



Kenya Power Company Ltd v M/S Fortunes Auctioneers (Civil Appeal E091 of 2022) [2023] KEHC 915 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E091 OF 2022
KW KIARIE, J
FEBRUARY 16, 2023**

BETWEEN

KENYA POWER COMPANY LTD APPELLANT

AND

M/S FORTUNES AUCTIONEERS RESPONDENT

RULING

1. On November 29, 2022 the respondent herein raised a preliminary objection on the following grounds:
 - a. That the instant application date November 21, 2022 was filed in total violation of the mandatory provisions of Rule 55(5) as read with Order 42 Rule 1 of the [Civil Procedure Rules](#). In fact the chamber summons under Rule 55(5) is the equivalent of memorandum of Appeal under Order 42 Rule 1, hence the same should be accompanied by the Record of Appeal not by an affidavit. Besides, Rule 55 does not provide for an affidavit in support of the chamber summons.
 - b. That the Memorandum of Appeal is a Chamber Summons which sets forth concisely and under distinct heads the grounds of objection to the decree or order appealed against and it provides that all what transpired before the court appealed from is to be introduced to the court appealed to by a Record of Appeal and not be an affidavit.
 - c. That the annexures attached to the supporting affidavit sworn on November 21, 2022 by the counsel of the appellant in respect of the instant application herein offends the mandatory provisions of Rule 9 of the [oaths and Statutory Declaration Rules](#) since the same refers to annexures that were neither marked nor sealed with Commissioner's stamp. Consequently, the supporting affidavit is fundamentally defective and cannot stand as part of the records in this application.



- d. That the supporting affidavit is therefore incompetent and should be rejected accordingly as without the annexures that were marked nor sealed with commissioner's stamp the said supporting affidavit is valueless and incurably defective and cannot sustain the current application.
 - e. In the premises, the instant chamber summons application dated November 21, 2022 which was filed in court on 22//11/2022 is legally untenable.
2. A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969]EA 696 at page 700 paragraphs -F Law JA as he then was had this to say:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....

3. Rule 55 (4) & (5) of the [Auctioneers Rules](#) provides as follows:
- (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..

It is clear that Rule 55 (5) of the [Auctioneers Rules](#) does not provide for a supporting affidavit. In the interest of justice the correct approach would be to strike out the supporting affidavit and not the appeal.

4. I therefore order that the offending supporting affidavit be struck out. Costs to abide with the outcome of the appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 16TH DAY OF FEBRUARY, 2023.

KIARIE WAWERU KIARIE

JUDGE

