



Kindest Auctioneers v Orbit Chemicals Industries Limited (Miscellaneous Appeal E038 of 2023) [2023] KEELC 21782 (KLR) (13 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21782 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPEAL E038 OF 2023**

JA MOGENI, J

NOVEMBER 13, 2023

BETWEEN

KINDEST AUCTIONEERS APPLICANT

AND

ORBIT CHEMICALS INDUSTRIES LIMITED RESPONDENT

RULING

A. Background

1. Before me for determination are three Applications namely: -
 - a. The Applicant's Appeal by way of Chamber Summons Application dated 15/08/2023.
 - b. The Respondent's cross- appeal by way of Chamber Summons Application dated 6/09/2023.
 - c. The Applicant's Notice of Preliminary Objection dated 14/09/2023.
2. Vide an appeal by way of a Chamber Summons Application dated 15/08/2023, the Applicant approached this Court seeking for various substantive orders which I wish to reproduce verbatim hereunder:
 1. Spent.
 2. That the Ruling of the Taxing Master (Hon. Diana Orago) dated 10/08/2023 in relation to Item No. 5 contained in the Amended Bill of Costs dated 23/05/2023 be reversed, reviewed, varied and/or set aside by this Honourable Court.
 3. That upon grant of prayer No.2 hereinabove, the Amended Bill of Costs dated 23/05/2023 in relation to Item No. 5 be referred back to a different Taxing Master for taxation afresh.



4. That the costs of this Appeal be provided for.
3. Vide a cross-appeal by way of a Chamber Summons Application dated 6/09/2023, the Respondent approached this Court seeking for the following Orders:
 1. The ruling delivered by the Deputy Registrar Hon. Diana Orago awarding the Auctioneer a sum of Kshs. 327,583 be reviewed and a sum of Kshs. 14,242,091.78 be awarded.
 2. The costs of this Cross-Appeal be in the cause.
4. In opposing the cross-appeal, the Applicant filed a Notice of Preliminary Objection dated 14/09/2023 and put forward the following grounds: -
 - a. That this Court lacks the jurisdiction to entertain, hear and/or determine the chamber summons as the same violates the clear and mandate provisions of Rule 55(4) of the Auctioneers Rules, 1997.
 - b. That no leave of Court was sought by the Respondent prior to the filing of the Chamber Summons dated 6/09/2023.
5. The Applicant in their Notice of Preliminary Objection dated 14/09/2023 subsequently sought for the following prayers:
 - a. The Chamber Summons dated 6/09/2023 struck out and/or dismissed.
 - b. An order that the Respondent's Advocates on record be personally liable for costs of the Application.
6. The Court on 21/09/2023 gave directions that the Notice of Preliminary Objection together with the appeal and the cross-appeal be canvassed by way of written submissions. The Respondent's written submissions to the preliminary objection are dated 16/10/2023 whereas its written submissions to the appeal and cross-appeal are dated 13/09/2023. The Applicant's submissions on the preliminary objection, appeal and cross-appeal are dated 4/10/2023. A Ruling date was scheduled.

Analysis and determination

7. I have carefully considered the appeal by way of the Chamber Summons, the cross appeal by way of the Chamber Summons, the affidavits on record, the Preliminary Objection together with the rival written submissions and the authorities cited. Having done so, I find that what this court is required to determine first is the preliminary objection on whether the cross appeal was filed within time because it raises both procedural and substantive issues which go to the jurisdiction of the Court.
8. 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”
9. 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 7 days of the decision of the Registrar or Magistrate. This provision clearly prescribes 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 7 days within which to file an appeal after the decision is made. This procedure was termed mandatory by court in *Ezekiel Kiminza t/a Auto Land Auctioneers v Mistry Valji Naran Mulji* [2017] eKLR.
 10. Regarding the issue on whether the appeal was filed out of the stipulated time, it is note-worthy that filing a suit or application out of time and without leave of Court to extend time goes to the root of the suit/application and thus it is not merely a procedural defect. It cannot be a technicality that can be cured by the provisions of Article 159 (2) (d) of *the Constitution* and Order 51 Rule 10(2) of the Civil Procedure Rules.
 11. In the case of *Mutia Muindi ya Matiba Auctioneers –vs- CFC Stanbic Ltd & Ano* [2015] eKLR, it was held that:

