the foregoing, Learned counsel has thus submitted that in the absence of service of the application upon the outgoing counsel, the Honourable court is handicapped from granting the Leave sought which would be essential and paramount to the Legal capacity of the current advocate coming on record.
14. Secondly, Learned counsel submitted that the instant application is contrary to and in contravention of the provisions of Rule 55 of the *Auctioneer Rules 1997*, which envisages that a Party who is aggrieved by the taxation of the Auctioneers bill, is obliged to file an appeal by way of chamber summons within fourteen (14) days from the date of delivery of the ruling sought to be challenged.
15. In respect of the instant matter, Learned counsel has submitted that what is before the Honourable Court is not an appeal by way of Chamber Summons as envisaged under the law. Furthermore, Learned Counsel has added that what is before the court is also not an application for extension of time within which to file an appeal out of time.
16. In the premises, Learned counsel has therefore contended that what is before the Honourable Court is alien and thus incapable of being granted, either as sought or at all. Instructively, counsel has pointed out that the grant of the order sought will therefore be contrary to law.
17. Thirdly, Learned counsel has submitted that the instant application has been made with inordinate and reasonable delay; which delay has neither been explained nor accounted for whatsoever. For clarity, counsel has pointed out that the supporting affidavit is devoid of any scintilla or iota of explanation or at all.
18. Consequently and to the extent that no explanation has been tendered or availed, Learned counsel has thus submitted that the applicant has not provided any sufficient basis and/or cause, to warrant the exercise of Judicial discretion by the Honourable court for purposes of extending time, either as sought or at all.
19. Fourthly, Learned counsel has submitted that the Applicants herein were duly represented by an advocate and thus same were bound by the actions and inactions of their duly appointed counsel. In any event, Learned Counsel has pointed out that time is ripe for the Applicants herein to be held accountable for failures/mistakes of their own counsel.



Issues For Determination

20. Having reviewed and considered the Application and the Replying affidavit filed in opposition thereto; and having similarly taken into account the oral submissions that were made on behalf of the Parties, the following issues do arise and are thus worthy of determination;-
- i. Whether the subject Application is Legal tenable and in accordance with the provision of Rules 55 of the *Auctioneers Rules, 1997*.
 - ii. Whether the instant Application has been filed by a Person seized and possessed of the requisite Locus Standi.
 - iii. Whether the Applicants have placed before the Honourable court any sufficient cause or basis to warrant exercise of Discretion, either as sought or at all.

Analysis And Determination

Issue Number 1

Whether the subject Application is Legally tenable and in accordance with the Provisions of Rules 55 of the Auctioneers Rules, 1997.

21. It is common ground that what was hitherto before the Deputy Registrar for taxation and further action, was a bill of costs lodged and/or amounted by an auctioneer, who contended that same was duly instructed and retained by the Respondents to levy or undertake eviction, albeit on behalf of the Respondents.
22. Furthermore, the named Auctioneer proceeded to and generated the bill pursuant to and in line with the *Auctioneers Rules 1997*, which espouses and underlines the manner in which an Auctioneer, the Respondent herein, not excepted, is supposed to be remunerated for work done for and on behalf of a client.
23. Additionally, there is no gain saying that the Auctioneers bill, which was subsequently taxed by the Deputy Registrar, was duly served upon the Applicants herein. Instructively and for good measure, upon being served, the Applicants herein instructed and retained counsel to appear on their behalf and participate in the subject proceedings
24. Inevitably, the auctioneers bill of costs was thereafter taxed and certified by the Deputy Registrar in terms of the ruling rendered don the February 28, 2023, whereupon the Auctioneers costs was taxed and certified in the sum of Kshs 1,876,300 /= only.
25. Nevertheless, it appears that the Applicants' herein were aggrieved and dissatisfied with the taxation and thus same are keen to challenge and impugn the certificate of taxation. For clarity, it is in this regard, that the Applicants have filed the subject Application for purposes of what same calls Leave to file a Taxation Reference.
26. Be that as it may, it is important to point out that the Auctioneers bill of costs is separate and distinct from the Advocates- client bill of costs or the ordinary Party and Party bill of costs, the latter, which is ordinarily filed in the substantive proceedings wherein the costs were awarded.



