



**Musoni Kenya Limited & another v Arnold Ombonya Okutoyi t/
a Dimonde Agencies and Auctioneers (Miscellaneous Reference Application
35 of 2022) [2023] KEHC 20518 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20518 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS REFERENCE APPLICATION 35 OF 2022**

DK KEMEL, J

JULY 21, 2023

BETWEEN

MUSONI KENYA LIMITED APPLICANT

AND

VINCENT CHIRCHIR DEBTOR

AND

**ARNOLD OMBONYA OKUTOYI T/A DIMONDE AGENCIES AND
AUCTIONEERS RESPONDENT**

RULING

1. This is a reference by the applicant dated August 3, 2022 in which it seeks to set aside, vary and/or dismiss the ruling and order of the Taxing Master made on June 10, 2022 in Misc Application No 16 of 2020 in accordance with rule 7 of the *Auctioneers Rules, 1997*. The applicant as well prays in the alternative, for the bill of costs by the Auctioneer be taxed afresh after which the debtor be ordered to pay the same.
2. The application is supported by the affidavit of Dennis Juma sworn on even date wherein he deponed *inter alia*; that the Applicant has raised complaints regarding failure by the Respondent to act upon the issued instructions as the amount owed to the Applicant was never recovered; that there was no legal proof that the Applicant had agreed to pay for the Auctioneer's charges; that pursuant to section 7 of the *Auctioneers Rules*, all Auctioneer/Applicant's bill of Costs should be served against the Debtor; that pursuant to Section 7 of the *Auctioneers Rules*, the Auctioneer/Respondent neither served the Debtor nor the Applicant with an invoice, a notice to pay and/or demand for payment; that it would be in the interest of justice that this Court sets aside, varies and/or dismiss the ruling and order of the



- Taxing Master dated June 10, 2022 so as to prevent the subversion of the cause of justice and to direct the correct party to pay the Auctioneers costs.
3. The Applicant also filed its grounds of objection to the Auctioneers bill of costs where it reiterated the contents on the supporting affidavit and further itemized some of the complaints with regard to the Auctioneer's bill of costs.
 4. The Respondent through his replying affidavits sworn on February 14, 2023 has defended the bill as well as the Court's ruling. He argued that the application before this Court was frivolous, vexatious and baseless.
 5. According to the auctioneer, it was clear that the Appellant retained his services as an Auctioneer to recover the loan from its various defaulters and he duly executed the instructions. He further argued that the Applicant was duly served with all the applications dated June 10, 2020 in Bungoma CMCC No 10 of 2020 to 28 of 2020. He averred that while in Court in Bungoma CMCC No 10 of 2020 Counsel on record for the Applicant informed the Taxing Master that they had just received instructions and intended to file a Notice of Preliminary Objection which was eventually dismissed.
 6. He argued that by virtue of the fact that the bills of costs were not opposed, the Taxing Master proceeded to tax the bills in Bungoma CMCC No 10 of 2020 to 28 of 2020 in the presence of Counsels who were holding brief on behalf of Counsels on record. He further argues that the Applicant's laxity in challenging the bill should not be visited upon the Auctioneer/Respondent.
 7. He deponed that the Applicant failed to specify the items allegedly exaggerated or excessively and erroneously awarded in any of the assessed bill of costs rendering the reference as a non-starter.
 8. In response to the Respondent's replying affidavit, the Applicant filed a supplementary affidavit sworn by Rose Wainaina on March 21, 2023 wherein she deponed inter alia; that the Respondent intentionally failed to serve the Applicant with any notice concerning the proceedings before the Taxing Master and feeling blind sided opted to negotiate the taxed amount which did not imply privity to the taxation bill of costs; that the quoted amounts with regard to the letter of instructions, proclamations and the Auctioneers bill of costs was not pursuant to the Auctioneers Fourth Schedule; that the Auctioneer is only entitled to items 1 & 2 since they are covered in the [Auctioneers Rules](#) and that the rest should be taxed off.
 9. Parties duly filed and exchanged their written submissions which have been considered. Basically, they are pulling on their respective corners and all that they state is reiterating what is contained in the various rival affidavits outlined above.
 10. I have considered the application, the respective affidavits and the well-researched submissions of Counsels. Arising from these, I find the issues to be determined are firstly; whether the omission to attach a copy of the ruling or order appealed from was fatal and secondly; whether the application complies with Rule 55(4) and (5) of the [Auctioneers' Rules, 1997](#).
 11. Dealing first with the issue of failing to attach a copy of the ruling appealed from, it is elaborate that the Rule under which the application ought to be brought does not prescribe that such a ruling be attached. It is noted that the Applicant's application is pursuant to Rule 7 of the [Auctioneers Rules 1997](#), instead of Rule 55(4) and (5) of the [Auctioneers' Rules, 1997](#). I therefore hold that failure to attach the ruling to the appeal/reference is not fatal.
 12. The second issue is whether the application before the Court complies with the requirements of Rule 55 of the [Auctioneers Rules, 1997](#). A synopsis of that rule shows that the fees payable to an auctioneer



for the attachment, repossession and sale of movable and immovable property shall be charged in accordance with the [Auctioneers Rules, 1997](#). Rule 55 of the [Auctioneer's Rules](#) provides 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”