“Time bar is both procedural and substantive issue which goes to the jurisdiction of the Court. The corollary of the time bar is that the authority of Court over the dispute is extinguished”
 12. Further, in the cases of *Owners of Motor Vessel “Lilian S” –vs- Caltex Oil (K) Ltd* [1989] KRL 1 and *Kakuta Maimai Hamis –vs- Peris Tobiko & 2 Others* [2013] eKLR, it was held that “the appellate jurisdiction of any Court is a creation of statutes and must be exercised within the strict edicts of the statutory jurisdiction”.
 13. Additionally, the Supreme Court of Nigeria said the following in the case of *Ocheja Emmanuel Dangana –vs- Hon. Attai Aidoko Alo Usman & Others*, SC 480/2011 and SC 11/2012 (consolidated) where *Bode Rhodes-Vivour*, JSC stated:

“A court is competent, that is to say, it has jurisdiction when;

 - i. it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and
 - ii. the subject matter of the case is within its jurisdiction, and no feature in the case...prevents the court from exercising its jurisdiction; and
 - iii. the case comes before the court initiated by the due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction”
 14. Therefore, from the above cases, there is no doubt that the procedure prescribed and the time within which to file an appeal under Rule 55(5) of the Auctioneer’s Rules is mandatory.



15. The Applicant submitted that the Respondent's Cross Appeal was not filed within Seven (7) days from the date of the Ruling of the Taxing Master. The decision sought to be impugned was delivered on 10/08/2023. Without prejudice to the foregoing, the Respondent was served with the Applicant's Appeal on 16/08/2023 and the Cross Appeal was filed on 7/09/2023, about three (3) weeks after the Appeal was filed and served. They added that the Respondent did not seek leave from this Honourable Court to file the present Cross Appeal.
16. On the other hand, the Respondent submitted that the Applicant has made allegations that the Cross Appeal was filed out of time relying on Rule 55 (4) and 55(5) of the Auctioneers Rules 1997 as a basis of its argument. They averred that the time limit for filing a Cross Appeal has not been provided for under the Auctioneers Rules 1997 or any other law enacted by Parliament. If there was need for limiting time for filing a Cross -Appeal, then Parliament should have expressly stated so. It was their humble submission that there is no time limit within which to file a Cross-Appeal. The Applicant can purport to rely on the provisions of the law governing filing of appeals to govern the filing of Cross-Appeals. No provisions of law have been cited to support such proposition and they urged the Court to overrule the Preliminary Objection and proceed to allow the Cross-Appeal.
17. The Court of Appeal in *Aprim Consultants vs Parliamentary Service Commission & Another*, Civil Appeal No. E039 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 opinion 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. See *Aprim Consultants* (supra).
18. In the instant case, the Respondent has filed a cross-appeal under the provisions of Rule 55 (2) (4) & (5) of the Auctioneers Rules, 1997. It is evident that the only way to lodge an appeal is by memorandum of appeal through a chamber summons as contemplated under Rule 55, provisions of which the Respondent clearly relied on. The Respondent averred that the time limit for filling a Cross Appeal has not been provided for under the Auctioneers Rules 1997 or any other law enacted by Parliament.
19. Notably, the legal authority to file a cross-appeal in the High Court is found under Order 42 Rule 32 of the Civil Procedure Rules states as follows:

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.”
20. Order 42 Rule 32 of the Civil Procedure Rules in my view, clearly provides for cross-appeal but did not provide for the procedure to be followed.
21. I agree with Njoki Mwangi J in the case of *Kenya Power & Lighting Co. Ltd v Peter Langi Mwas* [2018] eKLR, wherein she approached the case with the assumption that cross-appeal is legal though the procedure has not been provided for. While referring to Order 42 Rule 32 of the Civil Procedure Rules this what she said:

“ 13. The above provisions however do not address the timelines within which a cross-appeal should be filed. Going by the record herein, the memorandum of



appeal was filed on 8th July, 2014. If the applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside the said timelines given to an appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time.”