27. For good measure, the provisions of the Rule 11 of the Advocates Remuneration Order, which underscore that a party aggrieved by the taxation of costs, shall issue and file a Notice of Objection to Taxation and thereafter Reference, do not apply to Auctioneer's bill of costs.
28. To the contrary, the taxation of the auctioneer bill of costs, is governed and regulated by the provisions of the *Auctioneers Rules, 1997*; and the schedule attached thereto, which prescribes the manner of remuneration for an Auctioneer, who was instructed and retained for a Designated work.
29. Instructively, where a person is aggrieved by the taxation of the auctioneers bill of costs, such a person, the Applicants herein, not excepted, is anticipated to file and/or take out an appeal by way of Chambers Summons, which must be filed within Seven (7) days from the date of delivery of the Ruling sought to be challenged. For avoidance of doubt, the procedure for challenging the Auctioneers bill of costs is prescribed and regulated by the provisions of Rule 55 of the Auctioneers Rules.
30. Given the importance of Rule 55 of the *Auctioneers Rules*, it is imperative that same be reproduced.
31. In this respect, the said Rule is reproduced as hereunder;
 - “ 55. Fees and disbursements payable to an auctioneer (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.
32. From the foregoing, it is clear and explicit that a person who is aggrieved by the taxation of the auctioneers bill, must approach the court in the designated manner and not otherwise. Furthermore the approach to court must be within the set timelines.
33. Notwithstanding the express provisions of the law, the current application does not accord with and/or abide the stipulation of the law. Put differently, the current application is antithetical to and contrary to the legal prescription, envisioned by the named provisions.
34. Without belaboring the point, the application that has been put before the Honourable court is alien and foreign. In any event, it is no answer that counsel for the Applicants was not conversant with or knowledgeable of the import and tenor of Rule 55 of the *Auctioneers Rules*.



35. Simply put, ignorance of the law cannot be invoked and relied upon as a defence and neither can ignorance of the law provide a basis for exercise of discretion. In this regard, the want of knowledge on the part of Counsel as pertains to the correct procedure does not amount to sufficient Cause, as known to Law or at all.
36. In any event, the provisions of the law are enacted and proclaimed so that all and sundry can abide by or comply with same. In this respect, there is no gain saying that every party is called upon to comply with both the substantive and procedural provisions of the law. For clarity, where there is non-compliance, no doubt, the party at default must suffer the consequence of such non-compliance, unless the non-compliance does not go to the root of the Dispute
37. In this regard and to vindicate the foregoing position, it is appropriate to restate and reiterate the succinct exposition of the law as expounded by the Court of Appeal in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2014] eKLR, where the court stated and held as hereunder;
- “A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012 as follows;
- “In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.”
38. Furthermore, the importance of complying with the substantive provisions of the law and prescribed rules of procedures was also emphasized and underscored by the Supreme Court in the case of *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR in the following manner:-
- “(65) For the proper conduct of administration of justice, the statutory form is generally employed to confer jurisdiction, prescribe form, substance, process and procedure, governing the administration and dispensation of claims. A statute in this category may prescribe how to formulate a right of action – for instance, by petition, plaint, notice, or originating motion. On procedural aspects, the statute or the rules (as the case may be), may regulate timelines, and other facets of case- management.
- It may also regulate the confines within which a Court may exercise its adjudicatory powers, by prescribing the category of jurisdictional issues; or questions upon which a Court may make a determination of the case before it. This is the context in which the conduct of proceedings before our Courts is governed by the *Civil Procedure Act*, the Criminal Procedure Code, the *Appellate Jurisdiction Act*, the *Supreme Court Act*, 2011 and the Rules made pursuant thereto, and by many other Acts of special character.
39. Insofar as the Applicants herein have not complied with and abided by the substantive and procedural law that undergirds the dispute pertaining to auctioneers costs, the entire application before the Honourable court is not only misconceived, but same legally untenable.



40. In my humble view, it behooved counsel for the Applicants to endeavor to and search for the law and thereafter to comply with the express provisions thereof. However, in respect of the instant matter, counsel has failed to comply with the express dictates of the law and has placed before the Honourable Court an application seeking for a relief which is alien and unknown to law.
41. In the premises, the entire application and the reliefs sought are a nullity and thus incapable of being granted either as sought or at all.

