



**Expeditious Auctioneers v N’gan’ga & another (Miscellaneous Application E546 of 2023)
[2025] KEHC 12603 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E546 OF 2023**

**F GIKONYO, J
JULY 31, 2025**

BETWEEN

EXPEDITIOUS AUCTIONEERS APPLICANT

AND

MICHAEL KANGARA N’GAN’GA 1ST RESPONDENT

DIRECTLINE ASSURANCE COMPANY 2ND RESPONDENT

RULING

1. The 1st respondent filed the notice of motion dated 16th April 2025, seeking orders to set aside the ex-parte ruling entered on 30th January 2024 in favour of the applicant against him. That all consequential orders be set aside unconditionally and that the annexed draft replying affidavit be deemed as properly filed.
2. The application is made under Order 42 Rule 6 and 8, and 51 Rule 1 of the Civil Procedure Rules.
3. The application is based on the grounds set forth therein and in the supporting affidavit sworn by Michael Kangara N’gan’ga on 16th April 2025.
4. The main ground is that the 1st respondent was condemned unheard because he was not served with the auctioneer’s bill of costs, and the subsequent notices to appear before the court. The 1st respondent relied on Article 50 of *the Constitution* on the right to a fair hearing.
5. There was no response filed by the applicant despite service.



Service of the bill of costs

6. From the record, the applicant filed an affidavit of service sworn by Solomon Mbugua, an authorized process server on 25th July 2023. He deposed that he served the 1st respondent on 25th July 2023 at around 2.20 P. M with the court documents via his WhatsApp mobile number 0721606691.
7. In his supporting affidavit, the 1st respondent stated that the bill of costs was served through a strange phone number, not known to him. For this reason, he was not able to instruct advocates to enter an appearance and/ or file a reply, as he was not aware of the suit.
8. The 1st respondent annexed a message from Safaricom indicating that the mobile number is registered in the name of Joseph Kiundu.
9. Therefore, I find that there was no proper service effected upon the 1st respondent.
10. Order 51, Rule 15 of the Rules provides that the court may set aside an order made ex parte.
11. The court's power to set aside an ex parte order is discretionary and must be exercised judiciously, not capriciously. "The discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice." Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR
12. In the circumstances of this case, there was no proper service. This is against the rules of natural justice, which include the right to be heard and the right to a fair hearing.
13. Accordingly, the application dated 16th April 2025, is allowed in the following terms:-
 1. The ex-parte ruling entered on 30th January 2024 and consequential orders are set aside.
 2. The draft replying affidavit annexed to the application is deemed as properly filed.
 3. The auctioneer's bill of costs dated 4th July 2023 be set down for inter partes hearing on a priority basis.
 4. Costs to be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 31ST DAY OF JULY 2025

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F. GIKONYO M

JUDGE

In the presence of: -

Jepkorir for applicant

CA Kinyua

