



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muyodi t/a Rhemat Auctioneers v Faulu Microfinance Bank Ltd; Okusimba & 3 others (Debtor); Wamoto t/a Pawaba Auctioneers (Auctioneer) (Civil Appeal E046 of 2023) [2024] KEHC 15888 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 15888 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E046 OF 2023  
REA OUGO, J  
OCTOBER 22, 2024**

**BETWEEN**

**WALTER MUSUNGU MUYODI T/A RHEMAT AUCTIONEERS ..... RESPONDENT**

**AND**

**FAULU MICROFINANCE BANK LTD ..... RESPONDENT**

**AND**

**LUKAS SAMO OKUSIMBA ..... DEBTOR**

**ROSELYNE MULENGA ..... DEBTOR**

**COLLINS OTIENO OGWAL ..... DEBTOR**

**JEFFERSON KASANGO ..... DEBTOR**

**AND**

**PAUL BARASA WAMOTO T/A PAWABA AUCTIONEERS ..... AUCTIONEER**

**RULING**

1. This ruling relates to a preliminary objection raised on the following grounds:
  1. That the current application offends provisions of the Rule 55 (4) of the Auctioneers Rules 1997.
  2. That the current application offends mandatory provisions of Rule 55 (5) of the Auctioneers Rules 1997.
  3. That the stay of execution cannot be granted in respect of the taxed costs.



4. The instant application is thus incompetent, bad in law and fatally defective and should be struck off with costs to the Auctioneer/Respondent.
2. Mr. Anwar for the auctioneer/respondent argued that the assessment was done on 5/7/2024 and the application was filed on 29/7/2024. A period of 7 days had lapsed and the appeal was filed outside the stipulated time frame. They also argue that the rules demand that the appeal be filed by way of chamber summons which was not the case of the appeal. Mr. Anwar submitted that the appeal was therefore incompetent. It was further submitted that the relief of staying taxed costs cannot be stayed.
3. Mr. Maganga made oral submission on behalf of the appellant. He submitted that the preliminary objection is unmerited for reasons that substantive justice overrides the issue of form. The issue of not filing a chamber summons will not occasion a miscarriage of justice. It was argued that the ruling by the taxing officer was delivered on 18/5/2023 and the appeal was filed on 24/5/2023 within 7 days.

### Determination

4. Rule 55 of the Auctioneers Rules provide as follows:
  - “ 55 (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.
      4. An appeal from a decision of a registrar or a magistrate or 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 Magistrate”
5. Both parties cited the case of *Sino Hydro Corporation Limited v Tumbo t/a Dominion Yards Auctioneers* [2022] KEHC 15545 (KLR) where the court held as follows:
  37. In Ezekiel Kimiza T/A Auto Land Auctioneers v Mistry Valji Naran Mulji (supra) C. Yano J struck out a reference from the decision rendered by the taxing master following the taxation of the auctioneers bill of costs, holding that the application failed to comply with the procedure prescribed by rule 55(5) of the Auctioneers Rules.
  38. Thus, a reference from taxation pursuant to paragraph 11 of the Advocates Remuneration Order is not synonymous with an appeal pursuant to rule 55(5) of the Auctioneers Rules.
  39. Unlike in the above cited cases referred to extensively by F.A Ochieng J (as he then was), in the present case, the appellant has filed an appeal. He did not file a reference or a chamber summons. The chamber summons is what is contemplated in rule 55(4)(5) of the Auctioneers Rules.
  40. Therefore, does that defect render this appeal fatally defective and irredeemable? I disagree. In my humble view, want of form cannot be a ground for dismissal or striking out of an otherwise competent or meritorious appeal. This is because form does not go to the root or to the jurisdiction of the appeal or suit. In addition, failure to comply with the format provided



for in rule 55(4) (5) of the Auctioneers Rules would not in any way occasion a miscarriage of justice to any party to this appeal.”

6. It is clear that filing a notice of motion for an appeal under rule 55(5) of the Auctioneers Rules will not render a competent appeal fatally defective. The ruling in question is also said to be one dated 18<sup>th</sup> May 2023 and the appeal was filed on 25<sup>th</sup> May 2023, therefore the 7-day timeframe was observed.
7. However, in this case, the purported appeal/application is brought under Order 42 Rule 6 which is concerned with a stay in case of appeal. The appellant has not filed a proper and competent appeal under rule 55(5) of the Auctioneers Rules. In essence, there is no appeal under rule 55 of the Auctioneers Rules. I therefore agree with the auctioneer/respondent that the appeal is incompetent and fatally defective and is consequently struck off. Costs are awarded to the auctioneer/respondent.

**DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 22<sup>ND</sup> DAY OF OCTOBER 2024**

**R.E. OUGO**

**JUDGE**

In the presence of:

Appellant/Applicant - Absent

Respondent - Absent

Wilkister -C/A

