



Kimathia & 2 others v James Onkundi Omakori t/a Lifewood Traders Aucitioneers (Miscellaneous Civil Application E012 of 2024) [2025] KEHC 4439 (KLR) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS CIVIL APPLICATION E012 OF 2024**

**RK LIMO, J
APRIL 8, 2025**

BETWEEN

DAVID KIMATHIA & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS APPLICANT

AND

**JAMES ONKUNDI OMAKORI T/A LIFEWOOD TRADERS
AUCITIONEERS RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. S.K. Mutai
(Senior Principal Magistrate) in Kitale Chief Magistrate's Court
Civil Misc. App. No. 39 of 2023 delivered on 26th February, 2024)*

RULING

1. David Kimathia & 2 Others not identified have moved this court through a Notice of Motion dated 8/3/2024 for the following orders;
 - i. Spent
 - ii. That this Hon. Court do grant the applicants leave to appeal out of time against judgment delivered on 26/2/24 vide Kitale CMCC Misc. Application No.39 of 2023.
 - iii. That there be stay of execution of the decree and judgment in Kitale CMCC Misc. Application No.39 of 2023 pending determination of this application.
 - iv. That there be a stay of execution of judgment and decree in Kitale CMCC Misc. Application No.39 of 2023 pending determination of the intended appeal.
 - v. That costs be in the intended appeal.
2. The grounds upon which this is based on application are listed as follows;



- a. That the respondent filed a suit claiming auctioneers fees via a bill dated 31/10/2023 against the appellants.
 - b. That the applicants were unaware of the matter till later in January 2024 when they instructed an advocate to defend them and object to the bill by auctioneers as the proclamation and execution was carried out after the applicants had paid the full decretal amount to Gacathi Advocate in Kitale CMCC No.456 of 2016.
 - c. That the instructed counsel thought the matter was coming for taxation only for a ruling to be delivered on 26/2/2024 and decree issued.
 - d. That on 29/2/2024 the trial court issued warrant of attachment of movable property in execution of decree through Lifewood Auctioneers to remove the decretal sum of Kshs.78,609/-.
 - e. That the respondent has started execution.
 - f. That the applicants intend to appeal as they are aggrieved by the judgment entered on 26/2/2024.
 - g. That this application has been filed timely and the applicants stand to suffer irreparable loss unless the prayers sought herein are granted.
 - h. That the applicants have a good arguable appeal with high chances of success and the respondents will not suffer prejudice if the application is allowed.
3. The applicants have supported the above grounds with an affidavit sworn on 8/3/2024 by David Kimathia where he has majorly reiterated the above listed grounds.
 4. The deponent avers that he is the applicant and is interested in pursuing an appeal against the cited decision and that he is ready and willing to furnish security.
 5. In his written submissions through counsel the applicant claims that the reasons for delay in preferring an appeal is explained by delay by the trial court to avail him the copy of the ruling. He further submits that he was insured and that it took a while for his advocate to get feedback from his insurer. He relies on Edward Kamau & Another –vs- Hannah Mukui Githuki & Anor (2015)eKLR where the court held that a right to appeal is a constitutional right and that its denial is in essence is denial of right to access justice.
 6. The applicant prays for a chance to file an application arguing that he is likely to suffer irreparable loss unless he gets a chance to appeal.
 7. He submits that he is ready and willing to furnish security.
 8. The respondent has opposed this appeal vide a replying affidavit sworn on 25/3/2024.
 9. The respondent avers that the warrants of attachment in execution of decree was issued procedurally on 11/10/2022 and that the applicant's property were proclaimed on the same day and the court notified vide a letter dated 12/10/2022.
 10. The respondent avers that he was paid after he had obtained warrants and initiated execution and that he wrote a letter instructing the auctioneer to halt execution vide a letter dated 16/11/2022. He contends that the auctioneer was entitled to his fees and that is why he proceeded to have the same taxed.



11. The respondent faults the applicant for failure to file substantive appeal and that he does not deserve any discretion from this court by way of extension of time.
12. The respondent contends that the applicant ought to have filed an appeal to move the court under Order 42 Rule 6 of the Civil Procedure Rules. According to the respondent the applicant has not met the threshold for grant of the prayers sought.
13. This court has considered this application and the response made. At the heart of this application is the taxation of auctioneer fees through a bill of costs dated 31/10/2023 by auctioneer filed vide Misc. Application No.39 of 2023.
14. The applicant in this matter is not clear about whether he is aggrieved by the decision of the taxing master with respect to assessment of auctioneer's fees or the filing of auctioneer's fees and whether he was entitled to the fees in the first place.
15. In the first place if the applicant was dissatisfied with the taxation of auctioneer's fees then the best route was to file a reference so that he could ask the taxing master to give reasons for taxing the bill of costs at the figure arrived at. Secondly if the applicant was opposed to the bill of costs then the best approach or route to take was to ask the court to set aside the taxation on two grounds that either it proceeded ex parte without notice to him or that the auctioneer was not entitled to costs because the decretal sum in the primary suit had already been paid.
16. The applicant's option to appeal is the wrong option in my considered view because for one there is no judgment to be appealed from and that could explain why the applicant has not exhibited a draft appeal to demonstrate its viability. In such circumstances it is difficult for this court to exercise its discretion in his favour. This is because a court exercises its discretion when good cause is shown but in this case the applicant has kept the basis of his intended appeal, if at all, under wraps. He is the only person who knows what he is appealing against and the reliefs sought.

In the premises this court finds the application dated 8/3/2024 is incompetent for the afore-stated reasons and the same is struck out with costs.

DELIVERED, DATED AND SIGNED AT KITALE THIS 8TH DAY OF APRIL, 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Ruling delivered in open court

In the presence of;

Makori for the Respondent

No appearance for the Applicant

Court assistants – Duke/Chemosop

