



**Development Bank of Kenya Limited v Okwiri & another (Commercial Appeal E348 of 2024)  
[2025] KEHC 12730 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12730 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E348 OF 2024  
JK NG'ARNG'AR, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**DEVELOPMENT BANK OF KENYA LIMITED ..... APPELLANT**

**AND**

**HARRISON ODHIAMBO OKWIRI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH GIKONYO T/A GARAM INVESTMENTS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant herein, Development Bank of Kenya Limited moved this court by way of a chamber summons application dated 8<sup>th</sup> March 2024. The summons sought for the following orders;
  - i. This Honourable Court be pleased to vary and/or set aside the Ruling of Hon. Lucy Ambasi (Mrs) (CM) delivered on 1<sup>st</sup> March 2024 and any resultant Certificate of Taxation in the matter of taxation of the Auctioneer's Bill of Costs dated 9<sup>th</sup> September 2022 between the parties herein.
  - ii. This Appeal be allowed and the Auctioneer's Bill of Costs in the trial court be dismissed with costs.
  - iii. The Appellant be awarded costs of this Appeal.
2. The application supported by the sworn affidavit of Chris Gachiri and anchored on the following grounds;
  - i. The Honourable Magistrate erred in law and fact when she failed to appreciate that the provisions of Rule 7 of the Auctioneers Rules 1997 requires auctioneers to first seek their fees



from the Debtor and only after exhausting the exemptions under the aforementioned rule can they seek fees from the Creditor.

- ii. The Honourable Magistrate erred in law and fact by condemning the Appellant herein to pay the Auctioneer's costs despite lack of evidence that the debtor could not be found, the debtor had no goods to be executed against and that the sale proceeds were insufficient to cover the 2<sup>nd</sup> Respondent's fees, as is required by Rule 7 of the Auctioneers Rules 1997.
  - iii. The Honourable Magistrate erred in law and fact in taxing and awarding the costs to the 2<sup>nd</sup> Respondent despite the fact that the sale of the property had been stopped by the Bank, which fact the 2<sup>nd</sup> Respondent was well aware of.
  - iv. The Honourable Magistrate erred in law and fact in taxing the Auctioneer's Bill of Costs as drawn when the amount indicated and or demanded in the said Bill of Costs is exaggerated and without any evidential or legal backing.
  - v. The Honourable Magistrate erred in law and fact by failing to consider that the Auctioneers Bill of Costs as drawn offends the provisions of the Auctioneers Rules 1997, particularly the Fourth Schedule which provides how Auctioneers costs ought to be charged.
  - vi. The Honourable Magistrate erred in law and fact by wrongly exercising her discretion in taxing the Auctioneer's Bill of Costs at Kenya Shillings One Hundred and Thirty Cents (Kshs. 132,966.60/=) which amount is unjustified.
3. In opposing the summons, the 2<sup>nd</sup> Respondent filed a Replying affidavit by Joseph Gikonyo dated 13<sup>th</sup> September, 2024. He avers that the Honourable magistrate neither committed an error in law nor in fact in finding that both the applicant and 1<sup>st</sup> Respondent were jointly liable to pay his taxed costs. The applicant's interpretation of Rule 7 of the Auctioneers Rules 1997 is flawed. He states that Rule 7 does not exempt the creditor or instruction party from liability for Auctioneers costs but places primary responsibility on the debtor and secondary responsibility on the instructing party if the debtor cannot be found or is insolvent.
  4. According to the appellant, the 1<sup>st</sup> Respondent/debtor never entered appearance in the taxation proceedings, and any service upon them has gone unacknowledged meaning that Applicant may very well have to be the party to pay my costs in any event. He avers that the trial magistrate's finding that both the Applicant and the 1<sup>st</sup> Respondent were necessary parties in the taxation, in that the Applicant would be liable to meet the taxed costs if at all the exceptions listed under Rule 7 of the Auctioneers Rules, 1997 crystallize and believes that the Application/appeal by the applicant is unmerited. The 2<sup>nd</sup> Respondents states that costs follow the event and the Magistrate was within her discretion to award them costs. He also state that the exceptions listed under Rule 7 of the Auctioneers Rules 1997 need not have materialized before the magistrate/taxing master can assess the fees payable to an Auctioneer.
  5. He avers that the bill of costs was drawn to scale and in accordance with the Auctioneers Rules, and a certificate of taxation has been issued. The 2<sup>nd</sup> Respondent argues that the application is an abuse of the court process and prays that it be dismissed with costs.
  6. The application was canvassed by way of written submissions. The appellant's submissions are dated 11<sup>th</sup> June 2025 whereas the 2<sup>nd</sup> Respondent's submissions are dated 27<sup>th</sup> June 2025.