Issue Number 2

Whether the instant Application has been filed by a Person seized and possessed of the requisite Locus Standi

42. It is not in dispute that the Applicants herein had hitherto engaged and retained a previous counsel to represent same in the subject matter. Furthermore, the named advocate who had hitherto to be engaged, proceeded and participated in the proceedings.
43. On the other hand, there is no gainsaying that the auctioneers bill was ultimately taxed culminating into a decree, in so far as the resultant ruling determined and disposed of the entire matter which was before the Honourable Deputy Registrar.
44. To the extent that the subject proceedings had been determined vide ruling rendered on the February 28, 2023, it was therefore incumbent upon the incoming advocate to seek for and obtain Leave of the Honourable court before filing the Notice of change of advocate. In any event, the necessity to file an application for leave to come on record was within the knowledge of the Applicant's counsel and thus same sought for the relief to that effect in terms of prayer 2 of the Application.
45. Nevertheless, having filed the application seeking for leave to come on record, it behooved counsel for the Applicants herein to endeavor and serve the application upon the outgoing counsel and all the other parties in the matter prior to and before placement of same for hearing..
46. However, despite the clear provisions of Order 9 Rule 9 of the *Civil Procedure Rules, 2010*; Learned counsel for the Applicants herein did not anticipate to serve the application upon the outgoing counsel. Furthermore, the application itself was never served on the outgoing counsel.
47. In so far as the application was never intended to be served, nor was same served upon the outgoing counsel, the question that does arise is whether the pleadings and resultant proceedings taken without compliance with order 9, Rule 9 of the *Civil Procedure Rules* are valid and legitimate.
48. To be able to appreciate the ingredients attendant to and necessary prior to the grant of Leave for an incoming advocate to come on record, it is thus important to reproduce the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*.
49. For good measure, same stipulates as hereunder;

9. Change to be effected by order of court or consent of parties [Order 9, rule 9.]

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or



(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

50. Inevitably, the counsel for the Applicants herein did not deem it fit and/or appropriate to abide by the law and having failed to comply with the law; it is therefore means that the Notice of change of advocate which is dated the 20th April 2023; and filed alongside the application, was therefore filed prior to and or before leave was granted.
51. Furthermore, it is also worthy to recall that even when the current application come up for hearing, learned counsel for the Applicants did not seek the indulgence of the Honourable court to prosecute prayer 2 of the application beforehand. Contrarily, what Learned Counsel did was to argue the entire application together and by so doing counsel missed the point, which was however critical and paramount.
52. Based on the foregoing position, the question that now lingers around and must be resolved is whether the entire application herein, which was neither intended to be served was upon the out going advocate and indeed which was filed without the requisite Leave, as envisaged by the Provisions of Order 9 Rule 9 of the *Civil Procedure Rules, 2010*, is legally untenable.
53. I am afraid, that the subject application is inflicted with various procedural lapses, but most importantly, the lapse that the current application has been filed by counsel, albeit without the requisite legal capacity to sue, is Fundamental.
54. Consequently and in the premises, I similarly come to the conclusion that the current application is rendered invalid and misconceived by want of compliance with the provisions of Order 9 Rules 9 of the *Civil Procedure Rules, 2010*.

Issue Number 3

Whether the Applicants have placed before the Honourable court any sufficient cause or basis to warrant exercise of discretion, either as sought or at all.

55. Other than the fact that the application has been mounted contrary to and in violation of Rules 55 of the *Auctioneers Rules*, which governs and regulates proceedings touching on and concerning Auctioneers costs, there is also the question that any Party who is desirous to seek for and obtain exercise of discretion of the Honourable court, must place before the court cogent, credible and sufficient explanation of the delay to take the intended action within the set and or stipulated timeline.
56. Premised on the foregoing, it is thus imperative and important to underscore that it was incumbent upon the Applicants herein to provide sufficient deposition, at the foot of the supporting affidavit to explain, why the intended Reference, (which is however a nullity) was never filed timeously and with due promptitude.
57. However, it is not lost on this Honourable court that the Applicants herein have neither stated nor provided any iota or scintilla of explanation to underscore the failure and/or neglect attendant to the inaction, which is now sought to be excused by exercise of discretion.
58. Furthermore, I beg to state and reiterate that even where the lapse and/or delay complained of relates to just some days, it behoves the Applicant to account for that delay. In any event, where no reason is supplied or availed to account for the delay, such failure to provide reason, militates against the exercise of discretion by the Honourable court.



