



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC CIVIL APPLICATION NO.108 OF 2020

FIVE ELEVEN TRADERS AND AUCTIONEERS.....APPELLANT

VERSUS

NATIONAL BANK OF KENYARESPONDENT

RULING

1. Vide an appeal by way of a **Chamber Summons** application dated **12th January, 2021**, the Appellant, **Five Eleven Traders and Auctioneers**, approached this court seeking four substantive orders which I wish to reproduce verbatim hereunder:

i. That this Honorable court be pleased to set aside the ruling of the Taxing Master, Hon J.M Nyariki, delivered on 16th December 2020.

ii. That this Honorable court be pleased to tax as drawn the auctioneer's bill of costs dated 20th July 2020.

iii. In the alternative to prayer 2, that this Honorable court be pleased to remit the auctioneers bill of costs dated 20th July 2020 before a different Taxing Master.

iv. That the costs of the appeal be provided for.

2. In opposing the appeal, the Respondent filed a **Notice of Preliminary Objection** dated **29th January, 2021** and put forward the following grounds:-

i. That the said Memorandum of Appeal filed by the Applicant dated 12th January, 2021 is defective, frivolous and an abuse of the court process by dint of Section 55(5) of the Auctioneer's Rules, 1997.

ii. That this Honorable Court does not have the jurisdiction to entertain the appeal herein by dint of Section 55(5) of the Auctioneer's Rules 1997.

iii. That it is in the interest of justice that this Preliminary Objection be determined in favor of the Respondent so as to save on costs and precious judicial time.

iv. That this Honorable Court should strike out the said appeal herein with costs to the Respondent.

3. The appeal was contested by the Respondent through a **Replying Affidavit** sworn on **4th March, 2021** by **Vincent Nguli Titus**. In a nutshell, the Respondent has reiterated the grounds raised in the **Preliminary Objection** in the **Replying Affidavit**. He has averred that the decree was not issued against the Respondent hence there was no lawful basis for attachment of the Garnishee's/Respondent's personal property yet the Judgment debtor is well known to the Applicant.

4. Also, the Respondent has claimed that it discharged its obligation in remitting the decretal sum and it is only fair and in the interest of justice that the auctioneer's bill lie with the Judgment debtor who had already been identified by the Applicant and not the Respondent herein.

5. In addition, the Respondent has asked the court to dismiss the appeal with costs to the Respondent being that the Respondent was not the proper party to bear the auctioneer's charge/fees.

6. At the hearing, the parties consented to having the appeal heard by way of written submissions. The Appellant filed written submissions in support of their appeal on **31st March, 2021** and with leave of the court, filed supplementary written submissions dated **25th June, 2021**.

On its part, the Respondent filed their written submissions dated **19th April, 2021**. The court record shows that the Respondent filed further written submissions on **26th May, 2021**.

7. In their submissions, the advocates on record restated and expounded on the positions taken by their respective clients in support and in opposition to the appeal as summarized below.

The Applicant's/Appellant's Submissions

8. The Appellant has countermanded these averments and cited the case of **Gabriel Osimbo –vs- Chrispinus Mandare [2020]eKLR**, which discussed the import of **Order 50 Rule 4** of the **Civil Procedure Rules** as read together with **Section 57(b)** of the **Interpretation and General Provisions Act** which excludes from the computation of time, for the purposes of any written law, Sundays, Public Holidays and all other excluded days. The Court of Appeal held that the Christmas Vacation period, beginning from 21st December in a given year and ending on 13th January of the following year is for the purposes of **Section 57(b)** of the **Section 57(b)** of the excluded days.

9. It is the Appellant's case that the appeal was filed timeously since time stopped running on **20th December, 2020**, the fourth day since the date of the impugned ruling and commenced running on **14th January, 2021**. The appeal was filed on **13th January, 2021** therefore in factoring in the excluded time, only four countable days had lapsed since the date of the ruling.

10. The Appellant has also relied on the case of **Kamlesh Mansukhalal Damji Pattni –vs- Director of Public Prosecutions & 3 Others [2015]eKLR**, where the court held;

“It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial Officers are also State officers, and consequently are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve.”

11. The Appellant has further submitted that the Respondent would not suffer any prejudice if the appeal is allowed out of time and it is the Appellant herein who would be prejudiced if it were to be driven out of the seat of justice on a mere technicality.