22. In India, Order 41 Rule 22 of the Code of Civil Procedure, 1908 provides:

“Upon hearing respondent may object to decree as if he had preferred a separate appeal—
(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [409][but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.”

23. If the law was to assume that a respondent’s right to appeal is extinguished by the fact that he/she was beaten in time by the appellant, this would be a very unfair turn of events. I do agree with the finding in the case of Kenya Power & Lighting Co. Ltd v Peter Langi Mwasi (supra). There being no such provisions in respect of cross-appeals, courts have held that cross appeals should be filed within a reasonable period. If an applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside the said timelines given to an appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time.

24. I find the Respondent’s excuse implausible and not sufficient reason to warrant this court’s discretion. The Respondent did not make an application for extension of time. From the record, it is clear that they were equally aggrieved by part of the ruling of the Taxing Master and preferred an appeal against the same. There has been no explanation furnished for this delay. 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. The Respondent ought to have properly brought itself before this Court and the Court on its part must first be properly clothed with the necessary jurisdiction before embarking on determining the appeal. In this case, both conditions have not been met.

25. In the circumstances, I am unable to find any reasonable justification for the filing of the appeal outside the 7-day period prescribed under Rule 55(5) of the Auctioneer’s Rules. In view of the above, it is my opinion that this Court does not have authority to entertain the applicants’ application on the merits as the same is incompetent.

26. Consequently, I find the Applicant’s preliminary objection to be well founded. It is upheld and it is my determination that the cross-appeal is not sustainable. The Notice of Preliminary Objection dated 14/09/2023 is hereby allowed as prayed.

Merit of the Applicant’s Appeal dated 15/08/2023.

27. Firstly, the Applicant’s appeal is not opposed. The Respondent only filed grounds of opposition in relation to the Applicant’s Application dated 17/08/2023 seeking stay of execution pending the determination of this appeal. The same is now spent. Additionally, even though the averments in the



present appeal are not rebutted as the appeal stands unopposed, the appeal should not be deemed as having been allowed. This Court has a duty to consider the appeal and proceed to determine it on its merits.

28. In consideration of the Appeal on merit, it is trite law that taxation of costs is an exercise which is based on the discretion of the Taxing Officer. As a general rule the High Court ought to be slow to interfere in the decision of a Taxing Officer unless it can be shown that there was an error in law or in principle in reaching said decision. See the case of *First American Bank of Kenya –vs- Shah & Others* [2002] EALR. The Applicant challenged the award made by the taxing officer in regard to item no. 5 of the amended bill of costs dated 23/05/2023. Item no. 5 of the amended bill of costs was for “commission”. The question for determination therefore is whether the taxing master, Hon. D. Orago erred in law when she taxed item no. 5 of the Auctioneer’s Amended Bill of costs dated 23/05/2023 and whether the same should be set aside.
29. The Court is guided by the law in making its decision on the appeal being Rule 55 of the Auctioneers rules and the Fourth schedule therein and case law. In the case of *Zacharia Barasa -vs Dubai Bank Kenya Limited* (2015) eKLR Justice L Gacheru has outlined the case law which I adopt and rely on as follows: -

“ In *First American Bank of Kenya -vs - Shah & Others* (Nairobi Milimani) HC civil case No. 2255 of 2000 court held that: - “The court cannot interfere with the taxing master’s decision on taxation unless it is known that either the decision was based on error of principle or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principles”.
30. Further in the case of *Bank of Uganda -vs Benco Arabe Espanal* (199) Z EA 45 (2020) Z EA 297 (SCU) it was held that: -