59. In this respect, I am reminded of the decision of the Court of Appeal in the case of *Habo Agencies Limited versus Wilfred Odhiambo Musingo* [2015] eKLR, where the court stated as hereunder

“Without any material to explain that period of delay, it would be inordinate and would not avail Habo. As the Privy Council stated in the case of *Ratnam v. Cumarasamy* [1964] 3 All ER 933 :-

“The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion . If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

In *Savill v Southend Health Authority* [1995] 1 WLR 1254, Balcombe LJ, having considered various authorities, stated as follows at 1259:

“I have to say that the authorities are not all entirely easy to reconcile. I prefer to go back to first principles and to the statement made by Lord Guest in the *Ratnam* case that in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. He went on to say, and it is worth repeating: “If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation.”

Nevertheless, there must be some material on which the court can exercise its discretion.”

60. Be that as it may, even though no reason for the delay has been alluded to at the foot of the affidavit in support of the instant application save for the bare statement that the application has been made in good faith and without undue delay; learned counsel for the Applicants made submissions from the bar that the failure or inability of the Applicants to file (sic) the intended Reference, was because the erstwhile counsel had failed to appraise and update the Applicants of the position of the matter.
61. My understanding of the said submissions, which in any event, is not anchored on any deposition contained in the supporting affidavit, is to the effect that the Applicants herein are placing the blame on the part of their erstwhile counsel.
62. In addition, learned counsel for the Applicants also suggests that insofar as the mistake anchoring the failure was the mistake of counsel, same therefore ought not to be visited upon the Applicants.
63. Simply put, the Applicants herein are reciting the old adage that mistake of counsel, should not be placed on the shoulders of the client or better still, the client should still be allowed to access Justice, regardless of the efforts taken by him/her to follow up on his/her matter.
64. Whereas there are instances, where the mistakes of counsel ought not to be visited upon the client, but in such instances the client must show that same was proactive and exercised due diligence at all time. Clearly, an indolent client, who remains un-interested in his/her own matter, cannot be heard to say that the default leading to the inaction, belonged to the erstwhile advocate.



65. Invariably, it has been stated and reiterated on various occasions that the cases belongs to the clients and therefore, the client must take proactive role, in the prosecution of the matter, even when same has engaged and retained counsel to act for him/her in the matter.
66. Taking the foregoing position into perspective, it is therefore common knowledge that a client who has not exercised due diligence, cannot now be heard to place every sought of complaints and accusations against the erstwhile advocate. Instructively, such a client must also be ready to bear and/or shoulder own responsibility.
67. In the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, the Court of Appeal stated and underscored the position in the following manner;
- “It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”
68. In a nutshell, I must state that despite the submissions by Learned counsel for the Applicants and the plea of innocence on the part of the Applicants, the totality of the evidence before the Honourable court and coupled with the antecedent conduct of the Applicants, militates against exercise of discretion in their favor.
69. Notwithstanding the foregoing, I have pointed out elsewhere hereinbefore, that discretion can only be exercised based on some evidence, explanation and display of seriousness on the part of the Applicants, as pertains to compliance with court procedures.
70. Furthermore and for good measure, discretion must not be equated or better still, be mistaken for sympathy/ empathy. Discretion is informed by sufficient cause and plausible material placed before the Honourable Court.

Final Disposition

71. Having reviewed the totality of the submissions, which were placed before the Honourable court and having taken into account the relevant/applicable law; I come to the persuasion that the subject application, which has been mounted by the Applicants, is not only misconceived and legally untenable; but same is also devoid of merits insofar as the Applicants did not deem it fit to account for the failure to act timeously and with due promptitude.
72. Consequently and in the premises, the entire application dated the April 20, 2023; is devoid of merits. In this regard, same be and is hereby Dismissed with costs assessed and certified in the sum of KES 20,000/= only, payable to the Respondents.
73. Further and in addition, the interim orders of *status quo*, which were granted herein, be and are hereby vacated and discharged.
74. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:



Benson – court assistant

Mr. Ruto H/B for Mr. Ham Langat for the Plaintiff

Ms. Waliaula for the Respondents

