



REPUBLIC OF KENYA



KENYA LAW
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**Kimuyu v Ngulili & 2 others (Environment & Land Case
040 of 2024) [2025] KEHC 9507 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
ENVIRONMENT & LAND CASE 040 OF 2024**

EO OBAGA, J

JULY 3, 2025

BETWEEN

PAUL MUSYOKA KIMUYU PLAINTIFF

AND

JOHNBOSCO MUNYAO NGULILI 1ST DEFENDANT

TABITHA KAYUU & COMPANY 2ND DEFENDANT

KWETU SACCO SOCIETY LIMITED 3RD DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 21st February, 2025 in which the Plaintiff/Applicant seeks the following orders:
 1. Spent.
 2. Spent
 3. Spent
 4. That this Honourable court be deemed to declare the rent due to the 3rd Defendant as fully settled and auctioneers fees to be agreed or taxed.
 5. That alternatively, this honourable court be pleased to issue orders directing Eastern Kenya Auctioneers to deposit any proceeds of sale herein in a joint interest saving account with the Plaintiff and the Auctioneers do file a file return and tender proper account of any precipitated sale.
 6. That the honourable court be pleased to issue orders for indemnity and full compensation to the Plaintiff for any loss or damage which he may incur consequent to breach of legal



professional duty by the said auctioneers arising from irregular and unlawful attachment and sale of his property herein.

Background

2. The Applicant is a tenant of the 3rd Defendant/Respondent in a building known as Itumbule Building. The building previously belonged to the 2nd Defendant who had retained the 1st Defendant as an agent. The Applicant had entered the building as a tenant in 2003 at a monthly rent of Kshs.3,000/=. The building was sold to the 3rd Respondent on 4th May, 2015.
3. On 19th September, 2024, the advocate for the 3rd Respondent issued an eviction notice against the Applicant on account of rent arrears which then stood at Kshs.386,000/=. The Applicant moved in court seeking injunction orders but the application for injunction was dismissed on 20th January, 2025.
4. The 3rd Respondent engaged the services of Eastern Kenya Auctioneers who levied distress for rent by attaching the Plaintiff's goods. The Applicant was then forced to settle all the outstanding rent arrears before filing the present application.

Applicant's Contention

5. The Applicant states that on 19th September, 2024, he received a demand from the 3rd Respondent's lawyers claiming rent arrears amounting to Kshs.386,000/=. On 27th September, 2024, he wrote a response in which he lodged a counterclaim of Kshs.334,600/= and proposed an offset arrangement.
6. The 3rd Respondent did not respond to the proposal but instead they engaged the services of Eastern Kenya Auctioneers who proclaimed his goods. His efforts to get an injunction were futile as the court dismissed the application. He tried to engage the 3rd Respondent in an amicable settlement but this failed.
7. On 4th October, 2024 the Auctioneers proclaimed his goods. On 14th February, 2025 the auctioneers carted away the attached goods. The Applicant contends that the goods which were proclaimed are not the same ones which were carted away. He states that the arrears of Kshs.426,000/= as at the time of attachment is far less than the value of the goods taken away which is in excess of Kshs.15,000,000/=.
8. The Applicant states that he has since settled the entire rent arrears demanded by the 3rd Respondent and there is nothing owing to the 3rd Respondent. The Applicant states that despite the full settlement, the auctioneers have gone ahead to advertise the attached goods for sale.
9. The Applicant contends that the auctioneers have given him a bill of Kshs.187,000/= which is over 50% of the rent arrears demanded in violation of the *Auctioneers Act*.

3rd Defendant's Contention

10. The 3rd Respondent through a replying affidavit sworn on 17th March, 2025 confirms full settlement of the rent arrears and states that what is remaining is settlement of the auctioneer's fees, disbursements and costs which can either be agreed upon or taxed in accordance with Rule 55 (2) of the Auctioneers Rules.
11. The 3rd Respondent states that she has been informed that the Auctioneers fees has been agreed at Kshs.403,500/= and an invoice to that effect has been sent to the Applicant's advocate. The Applicant did ask for and was given the bank details of the Auctioneers on 23rd February, 2025. The 3rd Respondent further states that on 5th March, 2025 via email the Applicant wrote to the auctioneers



seeking to know the details of persons who had expressed interest in purchasing the lathe machine so that the Applicant can sell it to offset the Auctioneers costs.

12. The 3rd Respondents contends that the Applicant has admitted liability for auctioneer's costs and if he is disputing the figure, then the Deputy Registrar can tax the bill. It is further contended that there is no basis for indemnifying the Applicant who has admitted that he owes the auctioneers their fees and that the court should not order unconditional release of the goods before the auctioneer's fees is settled.