“ Even if it is shown that the taxing officer erred in principle, the Judge should only interfere on being satisfied that the error substantially affected the decision on quantum and that upholding the amount would cause injustice to one of the parties”.
31. Turning to the substance of the Applicant’s appeal on quantum, the Applicant was of the view that the Taxing Master was wrong in her finding that there was a valid Decree before the Court capable of invoking her jurisdiction to Tax the Amended Auctioneers Amended Bill of Costs dated 23/05/2023 despite the fact that the High Court Decree in ELC Case No. 147 of 2008 (Formerly HCCC 1400 of 1997)- *Prof David M. Ndeti vs Orbit Chemical Industries Ltd* had been overturned by the Judgement of the Court of Appeal delivered on 19/03/2021 in Civil Appeal No. 445 of 2018. The Respondent was awarded the sum of Kshs. 14,000,000/- by the Court of Appeal.
32. The Appellant contended that the Auctioneers fees awarded by the taxing master were manifestly excessive to warrant interference by this Court. In a nutshell, the Applicant submitted that the Taxing Master’s assessment of Item No. 5 of the Respondent’s Amended Bill of Costs is not only an error in law but also in principle. The said assessment was also inordinately high. They urged this Honourable Court to exercise its discretion and review, vary and/or set aside the Ruling delivered on 10/08/2023 in relation to Item No. 5 of the Bill of Costs and refer the same to another Taxing Master other than Hon. Diana Orago, for Taxation.
33. It is trite law that an appellate court will not interfere with the assessment of damages merely because it could have awarded a higher or lower figure. The principles under which an appellate court can interfere with an award of quantum has been propounded in several cases amongst them the case of *Butt vs Khan* [1981] KLR 470 and *Kitavi vs Coastal Bottlers Ltd* [1985] KLR 470.



34. The common holding of these cases is that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
35. In the present matter, the Applicant was sued in Civil Suit No. 147 of 2008 where the Plaintiff, Prof. David M. Ndetei was awarded Kshs. 269,439,464.15 including costs of the suit and the counterclaim and interest in the Judgment delivered on 13/06/2014. Thereafter, the Applicant herein, Orbit Chemical Industries Limited, was issued with a proclamation notice dated 2/05/2018 and warrants of attachment dated 30/04/2018 notifying them that their movable property would be removed to the auctioneer's premises and sold by public auction within 7 days.
36. From the record before me, the Applicant herein was issued with an interim order of stay of execution on 3/05/2018 on condition that they deposit in an interest earning account in the joint names of the advocates for the parties a sum of Kshs. 25,000,000.00 as security within 14 days from 3/05/2018, if they failed to comply, the order given automatically lapses. The said order was served upon the firm of Kyalo & Associates Advocates on 4/05/2018. The same has been stamped as received. The Ruling of the taxing master being appealed from also indicates that the Court of Appeal granted a stay of execution pending appeal on 30/01/2019.
37. The Applicant herein filed an Appeal against the trial court judgment in Civil Appeal No. 445 of 2018. The Appeal partially succeeded and the Appellate Court interfered with the award of Kshs. 267,439,464.15. The Court of Appeal entered judgment in the matter on 19/03/2021. The trial court's judgment was varied and Prof. David M. Ndetei was awarded Kshs. 17,000,000.00 plus interest on the said sum to accrue from the date of the judgment of the High Court. The Appellate Court also gave an order that Prof. David M. Ndetei will have the costs in the High Court limited to the aforesaid sum. It was submitted that the amount was later reduced to Kshs. 14,000,000.00 pursuant to a consent entered into by both parties.
38. The Auctioneer's bill of costs dated 30/09/2022 included their fee/commission to be assessed at Kshs. 14,000,000.00. They subsequently filed an amended bill of costs dated 23/05/2023 wherein they revised their commission to Kshs. 393,369,303.85 and the same tallied with the amount stated in the warrants of attachment. It is noted that the bill of costs had originated from the determination of High Court Civil Suit No. 147 of 2008 wherein warrants of attachment for the sum of Kshs. 393,369,303.85 were issued to the Respondent to execute.
39. The Applicant is challenging the assessment of item no. 5. The Taxing Master assessed it at Kshs. 1,966,846.52 for reasons that the proclamation and attachment of goods/assets was stopped when the Applicant obtained an order of stay of execution. They also submit that if the Respondent's instructing client's costs are pegged on Kshs. 14,000,000.00 then the Respondent's charges, if any, should be guided by the same amount. That the stay of execution obtained on 3/05/2023 suspended and/or stopped the attachment/proclamation.
40. It is trite that a Court dealing with a reference on assessment or taxation of costs should exercise great caution since the taxing master's assessment or taxation flows from the well of discretion. However, a Court dealing with a reference can interfere with the said assessment or taxation if it is shown that the decision was based on an error of principle or that the fee awarded is manifestly high so as to represent an erroneous estimate of the sums awarded. (See the case of Bank of Uganda (supra).



