

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
MISC APPL NO. E548 OF 2021
(Coram: F. Gikonyo J)

IRENE ADHIAMBO T/A ZASHA AUCTIONEERS.....
APPLICANT

VERSUS

SAMUEL GACHIE KAMITI.....1ST
RESPONDENT

OSEKO & OUMA ADVOCATES.....2ND
RESPONDENT

EQUITY BANK LIMITED.....3RD
RESPONDENT

JAMES NJUGUNA MWANGI.....4TH
RESPONDENT

MARY WANGARE WAMAE.....5TH
RESPONDENT

KENNETH MBAABU MUCHIRI.....6TH
RESPONDENT

GERALD GACHOKA WARUI.....7TH
RESPONDENT

ANDREW MWANGI KIMANI.....8TH
RESPONDENT

THE TRUSTEES OF THE EQUITY BANK EMPLOYEES SHARES
OWNERSHIP PLAN
(ESOP).....
.....9TH RESPONDENT

RULING

1. Before me is the 3rd to 9th respondents/applicants' Notice of Motion dated 9th October 2024, expressed to be brought under **Order 22 Rules 51 and 52 of the Civil Procedure Rules**, which is seeking:

-

(4) recall and cancellation of the Warrant of Attachment and Warrant of Sale issued to Kilimanjaro Auctioneers on 2nd October 2024.

(5) release of all the movable assets proclaimed vide proclamation notice dated 4th October 2024, and subsequently attached by Kilimanjaro Auctioneers.

2. The application is premised on the grounds on its face and the supporting affidavit sworn on 9th October 2024 by Samuel Wamaitha, the assistant manager, legal services of the 3rd respondent.
3. The background is that the court entered judgment delivered on 31st May 2018 in favour of the 1st respondent against the 3rd to 9th respondents in **HCCC 543 of 2010 Samuel Gachie Kamiti v Equity Bank Limited and 5 Others** for Kshs. 78,934,010.00/-. The 1st respondent then instructed the auctioneer/ applicant to commence execution against the 3rd to 9th respondents.
4. The 3rd to 9th respondents filed an application dated 18th July 2018 seeking a stay of execution of the judgment. On 15th November 2018, a stay of execution was granted on condition of payment of Kshs. 45,000,000/- as security.
5. The applicant/ auctioneer filed its bill of costs dated 22nd July 2021 drawn at Kshs. 9,062,606.90/-. Through a ruling of 25th August 2023, the Deputy Registrar taxed the bill at Kshs. 5,800/- and disallowed other items on grounds that the auctioneers had not availed the proclamation notice.

6. The auctioneer applied for review of the ruling and through a ruling of 20th September 2024, the Deputy Registrar allowed the application and taxed the bill at Kshs. 4,879,540/-.
7. The 3rd to 9th respondents' gravamen is that the Deputy Registrar did not review or vary its earlier finding that the decree holder was liable to pay the auctioneer's fees. Therefore, they argue that the warrants cannot be executed as they have been issued against the wrong party, contrary to the order of the court.

Responses

8. The 1st respondent filed a replying affidavit sworn on 18th December 2024. He argued that the application is an abuse of the court process. He urged the court to dismiss the application with costs.
9. According to him, the application is misguided as the Deputy Registrar's decision that he was to bear the costs in the ruling of 25th August 2023 were premised on the fact that the proclamation not produced by the auctioneer to demonstrate work done. That in the later decision of 23rd September 2024, the Deputy Registrar appreciated that there was work done by the auctioneer following the production of the proclamation notice. That following that finding, it is the 3rd to 9th respondents that are liable to pay the auctioneer's fees pursuant to rule 7 of the Auctioneers' Rules.
10. The auctioneer/ applicant filed a replying affidavit sworn on 21st January 2025. She urged the court to dismiss the application which is an afterthought and an abuse of the court process.
11. The auctioneer contended that the Deputy Registrar's ruling of 20th September 2024 set aside the earlier ruling of 25th August 2023 in

entirety. That the Deputy Registrar deemed it fit to apply Rule 7 of the Auctioneer's Rules on payment by the debtor. That the 3rd to 9th respondents ought to have sought clarification on who ought to pay her fees. That parties can only challenge a taxing master's decision through an appeal before the court pursuant to Rule 55 (5) of the Auctioneers' Rules.

Submissions

12. The application was canvassed through written submissions. The 3rd to 9th respondents filed written submissions dated 24th February 2024. The applicant/ auctioneer/ respondent filed written submissions dated 12th March 2025. I will consider the respective arguments in the analysis.

Analysis and Determination

13. I have carefully considered the application, the rival affidavits and the written submissions.

14. The issue before the court is whether the 3rd to 9th respondents have made a case for the cancellation of the warrants of attachment and sale and the release of all movable goods proclaimed.

15. The 3rd to 9th respondents argued that the warrants and the proclamation should be set aside as they contravene the Deputy Registrar's ruling of 25th August 2023 to the effect that the decree holder was liable to pay the auctioneer's fees.

16. On the other hand, the auctioneer contended that following her review application, the earlier ruling of 25th August 2023 was set aside in entirety through the ruling of 23rd September 2024. That

therefore, it is the 3rd to 9th respondents that are liable to pay the auctioneer's fees pursuant to rule 7 of the Auctioneers' Rules.

17. I have read the two rulings. In the ruling of 25th August 2023, the Deputy Registrar observed, based on the decisions in **Kenya Oil Company Limited v Jovan H. Kariuki T/A Moran Auctioneers [2020] eKLR** and **Francis Mwatha Macharia t/a Freeman Auctioneers v Tata Africa Holdings (Kenya) Limited [2019] eKLR** that:-

“From the above precedents, it's evident that if the execution is stayed prior to the auctioneer completing his work then the instructing party is liable to pay. I find that the decree holder in this instance is liable to pay.”

18. Through the ruling of 23rd September 2024, the auctioneer's bill was taxed at Kshs. 4,879,540/-.

19. Context and reasons for the decision occupy central place in determination of the issue in controversy. The earlier decision made by the DR on 25th August 2023 was on the basis that the auctioneer did not provide a Proclamation Notice to show execution was done. The liability to pay the minimal costs taxed was on the basis of the materials before the DR at the time.

20. The decision was reviewed when the Proclamation Notice was produced and the Auctioneer's Bill of Costs was accordingly taxed through the ruling of 23rd September 2024 at Kshs. 4,879,540/-. Execution is in respect of those auctioneers costs.

21. Thus, I find that the 3rd to 9th respondents have not made a case for the grant of the orders sought.

Disposal

22. The 3rd to 9th respondents' notice of motion dated 9th October 2024 is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 9th day of October, 2025 through Teams online application.

**F. Gikonyo M
Judge**

In the presence of: -

Kaczeda for Obwaka for Auctioneers
Ole Ntome for Applicant
Odayo for 1st Respondent
Ms. Ouma for Oseko Adv
CA Kinyua