



**Nyamurongi t/a Nyamurongi & Company Advocates v Kisii County
Assembly Service Board & another (Miscellaneous Civil Application
157 of 2022) [2024] KEHC 1304 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CIVIL APPLICATION 157 OF 2022
TA ODERA, J
FEBRUARY 15, 2024**

BETWEEN

**HERBERT NYAMURONGI T/A NYAMURONGI & COMPANY
ADVOCATES APPLICANT**

AND

**KISII COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT
KENNEDY MOTURI MOKUA T/A MOCO AUCTIONEERS 2ND RESPONDENT**

RULING

1. By a Notice of Motion dated 10.7.2022, and filed through the firm of Ochwangi & Co. Advocates, the Applicants herein sought the following orders: -
 - a. Spent.
 - b. This Honourable Court be pleased to grant leave to the applicant to file an appeal against the ruling of the Deputy Registrar of this Honourable Court delivered on 3rd June 2022.
 - c. Costs of this application do abide the outcome of the intended appeal.
2. The Application was based on the grounds that the 2nd Respondent lodged his bill of costs for taxation *vide* Kisii HC Miscellaneous Civil Application No. 143 of 2019 which arose from auctioneering work done in Kisii HCCC No. 24 of 2014. A Ruling was delivered on 21.12.2020 and the bill was taxed at KShs. 261,980/=. The 1st Respondent subsequently lodged an Application dated 6.2.2022 seeking to enjoin the Applicant herein as a 2nd Respondent and for the 1st Respondent i.e. Kisii County Assembly Service Board, to be discharged. A Ruling on that Application was delivered on 3.6.2022 and the Deputy Registrar set aside her Ruling of 21.12.2020. *vide* the same Ruling, the Deputy Registrar substituted the sum of KShs. 261,980/= with the sum of KShs. 2,365,987/= and ordered the Applicant



herein to pay the 2nd Respondent herein. The Applicant being aggrieved by the Ruling, was desirous of appealing against it and was thus seeking leave to appeal.

3. The Applicant swore a Supporting Affidavit on 10.7.2022. He reiterated the grounds on the face of the Application. In addition, he annexed the relevant pleadings filed before the Deputy Registrar in Kisii HC Misc. Civ. Appl. No 143 of 2019 and a draft Memorandum of Appeal. He deponed that he was aggrieved by the Ruling on the following salient grounds:
 - a. Whether he was properly enjoined to Kisii HC Misc. Civ. Appl. No. 143 of 2019.
 - b. Whether the Registrar had jurisdiction to hear an application for joinder of parties.
 - c. Whether he could be ordered to pay the auctioneer's costs without having participated in the taxation.
 - d. Whether the Registrar had jurisdiction to suo moto vacate its Ruling of 21.12.2020.
 - e. Whether the Deputy Registrar had jurisdiction to suo moto substitute the taxed sum of KShs. 261,980/= with the sum of KShs. 2,365,987/=.
4. He deponed that his firm did not participate in the taxation proceedings and he was therefore condemned unheard and saddled with the 1st Respondent's responsibilities.
5. The 2nd Respondent swore a Replying Affidavit on 25.7.2022 in opposition to the Application. He deponed that it was not in dispute that in 2014 the Applicant instructed him to recover a debt from the 1st Respondent. He performed his duties which prompted him to file his bill of costs for assessment as per Rules 7 and 55 of the *Auctioneer's Act*. The Deputy Registrar delivered a Ruling on 3.6.2022 and ordered the Applicant to settle the auctioneer's costs that were remitted to his firm. The Applicant did not present any proof of remitting any money to M/s Odongo Auctioneers as alleged. He was seeking to avoid his obligations by making unsubstantiated claims. He urged the Court to dismiss the Application as it was frivolous, vexatious, without merit and abuse of court process.

Submissions

Applicant's Submissions

6. The Applicant filed his submissions dated 8.5.2023. He submitted that the Deputy Registrar proceeded to substitute her Ruling of 21.12.2021 taxing the 2nd Respondent's costs at KShs. 261,980/= with a Ruling awarding the 2nd Respondent KShs. 2,365,987/= in costs. The substitution of the taxed costs was not one of the prayers sought and neither was the substitution of the 1st Respondent with the Applicant.
7. He submitted that Section 75(1) of the *Civil Procedure Act* provided for appeals which lie as of right and those for which leave must be sought.
8. He submitted that the matters for which he was desirous of appealing against could only be commenced upon obtaining leave. He cited the case of *Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions & 3 Others* [2015] eKLR where the Court of Appeal emphasized that courts should focus on achieving the overriding objective as opposed to procedural technicalities. He submitted that he had demonstrated that he had an arguable appeal and prayed for leave to challenge the same.
9. He submitted that the Respondents would not be prejudiced if the application was allowed as prayed.



