



**Friends Lugulu Mission Hospital v Tumbo t/a Creescent Auctioneers (Miscellaneous Civil Appeal 39 of 2023) [2024] KEELRC 1119 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1119 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
MISCELLANEOUS CIVIL APPEAL 39 OF 2023  
MA ONYANGO, J  
APRIL 25, 2024**

**BETWEEN  
FRIENDS LUGULU MISSION HOSPITAL ..... APPLICANT  
AND  
SAMSON ITONDE TUMBO T/A CREESCENT AUCTIONEERS RESPONDENT**

**RULING**

1. The application dated 19<sup>th</sup> September 2023 and filed in court on 20<sup>th</sup> September 2023 is seeking the following orders: -
  - i. That the Deputy Registrar’s decision of 13<sup>th</sup> September 2023 assessing the fees payable to the Respondent be set aside.
  - ii. That the Honourable court be pleased to assess the fees payable to the 5<sup>th</sup> Respondent, if any.
  - iii. That the Respondent do pay the costs of this Application.
2. The grounds upon which the application is made are that the Deputy Registrar erred in proceeding to access the Respondent’s fees in the absence of a dispute as to the amount of fees payable to the Respondent; that the Deputy Registrar erred in failing to appreciate the guidelines on assessment of fees payable to an auctioneer under the Fourth Schedule of the Auctioneers Rules, 1997; that the Deputy Registrar misunderstood and misapplied the Fourth Schedule of the Auctioneers Rules, 1997 and that the Deputy Registrar erred in assessing and awarding excessive fees to the Respondent which are not supported by any law and in the absence of evidence supporting documents.
3. The application is supported by an affidavit sworn on 19<sup>th</sup> September 2023 by Grace Khayota Tago, the Applicant’s Acting CEO and Hospital Administrator which reiterates the matters set out in the grounds above.



4. The Respondent opposed the application vide his Replying Affidavit sworn on 12<sup>th</sup> October 2023. He deposes that he was served on 8<sup>th</sup> September 2022 with warrants of attachment and sale from Eldoret ELRC No. E004 of 2022 to levy execution against the Applicant; that on 12<sup>th</sup> September 2022, he served the proclamation against the Applicant consequently attaching goods as were set in the proclamation; that the Respondent filed his Bill of costs dated 30<sup>th</sup> November 2022 in court for assessment; that both the Applicant and the Respondent filed submissions to the Bill of Costs and the court in its ruling assessed the Bill of costs on 13<sup>th</sup> September 2023 at Kshs. 167,274.
5. The Respondent further avers that this court is invited to preside over an academic exercise as there is nothing for this court to adjudicate upon. It is contended that the Certificate of Costs was not extracted and attached to the application before court and as such there is nothing before this court to set aside.
6. The Respondent states that the Applicant never asked the Deputy Registrar in writing to give written explanations to each item taxed in the Bill upon which the decision was made and that in the absence of the written request, the court has nothing to adjudicate on making the instant application premature. The Respondent states that the applicant never raised the issue that he is not entitled to costs; that prayer 2 of the instant application is asking the court to access the fees due to the 5<sup>th</sup> Respondent, which party according to the Respondent is unknown to the court.
7. The Respondent has also averred that the Applicant has not demonstrated to the court that it will suffer irreparable loss if it pays the Auctioneers costs; that it has not alleged that the Respondent is a man of straw and will not be able to refund the taxed costs if the same is paid to him and by chance the appeal succeeds. Further, that the Applicant has not offered any security.
8. The Application was canvassed by way of written submissions. The Respondent filed his submissions on 16<sup>th</sup> November 2023. I have perused the record and did not find submissions of the Applicant.
9. In his submissions, the Respondent identified the issues for determination to be:
  - i. Whether there is a competent appeal before court for consideration
  - ii. What orders should I be granted in the circumstances
10. On the first issue, it is the Respondent's case that the Applicant herein has not filed a record of appeal as required by law and that as such, there is no competent appeal before court. The Respondent relied on decisions in the following cases in support of its case; *Oscar Otieno t/a Odongo Investment Auctioneers v Sukari Industries Limited (2019)* eKLR, *Ndegwa Kamau t/a Sideview Garage vs Fredrick Isika Kalumbo (2016)* eKLR and *Law Society of Kenya vs Center of Human Rights & Democracy & 12 others (2014)* eKLR.
11. It is the Respondent's submissions that compliance with the mandatory provisions of Order 42 Rule 13(4) of the *Civil Procedure Rules* is not a mere technicality as it goes to the substratum of the Appeal. In support of this position, the Respondent cited the case if *South Nyanza Sugar Co. Ltd vs Simeona A. Opola(2020)*eKLR.
12. On the second issue, it is the Respondent's submissions that there being no record of appeal filed in the instant appeal, the same is incompetent. The court was urged to strike it out with costs to the Respondent.

### **Determination**

13. The issue that falls for my determination is whether the Applicant is entitled to orders setting aside the assessment of the Respondent's fees by the Deputy Registrar.



14. The Respondent has faulted the procedure adopted by the Applicant in bringing the instant application before this court and has averred that the application is incompetent as the Applicant ought to have filed a record of appeal.
15. The procedure of filing a reference to oppose taxed auctioneers bill of costs is set out in Rule 55 of the Auctioneers Rules, 1997 which provides as follows:
- (1) Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.
  - (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.
  - (3) In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.
  - (4) 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.
  - (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.
16. I have taken the trouble of perusing ELRC Miscellaneous E004 of 2022 relating to the parent file in this suit and noted that the ruling on the Auctioneer's Bill of costs that the Applicant seeks to appeal against herein, was delivered on 13<sup>th</sup> September 2023.
17. For this court to grant the orders sought by the Applicant, the applicant ought to have filed an appeal via chamber summons within 7 days from the date of the decision of the taxing master, that is on or before 21<sup>st</sup> September 2023 as per the provisions of Rule 55 (4) and (5) of the Auctioneers Rules. The instant application is therefore incompetent as it has been filed outside the statutory time allowed. The Applicant did not seek extension of time before filing the same.
18. Consequently, the application dated 19<sup>th</sup> September 2023 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON

\*\*\*\*

**THIS 25<sup>TH</sup> DAY OF APRIL, 2024**

**MAUREEN ONYANGO**

**JUDGE**