12. Finally, the Applicant/Appellant has stated that the **Auctioneer's Rules** give the board discretion to disregard time limitations imposed therein and the court should thus be flexible in its regard for procedural technicalities. The Appellant has prayed that the **Preliminary Objection** should thus be dismissed.

The Respondent's Submissions

13. According to the Respondent's counsel, the Applicant's application was filed outside the stipulated period in that the decision having been made on **16th December, 2020** then the application ought to have been filed on **23rd December, 2020** and not **13th January, 2021**. Further, it has been submitted that the said **Chamber Summons** was not accompanied with a **Supporting Affidavit** to enumerate the grounds that the appeal is premised on.

14. The Respondent has relied on the case of **Kiminza t/a Auto Land Auctioneers -vs- Mistry Valji Naran Mulji [2017] eKLR** in which the Honorable Judge struck out the Appellant's application with costs in favour of the Respondent expressing himself as follows:-

“...In addition, Rule 55 (5) of the Auctioneers Rules only allows a window of 7 days within which to file an appeal after the decision is made. There is no doubt that the procedure prescribed and the time within which to file an appeal is mandatory. In this case, the Respondent has approached the Court by what is referred to as a “Reference” filed on 16th March 2017. This is obviously an unknown procedure under the Rules and certainly one filed outside the time permitted and without leave.”

15. Further, the Respondent has submitted that the Appellant's reason that the High Court was on Vacation from **21st December, 2020** to **13th January, 2021**, hence the filing of the appeal outside the prescribed time should not stand. This is in line with the provisions under **Article 48** of the **Constitution of Kenya, 2010** which provides that the state shall ensure access to justice for all persons.

16. The Respondent has gone on to submit that the Appellant had not sought leave to file the appeal and stated that the importance of seeking court's leave is propounded in the case of **Kenya Oil Company Limited –vs- Jovan H Kariuki t/a Moran Auctioneers [2020] eKLR**, where, in dismissing the application, the court stated as follows;

“... I note that nowhere in the Applicant's pleadings has any attempt been made to explain the reason for the delay in filing the instant application. While I find that this court has the discretion to grant leave to the Applicant to file the appeal out of time, I also find like all discretionary orders, the discretion to grant leave to appeal out of time is not automatic right and can only be exercised where the Applicant has placed before the court, sufficient grounds to explain the delay in filing of the appeal”

17. The Respondent has also stated that the Applicant has not explained to the court the reasons for delay and is therefore not entitled to the exercise of the discretionary powers of the court hence the appeal should be struck out. The Respondent has cited the case of Leo Sila Mutiso –vs- Rose Hellen Wangari [1997], where it was held that;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether or not to grant an extension of time are: firstly, the length of the delay; secondly, the reason for the delay; thirdly (possibly) the chance of the appeal succeeding if the application is not granted; and fourthly, the degree of prejudice to the Respondent if the application is not granted.”

Analysis and Determination

18. I have carefully considered the appeal by way of the Chamber Summons, the affidavits on record, the Preliminary Objection, the parties’ rival written submissions and all the authorities cited. Having done so, I find that what this court is required to determine first is the Preliminary Objection on whether the appeal was filed within time because it raises both procedural and substantive issues which go to the jurisdiction of the Court.

19. **Rule 55(5)** of the **Auctioneers Act** provides that;

“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 view of the above provision, I wish to briefly address the Respondent’s complaint that the Appellant did not accompany the filed Chamber Summons with a Supporting Affidavit before delving into the issue of whether the appeal was filed within time.

21. In the case of **Oscar Otieno Odongo Trading as Odongo Investment Auctioneers –vs- Sukari Industries Limited, Misc. Civil Application No.293 of 2018, eKLR**, the court dealt with issues emanating from the decision made by the learned Senior Resident Magistrate when he had been called upon to assess the Auctioneer’s costs. The Auctioneer was dissatisfied with the decision of the learned Magistrate, and it therefore filed a **Chamber Summons** under **Rule 55(4)** of the **Auctioneers Rules**. However, the said **Chamber Summons** was not supported by an affidavit. The Respondent, in that case, asked the court to strike out the Chamber Summons, as being incompetent, due to the absence of a **Supporting Affidavit**.