The 2nd Respondent's Submissions

10. The 2nd Respondent filed its submissions dated 7.7.2023. He submitted that the Applicant did not seek for leave to appeal within the statutory period of 14 days; the Applicant had not sought leave to file the Application out of time; and he had not provided any explanation as to why it took him over 40 days to file the instant Application.
11. He submitted that the intended appeal was frivolous and had no chances of success as the debtor paid all its dues to the 2nd Respondent.
12. He cited the case of *Khelef Khalifa & 2 others v Independent Electoral and Boundaries Commission & another* [2017] eKLR; where the Court held that an absolute enactment must be obeyed and fulfilled exactly.
13. He also cited the case of *Almond Resort Limited v Mohamed Mahat Kuno & another* [2020] eKLR where the Court cited the case of *Serephen Nyasani Menge v Risipab Onsase* [2018] eKLR where the Court stated that under *Order 43 Rule 3*, leave must be sought from the court that made the order either at the time the order is made, by an oral application, or within 14 days from the date the order was made. This requirement, it was argued, was couched in mandatory terms. He submitted the Applicant ought to have sought leave within the stated timelines. In support of the argument for declining to grant leave to file an appeal, he cited the case of *David Mwaniki Kasimu v Collins Musyani Muthangya & another* [2020] eKLR.
14. He also cited the case of *Northewood Agencies v Raj Devani & another* [2019] eKLR, where the Court held that Section 75 of the *Civil Procedure Act* and Order 43 Rules (1)(3) of the *Civil Procedure Rules* is couched in mandatory terms in terms of seeking leave for matters where appeals do not lie as of right.
15. He submitted that the Application was not competently before Court since it was filed out of time. The Applicant had not sought extension of time to file the application for leave.
16. He submitted that discretion must be exercised judiciously and cited the case of *National Super Alliance (NASA) v Independent Electoral and Boundaries Commission* [2017] eKLR. He submitted that since the Applicant had not given an explanation for the delay, he was not deserving of this Court exercising its discretion in his favour.

The 1st Respondent's Submissions

17. The 1st Respondent did not file submissions or any document in opposition to the Application.

Determination

18. I have considered the Application herein, the Replying Affidavit and the parties' submissions.
19. The Application is one seeking leave to file an appeal. The Application, grounds, supporting affidavit and even the Applicant's submissions are very particular about that.
20. A common argument by the Applicant and the 2nd Respondent is that an appeal from the Deputy Registrar's decision does not lie as of right but must be preceded by leave so sought and granted.
21. I have perused the various legal provisions and I have not found anything in support of that argument.
22. The Application before the Deputy Registrar dated 6.2.2022 sought the various orders:



- a. That the firm of Nyamurongi & Co. Advocates be enjoined in these proceedings as 2nd Respondents.
 - b. That the Respondent/Applicant be discharged from these proceedings.
 - c. That the costs of this application be provided for.
23. The said Application was filed under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 1 Rule 10(2) of the Civil Procedure Rules and the inherent powers of the Court.
24. Therefore, the application was principally one for addition and/or substitution of parties and the 1st Respondent herein was correct in citing Order 1 Rule 10(2) of the Civil Procedure Rules. It provides thus:
10. Substitution and addition of parties.
 - (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may be appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, added.
25. Order 49 rule 7(2) of the Civil Procedure Rules provides thus:
7. Hearing of applications
 - (2) An appeal from a decision of the registrar under the Orders referred to in sub rule [1] shall be to a judge in chambers.
26. Order 49 Rule 7 [1][b] of the Civil Procedure Rules lists under [i] Order 1, rules 2, 8, 10, 17 and 22. It therefore follows that the present appeal does indeed lie as of right.
27. There is no need to seek leave to appeal as purported by the Applicant. I am further fortified in this finding by the provisions of Section 75 [1] [h] of the Civil Procedure Act which provides as follows:
75. Orders from which appeal lies
 - (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-
 - (h) any order made under rules from which an appeal is expressly allowed by rules.
28. In any event, the present appeal was against the taxed costs (which to my mind is not) the appeal would still lie as of right. Rule 55 [2], [3] and [4] of the Auctioneer's Rules 1997 (as read with Section 75[1] [h] of the Civil Procedure Act) clearly provides that appeals against the decision of a registrar or magistrate or the Board shall be to a judge in chambers.
29. I believe I have said enough to show that not the current application is superfluous. I however allow it as prayed.
30. That said, I note that the Applicant raised arguable points as regards the Deputy Registrar's Ruling delivered on 3.6.2022. In the interests of justice, I will allow the Applicant to file an appeal against



the said Ruling. The same shall be filed within 14 days of the date of this Ruling otherwise the orders will lapse.

31. Each party to bear its own costs.

32. It is so ordered.

DATED, DELIVERED AND SIGNED AT KISII THIS 15TH DAY OF FEBRUARY 2024.

T.A. ODERA

JUDGE

In the presence of:

Miss Kebungo Applicant

Kyumu H/B for Mr Muchemi for the 1st Respondent

Miss Nduhukire for the 2nd Respondent

Oigo- Court Assistant