### **Appellant's submissions**

7. On whether the appeal is merited, the appellant cited Rules 55 (4) and (5) of the Auctioneer Rules 1997 which provides that;



4. 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.
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 a magistrate.”
8. The ruling was delivered on 1<sup>st</sup> March 2024 and the appeal was lodged on 8<sup>th</sup> March 2024 which was within the seven days of the decision of the magistrate. The appeal is therefore properly before this Court in accordance with Rules 55 (4) and (5) of the Auctioneers Rules 1997.
9. On the issue of whether the appellant was a proper party to the 2<sup>nd</sup> Respondent’s bill of costs, the 2<sup>nd</sup> Respondent cited Rule 7 of the Auctioneers Rules which provides for payment of auctioneer’s charges. It was submitted that Rule 7 of the Auctioneers Rules 1997 stipulates that it is the debtor who is liable to pay the charges of the auctioneer. The appellant cited the case of Co-operative Bank of Kenya vs Jeofrick N. Muinde t/a Kimu Auctioneers (HCCA 9 of 2019) KEHC 1967 (KLR) and Joseph M. Ng’ang’a & 2 others vs Lawrence Muriungi Gichunge & another (2016) eKLR.
10. The appellant submitted that the 2<sup>nd</sup> Respondent’s first point of call should have been the 1<sup>st</sup> Respondent and only upon meeting the exceptions under Rule 7 of the Auctioneer Rules could it pursue the appellant. The appellant contends that the burden of proof was not discharged and the magistrate court erred when she failed to consider that the 2<sup>nd</sup> Respondent was required to first seek their fees from the Debtor and only after exhausting the exceptions under Rule 7 of the Auctioneers Rule 1997.
11. On whether the bill of costs is drawn in accordance with the Auctioneers Rules 1997, the appellant submitted that the bill of costs offends the provisions of the Auctioneers Rules 1997 particularly the fourth schedule to the Auctioneers Rules. The appellant submitted that the learned magistrate fell into error when she awarded items which are not provided for under the Auctioneers Rules.

## **2nd Respondent’s submissions**

12. On whether the Appellant has a right of appeal concerning its inclusion as a party in the Bill of costs, the 2<sup>nd</sup> Respondent submitted that the Appellant raised a Preliminary Objection to the Bill under Rule 7 of the Auctioneers Rules 1997, in a series of related matters being Misc. E1259, Misc.E1260, Misc. E1262, and Misc. E1308 of 2022, Misc. 1262 of 2022 was the lead file. In her ruling on the preliminary objection delivered on 8<sup>th</sup> September 2023, Hon. Grace Omodho’s dismissed the Preliminary Objection and held that the Appellant is a necessary party to the Bill of Costs. The Appellant did not appeal the decision on within the seven days’ timeline stipulated in Rule 55(5) of the Auctioneers Rules. The Appellant has been shut out by time and has not sought an extension of time to file the Appeal in these proceedings. Therefore, the Auctioneer’s enjoinder of the Appellant as the instructing client is well-founded pursuant to Hon. Grace Omodho’s finding that both the Appellant and the 1<sup>st</sup> Respondent were necessary parties for the proper assessment of fees, irrespective of who would ultimately pay the costs.
13. It was submitted by the 2<sup>nd</sup> Respondent that the appellant cannot raise any issue as concerns Rule 7 of the Auctioneers Rules 1997 because Hon. Grace Omodho’s ruling has never been appealed. We submit that the issue as to whether the Appellant is a necessary party to these proceedings is moot.
14. On the issue of who between the instructing party and the 1<sup>st</sup> respondent (debtor) is liable to pay the Auctioneer’s costs, the 2<sup>nd</sup> Respondent relied on Rule 7 of the Auctioneer’s Rules 1997 and submitted that the instructing party promised the Auctioneer to stop the Auction and that they would send his



cheque. The Auctioneer could not pursue the debtor as the instructing party had entered into private arrangements for debt recovery of his costs because he had no leverage anymore with the debtor the auctioneer's only recourse for payment was the instructing party. Reliance was placed on Kenya Oil Company Limited vs Jovan H Kariuki t/a Moran Auctioneers [2020] KEHC 7688 (KLR) and Francis Mwatha Macharia t/a Freeman Auctioneers Services vs Tata Africa Holdings (Kenya) Limited [2019] KEHC 3964 (KLR).

15. The 2<sup>nd</sup> Respondent contended that the appellant was the instructing party and is therefore bound to meet the costs lawfully incurred by the Auctioneers. The Auctioneer submits that the Appellant is estopped from raising any objections under Rule 7 of the Auctioneer's Rules due to its conduct, which demonstrates an acceptance of primary responsibility for the settlement of the Auctioneer's costs, further the lower Court found both the instructing party and the debtor liable for the auctioneer's fees.
16. In regards to whether the bill of costs is taxed to scale, the 2<sup>nd</sup> Respondent submitted that the bill of costs is drawn to scale. The Auctioneer submitted that having issued requisite notices to the 1st Respondent upon the Appellant's instructions on 29/01/2018 and the sale having been stopped, he was entitled to his professional fees by Rule 55 (1) of the Auctioneers Rules 1997.
17. The 2<sup>nd</sup> Respondent submits that the Appellant's Chamber Summons Application dated 8/03/2024 lacks merit and represents an attempt to evade a clear legal and contractual obligation. The Appellant, as the instructing client, was correctly included as a necessary party in the taxation proceedings, aligning with both the Auctioneers Rules, 1997, and binding judicial authority.