13. It is clear from the above provision and in particular Rule 55(5) that 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 and that the Memorandum of Appeal, by way of chamber summons setting the grounds of the appeal shall be filed within 7 days of the decision of the Registrar or Magistrate. This provision clearly prescribes the procedure to be followed where one challenges the decision of the Taxing Officer. That is, the only prescribed way is through a memorandum of appeal by way of Chambers summons. In addition, Rule 55 (5) of the [Auctioneers Rules, 1997](#) only allows a window of 7 days within which to file an appeal after the decision is made. This procedure was termed mandatory by the Court in [Ezekiel Kiminza t/ a Auto Land Auctioneers vs Mistry Valji Naran Mulji](#) [2017] eKLR. This differs from the procedure for filing references to objections under paragraph 11 of the [Advocates \(Remuneration\) Order](#).
14. Recently, the Court of Appeal in [Aprim Consultants vs Parliamentary Service Commission & another](#), Civil Appeal No E039 of 2021, held that where terms of a provision are couched in terms that are plain and unambiguous, it leaves no interpretive wiggle room. The provisions of Rule 55 of the [Auctioneers Rules, 1997](#) in my view, are couched in clear terms with strict timelines for the Applicant. Considering therefore that, the above provisions are clear statutory commands it is the province of the Courts to interpret and give effect to the express language of the above provision.
15. From my in-depth analysis of the Applicant's pleadings and submissions, it is elaborate that the Applicant filed its application pursuant to Rule 7 of the [Auctioneers Rules, 1997](#), Article 159 of the [Constitution of Kenya, 2010](#), Sections 1A, 1B, 3A of the [Civil Procedure Act, 2020](#) and all other enabling provisions of the law.
16. The application which was dated August 3, 2022 and filed on August 22, 2022, was specifically by way of chamber summons taken out under paragraph 11(2) of the [Advocates \(Remuneration\) Order](#). This is the procedure laid down under that rule for objections to decisions on taxation. It is significant that paragraph 3 of the application sought an order that the Respondent “be ordered to pay the cost of this reference.”
17. The supporting affidavit of Mr Dennis Juma is even more telling. In paragraph 3 thereof, he deposes that the Auctioneers' bill of costs was taxed by the Taxing Master who proceeded to deliver a ruling on



the June 10, 2022. Being dissatisfied with the taxation of the said bill, the Applicant's advocates gave notice to the taxing officer of the item to which they were objecting. His supporting affidavit stated:

“That the instructing party being aggrieved by the decision of the Taxing Master in the Trial Court instructed us to file an application before this Honourable Court seeking to be allowed to file grounds of objection and a reference to the ruling delivered on June 10, 2022. The said prayers were allowed by the Honourable Mr Justice Kemei on July 25, 2022.”

18. To the extent that what was filed was admittedly a reference under paragraph 11 of the *Advocates (Remuneration) Order*, and the Applicant even seeks costs for that reference, I have no doubt that there is no compliance with the dictates of Rule 55(5) of the *Auctioneers Rules, 1997*, which expressly provides for the filing of a memorandum of appeal by way of a chamber summons and not a reference. This was clearly a reference under paragraph 11 of the *Advocates Remuneration Order*.
19. It is noted that there was no contention that the Applicant did not file an appeal within the meaning of Rule 55 (5) of the *Auctioneers Rules, 1997*, but that all it filed was a reference under paragraph 11 of the *Advocates (Remuneration) Order*. The appellate jurisdiction of any Court is a creation of statutes and must be exercised within the strict edicts of the statutory jurisdiction. This simply means that there is no appeal pursuant to the *Auctioneers Rules* and as such, the court should dismiss the same with costs.
20. The law and procedure for challenging an Auctioneers Bill of Costs is provided for under Rule 55 of the Auctioneers rules and hence the current application (reference) offends the said Rule and in particular Rule 55(4) which provides that an objection to an auctioneer's costs assessed pursuant to Rule 55(2) must be by way of an appeal and not a reference.
21. In view of the foregoing observations, it is my finding that the applicant's application dated August 3, 2022 is devoid of merit. The same is ordered struck out with costs to the Auctioneer/ Respondent

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF JULY 2023.

D. KEMEI

JUDGE

In the presence of:

Waweru for Mbathi for Instructing Party/Applicant

No Appearance Debtor/Respondent

Shaban for Otsiula for Auctioneer/Respondent

Kizito Court Assistant