22. In his Ruling, Mrima J. held that pursuant to **Rule 55(5)** of the **Auctioneers Rules**, the **Chamber Summons** is the equivalent of a **Memorandum of Appeal** under **Order 42 Rule 1** of the **Civil Procedure Rules**. The learned Judge stated thus;

“That is the reason why an Affidavit is not required to accompany the Chamber Summons. Like the appeals under Order 42 of the Civil Procedure Rules, all what transpired before the Court appealed from is to be introduced to the Court appealed to by a Record of Appeal. I therefore do not see how the Chamber Summons and the Record of Appeal infringed any law. In any event, the argument rests on the form of the appeal and procedural issues, which Article 159 (2) (d) of the Constitution overrides, for substantive justice.”

23. From the reading of **Rule 55(5)** of the **Auctioneers Rules**, I agree with the Hon. Mrima’s holding that there is no requirement for an affidavit to accompany the **Chamber Summons** as filed by the Appellant in this case and proceed to find that the Appellant complied with the provisions of **Rule 55(5)** of the **Auctioneers Rules**.

24. Regarding the issue on whether the appeal was filed out of the stipulated time, it is note-worthy that filing a suit or application out of time and without leave of Court to extend time goes to the root of the suit/application and thus it is not merely a procedural defect. It cannot be a technicality that can be cured by the provisions of **Article 159 (2) (d)** of the **Constitution** and **Order 51 Rule 10(2)** of the **Civil Procedure Rules** as submitted by the Appellant.

25. In the case of **Mutia Muindi ya Matiba Auctioneers –vs- CFC Stanbic Ltd & Ano [2015]eKLR**, it was held that:

“Time bar is both procedural and substantive issue which goes to the jurisdiction of the Court. The corollary of the time bar is that the authority of Court over the dispute is extinguished”

26. Further, in the cases of **Owners of Motor Vessel “Lilian S” –vs- Caltex Oil (K) Ltd [1989]KRL 1** and **Kakuta Maimai Hamis –vs- Peris Tobiko & 2 Others [2013]eKLR**, it was held that *“the appellate jurisdiction of any Court is a creation of statutes and must be exercised within the strict edicts of the statutory jurisdiction”*.

27. Additionally, the Supreme Court of Nigeria said the following in the case of **Ocheja Emmanuel Dangana –vs- Hon. Attai Aidoko Alo Usman & Others, SC 480/2011 and SC 11/2012 (CONSOLIDATED)** where **Bode Rhodes-Vivour, JSC** stated:

“A court is competent, that is to say, it has jurisdiction when;

i. it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and

ii. the subject matter of the case is within its jurisdiction, and no feature in the case...prevents the court from exercising its

jurisdiction; and

iii. the case comes before the court initiated by the due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction

28. Therefore from the above cases, there is no doubt that the procedure prescribed and the time within which to file an appeal under **Rule 55(5)** of the **Auctioneer's Rules** is mandatory.

29. The Appellant submitted that his appeal was timeously filed since in computing time in respect of this appeal, it stopped running on **20th December, 2020** during the Christmas Vacation and commenced running on **14th January, 2021**. In view of the provisions under **Rule 55(5)**, I find the Appellant's excuse implausible and not sufficient reason to warrant this court's discretion. This is because, during judicial recess, it is a practice that the Courts and their services continue to operate as normal during those periods, in which hearings can be organized if the circumstances of the case so require and there is always a Judge on duty during the Vacation. I agree with the Respondent's submissions that the registries are always in operation during recess and the Appellant would still have filed its appeal on time.

30. It is apparent that the Appellant has not been candid with this court. The orders the Appellant seeks are discretionary in nature and equitable. Equity calls upon those seeking its aid to come before it with clean hands and also do equity. In the case of **John Njue Nyaga – vs- Nicholas Njiru Nyaga & Another [2013]eKLR**, the Court of Appeal sitting at Nyeri observed as follows:

“It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings.” The Applicant has not done so and is underserving of the orders he seeks.”

31. This is the situation obtaining here. The Appellant ought to have properly brought itself before this Court and the Court on its part must first be properly clothed with the necessary jurisdiction before embarking on determining the appeal. In this case, both conditions have not been met.

32. In view of the aforesaid, I find the Respondent's **Preliminary Objection** meritable, allow the same and strike out the Appellant's application with costs to the Respondent. However, the Appellant is nonetheless at liberty to move the High Court for extension of time in the proper manner.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021.

D. O. CHEPKWONY

JUDGE

IN THE PRESENCE OF:

MR. ORIGI COUNSEL FOR APPELLANT

M/S AMBETSA COUNSEL FOR RESPONDENT

COURT ASSISTANT - GITONGA