Applicant's Contention in the further affidavit

13. In a further affidavit sworn on 24th March, 2025, the Applicant denied admitting liability of the auctioneer's costs. He contends that the email which he wrote to the auctioneers was for purposes of investigating whether the auctioneer had sold his lathe machine as one of his friends had seen a lathe machine on sale at Gikomba which resembled the lathe machine which had been attached. He stated that he is not liable to pay auctioneer charges which are as a result of an illegal process.
14. The Applicant states that he engaged the services of Volta Electronic services to value the attached property. The value of the attached properties was found to be Ksh.10,252,299/=. He denied ever agreeing to any sum on auctioneer's fees contending that the auctioneers acted unlawfully and unprofessionally.

Analysis and Determination

15. The parties were directed to file written submission on 23rd March, 2025. The Applicant was given 14 days to file and serve written submissions. The 3rd Respondent was given 14 days to file submissions upon being served. The Applicant filed his submissions dated 8th May, 2025 which was way outside the time given. The Applicant served submissions upon the 3rd Respondent on 10th May, 2025. As at the time of writing this ruling on 4th June, 2025, the 3rd Respondent had not filed submissions.
16. The Applicant filed submissions based on the regularity or otherwise of the process undertaken by the auctioneers. The issues which were raised in the submissions are way outside the scope of the orders sought in the application and I need not rehash the same herein.
17. The only relevant submissions are those touching on the court's power to order taxation of the auctioneer's bill in terms of Rule 55(2) of the Auctioneers Rules and those touching on the unconditional release of the attached goods.
18. The issues which emerge for determination are firstly whether this court should order that the Deputy Registrar of this court do tax the auctioneers bill in accordance with Rule 55(2) of the Auctioneers Rules. Secondly this court has to determine whether the court should order the unconditional release of the attached goods. Thirdly which order should be made on costs.
19. On the first issue, there is no contention that the Applicant is disputing the auctioneer's bill as presented to him. Rule 55(2) of the Auctioneers Rules provides as follows:

“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.



20. As per Rule 55 (2) of the Auctioneers Rules, where there are proceedings before this court as is the case herein and there is a dispute on the amount payable, the court can order the auctioneers bill be taxed by the Deputy Registrar of the court. As the Applicant is disputing the amount being charged by the auctioneer and there being no agreement on fees, I order that the Deputy Registrar of this court should tax the auctioneer's bill which shall be filed by the auctioneers.
21. On the second issue, the Applicant is asking for unconditional release of the attached goods. He argues that he has settled the rent arrears owing and that he is not liable to pay the auctioneers charges because the auctioneers misconducted himself and carried out an illegal attachment. It is important to note that the application before me is not for determination on whether the attachment was lawful or not.
22. The auctioneer is not a party to this suit. There can be no adverse orders given against the auctioneer without affording him an opportunity to be heard. Section 26 of the Auctioneers Act provides as follows:
- “(1) An accountant is not qualified to give an accountant's certificate, if—
- a. He has at any time during the accounting period but before giving the certificate, been a partner, clerk or servant of the auctioneer; or
- b. He is subject to a notice of disqualification under subrule
- (2) Where the Board is satisfied that—
- a. The accountant has been found guilty, by the disciplinary committee appointed under section 29 of the Accountants Act (Cap. 531), of professional misconduct; or
- b. The accountant has deliberately or negligently failed to comply with this Part, it may notify the accountant concerned in writing and on receipt of that notice the accountant shall not be qualified to give a certificate.
23. If the Applicant feels that the Auctioneer did not conduct his affairs as per the law, he is at liberty to bring an action claiming general or special damages arising from the said alleged unlawful action. There is nothing in the present application which can be a basis for assessing the alleged damage for indemnity purposes. The Auctioneers Act states that the damages are recoverable through an action which has not been filed.
24. The goods were attached before the rent arrears were cleared. The auctioneer was therefore entitled to payment of his fees. There is even an option to make a complaint against the Auctioneer if the Applicant is convinced that the auctioneer acted in an unprofessional manner. The auctioneer has a lien over the attached property pending settlement of his fees. There is therefore no basis of ordering an unconditional release of the attached goods.

Disposition

25. The attached goods have not been sold. It is therefore clear that Prayer 5 of the application is misplaced. Prayer 6 of the application has been disallowed for the reasons given hereinabove. The only prayer which succeeds partially is prayer 4 which I allow by ordering that the auctioneers fees be agreed or taxed by the Deputy Registrar of this court. As the Applicant has substantially lost the application, I grant costs of the application to the 3rd Respondent.



It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 3RD DAY OF JULY, 2025.

In The Presence Of:

Mr. Kivindyo for Applicant.

Ms. Nyatigo for Mr. Anam for 3rd Defendant/Respondent.

Court assistant – Steve Musyoki

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