



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL CAUSE NO. E012 OF 2020

SINOHYDRO CORPORATION LIMITED.....APPLICANT

VERSUS

SAMSON ITONDE TUMBO t/a

DOMINION YARDS AUCTIONEERS.....RESPONDENT

RULING

This Ruling is in respect to the Notice of Preliminary Objection dated 2nd November 2020.

1. It was the Respondent's contention that the Application dated 21st October 2020 should be struck out because it offends the mandatory provisions of;

- (i) Rule 55 (5) of the Auctioneers Rules;***
- (ii) Order 42 Rule 2 of the Civil Procedure Rules;***
- (iii) Order 42 Rule 6 of the Civil Procedure Rules;***
- (iv) Article 47 (1) of the Constitution; and***
- (v) Article 50 (1) of the Constitution.***

2. It is clear from the face of the application in issue that the Applicant referred to it as a Reference.

3. In the circumstances, the Respondent submitted that if the Applicant was dissatisfied with the Ruling which the learned magistrate made on taxation, the only avenue available for challenging the Ruling was through an appeal, as opposed to a Reference.

4. Pursuant to the provisions of **Rule 55 (4)** of the **Auctioneers Rules**;

“An appeal from a decision of a registrar or magistrate or the Board under sub-rule (2) and (3) shall be to a Judge in chambers.”

5. The Applicant concedes that fact.

6. According to the Applicant, it has actually complied with the said provisions of the law.

7. Pursuant to **Rule 55 (5)** of the **Auctioneers Rules**;

“The memorandum of appeal, by way of chamber summons setting out the grounds of appeal, shall be filed within 7 days of the decision of the registrar or magistrate.”

8. In the case of **OSCAR OTIENO ODONGO Trading As ODONGO INVESTMENT AUCTIONEERS Vs SUKARI INDUSTRIES LIMITED, MISC. CIVIL APPLICATION NO. 293 OF 2018**, (at Migori), the court dealt with issues emanating from the decision made by the learned Senior Resident Magistrate when he had been called upon to assess the Auctioneer's costs.

9. The Auctioneer was dissatisfied with the decision of the learned magistrate, and it therefore filed a Chamber Summons under **Rule 55 (4)** of the **Auctioneers Rules**. However, the said Chamber Summons was not supported by an affidavit.

10. The Respondent, in that case, asked the court to strike out the Chamber Summons, as being incompetent, due to the absence of a supporting affidavit.

11. In his Ruling, Mrima J. held that pursuant to **Rule 55 (5)** of the **Auctioneers Rules**, the Chamber Summons is the equivalent of a Memorandum of Appeal under **Order 42 Rule 1** of the **Civil Procedure Rules**.

12. The learned Judge stated thus;

“That is the reason why an Affidavit is not required to accompany the Chamber Summons. Like the appeals under Order 42 of the Civil Procedure Rules, all what transpired before the Court appealed from is to be introduced to the Court appealed to by a Record of Appeal.

I therefore do not see how the Chamber Summons and the Record of Appeal infringed any law.

In any event, the argument rests on the form of the appeal and procedural issues, which Article 159 (2) (d) of the Constitution overrides, for substantive justice.”

13. In the result Court overruled the objection in that case.

14. A careful look at the Ruling of Mrima J. will reveal the following statement;

“4. The Appellant, then aggrieved by that decision preferred an appeal by way of reference, which is the subject of this judgment.”

15. It is to be noted that even in that case, which was cited by the Respondent herein, the learned Judge used the word “Reference” when talking about the Appeal.

16. I hold the considered view that by terming an Appeal as a Reference does not convert the said Appeal to a Reference.

17. In the case of **JOEL TITUS MUSYA T/A MAKURI ENTERPRISES Vs SOUTHERN CREDIT TRADING CORPORATION MISC CIVIL APPLICATION NO. 544 OF 2004**, Njagi J. held that;

“For the failure to file a memorandum of Appeal in place of a reference, I find that the applicant strayed, and renders his application incompetent.”

18. By necessary implication, I understand L. Njagi J. to have been saying that a Reference cannot be transformed into an Appeal.

19. In that case, the Applicant had lodged a Reference under **Paragraph 11** of the **Advocates (Remuneration) Order**.

20. The court dismissed the Reference because it was deemed to be incompetent beyond redemption.

21. In the case of **EZEKIEL KIMINZA T/A AUTO LAND AUCTIONEERS Vs MISTRY VALJ. NARAN MULJI, ELC MISC. APPLICATION NO. 21 OF 2016**(At Mombasa), C. Yano J. struck out the Reference from the decision rendered by the Taxing Master following the taxation of an Auctioneer’s Bill of Costs.

22. The learned Judge held that the application was incompetent and a non-starter in limine, for failure to comply with the procedure prescribed by **Rule 55 (5)** of the **Auctioneers Rules**.

23. To my mind, that decision constitutes a further affirmation of the legal position that a Reference from Taxation, pursuant to **Paragraph 11** of the **Advocates (Remuneration) Order** is not synonymous with an Appeal pursuant to **Rule 55 (5)** of the **Auctioneers Rules**.

24. In **MACHIRA & CO. ADVOCATES Vs MAGUGU [2002] 2 EA 428**, Ringera J. (as he then was) said;

“As regards the point that the client’s objections to the taxation itself having been overruled, the proper remedy to adopt was an appeal to the High Court and not a reference under paragraph 11 of the Remuneration Order, I have the following to say:

First, the Advocates (Remuneration) Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. It does not provide for an appeal from any sort of decision by the taxing officer.”

25. The question that must now be answered is whether or not the Applicant had filed a Reference, instead of an appeal.

26. On the face of the document filed by the Applicant on 21st October 2020, the heading reads as follows;

“ **CHAMBER SUMMONS** ”

(Memorandum of Appeal pursuant to Rule 55 (5) of the Auctioneers Rules 1997 (Rev. 2012) AND the Chief Magistrate for reasons or taxation dated 15.10.2020)”

27. It is clear that the Applicant filed a Memorandum of Appeal, by way of a Chamber Summons. Therefore, I find that the Applicant complied with the provisions of **Rule 55 (5)** of the **Auctioneers Rules**.

28. I further find that the use of the word “*Reference*” in the Chamber Summons dated 21st October 2020 does not alter the fact that the document before the Court is a Memorandum of Appeal.

29. Accordingly, the Preliminary Objection herein is overruled. The Respondent will pay to the Applicant, the costs of the said Preliminary Objection.

DATED, SIGNED and DELIVERED at KISUMU This 28th day of January 2021

FRED A. OCHIENG

JUDGE