### **Analysis and Determination**

18. Upon consideration of the chamber summons application, the response, rival submissions and authorities relied upon, I find the following issues condensing for determination:
  - i. Whether the appeal is proper before this court.
  - ii. Whether the appellant was a proper party for the 2<sup>nd</sup> Respondent's bill of costs.
  - iii. Whether the Bill of costs is drawn in accordance with the Auctioneer's Rules 1997.
19. On the first issue, this court is guided by the provisions of Rule 55 of the Auctioneer's Rules. The said Rule 55 of the Auctioneer's Rules 1997 provides that;
  1. Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.
  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.
  3. In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.



4. An appeal from a decision of a registrar or a magistrate or the Board under subrules (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.
20. In the case of *Mutia Muindi t/a Matiba Auctioneers –vs- CFC Stanbic Ltd & Ano* (2015) eKLR where the Court held that:
- “There is no doubt that the time allowed to file an appeal against the taxing officer’s decision on taxation of a bill of costs under Rule 55(5) of the Auctioneers Rules is 7 days from the date of the decision. Rule 55(5) of the Auctioneers Rules only allows a window of 7 days within which to file an appeal after the decision appealed from.”
21. The impugned ruling in this matter was delivered on 1<sup>st</sup> March 2024 and the present appeal was filed on 8<sup>th</sup> March 2024. It is thus clear that this appeal was filed within the statutory seven days period envisaged under Rule 55 (5) of the Auctioneer’s Rules, 1997.
22. I have perused the record of appeal and noted that indeed the ruling was delivered on 1<sup>st</sup> March 2024 and noted that the Chamber summons application is dated 8<sup>th</sup> March 2024. This court finds that this appeal was filed within the time frame and therefore properly before this court.
23. On the second issue, the relevant provision is anchored on Rule 7 of the Auctioneers Rules, 1997 which stipulates that;
- “A debtor shall pay the charges of the auctioneer unless:
- a. The debtor cannot be found or
  - b. He has no goods upon which execution can be levied; or
  - c. The sale proceeds are insufficient thereof to cover the charges, in which cases the creditor shall pay the charges or the deficiency.”
24. I have carefully read through the aforementioned provision and it is clear that a debtor shall pay the charges of the auctioneer unless the debtor cannot be found or he has no goods upon which execution can be levied or the sale proceeds are sufficient thereof to cover the charges in which case the creditor shall pay the charges or the deficiency. The law provides for instances when the creditor shall pay the auctioneer charges.
25. It has been submitted by the 2<sup>nd</sup> Respondent that the 1<sup>st</sup> Respondent (debtor) is liable to pay the Auctioneer’s costs under Rule 7 of the Auctioneer’s Rules 1997. Further, the 2<sup>nd</sup> Respondent submitted that the instructing party promised the Auctioneer to stop the Auction and that they would send his cheque. For that reason, the Auctioneer could not pursue the debtor as the instructing party had entered into private arrangements for debt recovery of its costs.
26. From the above arguments, it is my finding that the appellant who was the instructing party in the circumstances was the proper party to settle the auctioneer’s costs as it stopped the auctioneer from conducting the auction where the 2<sup>nd</sup> Respondent could have recovered the charges from the debtor.
27. As regards the issue of whether the Bill of costs was drawn to scale, Part II of the Fourth Schedule of the Auctioneers Rules, 1997 provides for auctioneer’s charges.



28. The principles governing reference application were laid down in the case of Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board [2005] eKLR the Court of appeal held that;

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph I: “where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases”.

29. It is important to note that taxation of bills of costs is a discretionary function of a taxing master and as indicated in the above authority, an appellate court will not interfere with such discretion unless there is clear evidence of misdirection, error of principle, or that the sum awarded is manifestly excessive. In the present appeal, no such evidence has been presented to warrant interference by this court.

30. I have carefully perused the Auctioneer’s bill of costs dated 14<sup>th</sup> March 2022 and noted that the same is drawn to scale in line with the provisions under Part II of the Fourth schedule of the Auctioneers Rules, 1997. In my considered view, the Appellant has not demonstrated how the taxing officer misapplied the schedule or awarded amounts outside the allowable scale.

31. In view of the foregoing, I find that the present appeal is without merit and is hereby dismissed in its entirety. I proceed to issue the following orders;

- i. The Chamber Summons application dated 8th March 2024 is hereby dismissed.
- ii. The ruling and Certificate of Taxation issued by Hon. Lucy Ambasi (CM) delivered on 1st March 2024 is hereby upheld.
- iii. Each party will bear its own costs for this appeal

It is so ordered.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY THIS 18TH DAY OF SEPTEMBER, 2025.**

.....

**HON. JULIUS K. NG’ARNG’AR**

**JUDGE**

Ruling delivered in the presence of:

Siele/Susan (Court Assistant

Lundi for the Appellant

No Appearance for the 1st Respondent

Ngunyi holding brief for the 2nd Respondent

