



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Scientific, Research International, Technical and Institutions Workers’
Union v Kenya Agricultural and Livestock Research Organisation (Sugar
Research Institute); Stephen Juma Onyango t/a Intime Auctioneers (Auctioneer);
Kenya Agricultural and Livestock Research Organisation (Respondent)
(Cause 281 of 2016) [2023] KEELRC 96 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 96 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 281 OF 2016
S RADIDO, J
JANUARY 25, 2023**

BETWEEN

**KENYA SCIENTIFIC, RESEARCH INTERNATIONAL, TECHNICAL AND
INSTITUTIONS WORKERS’ UNION CLAIMANT**

AND

**KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANISATION
(SUGAR RESEARCH INSTITUTE) RESPONDENT**

AND

STEPHEN JUMA ONYANGO T/A INTIME AUCTIONEERS AUCTIONEER

AND

**KENYA AGRICULTURAL AND LIVESTOCK RESEARCH
ORGANISATION RESPONDENT**

RULING

1. For determination is a motion dated November 23, 2022 by Kenya Agricultural and Livestock research organisation (the respondent) seeking orders:
 - (1) ...
 - (2) ...
 - (3) That the respondent /applicant be granted leave to appeal out of time against the ruling and order of Hon Beryl MA Omollo delivered on November 2, 2022.



- (4) That upon grant of prayer (3) above, pending the hearing and determination of the intended appeal, this honourable court be pleased to issue an order of stay of execution of the ruling and all consequential orders arising from the decision of the Hon Beryl MA Omollo delivered on November 2, 2022.
 - (5) That this honourable court be pleased to set aside the warrants of attachment and warrants of sale issued to keysian auctioneers.
 - (6) That the honourable court be pleased to lift the proclamation notices dated November 21, 2022 as issued to Keysian auctioneers.
 - (7) That the costs of this application be borne by Stephen Juma Onyango t/a Intime auctioneers.
2. When the motion was placed before the court ex-parte on November 23, 2022, it granted interim stay of execution on condition that the respondent deposited the taxed costs of Kshs 633,494/36 in court on or before November 25, 2022. The respondent complied with the condition.
 3. The main grounds in support of the motion were that the taxing officer had delivered a ruling on taxation on 2 November 2022 without notice to the respondent, that the respondent had failed to attend taxation due to misfiling of the hearing notice; the respondent only learnt of the ruling after the lapse of 7 days prescribed under rule 55(5) of the auctioneers rules for appeals; the execution process was unlawful; that the auctioneer had no locus standi to file any proceedings in the matter and that the Auctioneer was a person of no known means.
 4. The auctioneer filed a replying affidavit in opposition to the motion on December 5, 2022, deposing that the respondent had previously challenged the taxation of the bill of costs and a ruling delivered on February 17, 2022 settling the question; the respondent had been approached for out of court settlement for the fees but was not willing to negotiate; that a taxation notice had been served; that a ruling notice was served and acknowledged on May 18, 2022 and, that the failure to participate in the taxation was deliberate and meant to frustrate the Auctioneer.
 5. Pursuant to court directions, the respondent filed its submissions on December 15, 2022 (should have been filed and served on or before December 13, 2022) and the auctioneer on December 22, 2022.
 6. In the submissions, the respondent contended that the auctioneer's replying affidavit was defective because it was allegedly sworn on November 2, 2022, before the filing of the motion it was responding to.
 7. The court has considered the motion, affidavits, and submissions.
 8. Orders 5, 6 and 7 will stand or fall depending on the conclusions the court reaches on the prayer for grant of leave to appeal out of time.
 9. The court will, however, address the arguments on the competency of the auctioneer's replying affidavit.

Defective replying affidavit

10. The respondent urged the court to reject the replying affidavit by the auctioneer on the ground that it was sworn on November 2, 2022, before the filing of the motion it was responding to. The respondent cited *Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuki & 2 Ors* (2018) eKLR.



11. The auctioneer, on the other hand countered that the authority relied on by the respondent concerned an affidavit which was not dated, signed or commissioned and that the certification stamp from the commissioner for oaths explicitly indicated that he certified the annexures on 2 December 2022.
12. It is not in dispute that the replying affidavit indicates it was sworn on November 2, 2022. However, the commissioner for oaths stamped the annexures on December 2, 2022.
13. The court, therefore, agrees with the auctioneer that the handwritten date of November 2, 2022 was a curable error and the correct date is December 2, 2022.

Grant of leave to appeal out of time

14. The taxing officer delivered her ruling on taxation on 2 November 2022. Under rule 55(5) of the [Auctioneers Rules](#), the respondent had 7 days to appeal.
15. The respondent moved to court seeking leave after the lapse of the 7 days and the primary ground relied on was that it was not aware of the ruling date and thus did not attend.
16. The grant of leave to appeal out of time requires an exercise of the court's discretion and the principles the court should consider are well known (length of delay, reasons for delay, chances of appeal succeeding and likely prejudice to the other party if leave is granted).
17. The court has looked at the material placed before it and the record demonstrates that a ruling notice was served upon and acknowledged by one Mercy on behalf of the respondent's advocate on record on May 13, 2022. The notice clearly notified the respondent that the ruling would be delivered on October 18, 2022.
18. The respondent was aware of the ruling date but has not satisfactorily explained why it did not attend before the taxing officer on October 18, 2022 (the court notes that the ruling was delivered on November 2, 2022).
19. The respondent has not disclosed whether it attended the court on October 18, 2022 or what proactive steps it took immediately thereafter to ascertain what had transpired on October 18, 2022, warranting the rescheduling of the ruling date.
20. However, the record does not disclose why the ruling was rescheduled or whether the respondent was notified of the change of ruling date.
21. The court, will therefore give the benefit of doubt to the respondent and grant leave to file a reference out of time.
22. Before concluding, considering that the taxed costs have since been deposited in court to secure the auctioneer's interest, it is the view of the court that it would not serve the purposes of justice to leave the warrants of attachment and sale in place.

Conclusion and Orders

23. In light of the foregoing, the court makes the following orders:
 - i. The respondent to file and serve a reference on or before February 3, 2023.
 - ii. The auctioneer to file and serve a response on or before February 17, 2023.
 - iii. The warrants of attachment and sale are hereby set aside/vacated.
 - iv. Oral submissions to be taken on a date to be set after this ruling.



DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 25TH DAY OF JANUARY 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

Auctioneer in person

For Respondent Millimo Muthomi & Co. Advocates

Court Assistant Chrispo Aura