41. In the case of National Industrial Credit Bank Limited –vs- S. K. Ndegwa Auctioneer, Civil Appeal No. 195 of 2004, the Court of Appeal made the following pronouncement: -

“The object of paragraph 4 is clear.

“It is intended to provide values on the basis of which the auctioneer’s charges should be assessed. We think that it is reasonable that the auctioneer’s charges for attachment should be based on the value of the goods attached and not on the decretal sum. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum.”

42. The above is a decision of the Court of Appeal which binds all lower Courts. The commission of an Auctioneer is to be based upon the value of goods attached and not on the decretal sum.
43. The relevant legislation governing auctioneer’s fees/charges is Part II of the Fourth Schedule of the Auctioneer Rules No. 5 of 1996 (Revised 2017) which has 11 items thereunder. As the Applicant’s reference is in the form of an appeal, this court will proceed to analyze the Respondent’s amended bill of costs dated 23/05/2023 limited to item no. 5. The amended bill of cost used the sum of Kshs. 393,369,303.85 as the basis to calculate the commission/fees. I note that the Respondent attached goods amounting to Kshs. 393,369,303.85. Part II of the Fourth schedule does provide that where requisite notices are served and the sale is stayed, or postponed, the auctioned is entitled to ½ of fees to which he would have been entitled to after sale, plus expenses. The wording of paragraph 4 of Part II of the Fourth Schedule does not say that the percentages stated apply to the decretal amount. It would be unjust to base the fee on attachment on the decretal amount because in some cases, the value of the attached goods may be many times less than the decretal amount shown in the warrant of attachment and sale. I note that the taxing master assessed the same at Kshs. 1,966,846.52 for reasons that the proclamation and attachment of goods/assets was stopped when the Applicant obtained an order of stay of execution.
44. Noting that the commission of an Auctioneer is to be based upon the value of goods attached and not on the decretal sum, it is my considered view that item no. 5 is in relation to fees is with regard to the goods attached. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had be attached goods equivalent in value to the decretal sum. I am guided by the Court of Appeal decision in National Industrial Credit Bank Limited (supra) wherein the Court held that the essence and purpose of the attachment is the execution of the decree. The essence of the attachment is to remove the goods from the possession of the judgment debtor and place them in the custody of the law so that they can be sold to satisfy the judgment debt if the judgment-debtor does not pay the debt. To place the goods in the custody of the law is not necessary. That the goods must be carried away from the premises of the judgment-debtor. In the commentary to Order 21 Rule 43 of the Indian rule which is in part materia to Order 21 Rule 38, the authors of Mulla, The Code of Civil Procedure 16th Edition state in part at page 2667:

“Where a warrant of attachment is executed by affixing it to the out door of the warehouse in which goods belonging to the judgment debtor are stored, it amounts to “actual seizure” within the meaning of the present rule”.

45. It is clear from Rule 12 as read with Rule 14 of the Auctioneers Rules and the contents of the prescribed form, that is, Sale Form 2 that the proclamation of the movable goods is legally and effectively an attachment. From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law



and the court through the auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods.

46. In the end, I am satisfied that the reasoning by the taxing master on item no. 5 was sound in law and reasonable. The schedule is clear that where the attachment or repossession is taxed or postponed or money tendered after attachment or repossession, but before sale, the auctioneer is entitled to the attaching and repossession charges. In addition to expenses.
47. For the foregoing reasons, the upshot of this court's decision is that the Applicant's Application dated 15/08/2023 is devoid of merit and the same is dismissed with costs.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2023.

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MOGENI J

JUDGE

In the virtual presence of: -

Mrs. Omutimba for the Appellant/Applicant

Ms. Rotich for the Respondent

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE

