



Joel Titus Muysa t/a Makuri Auctioneers v Tamarind Management Ltd (Miscellaneous Application E036 of 2021) [2023] KEELRC 289 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 289 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E036 OF 2021**

**AK NZEI, J
FEBRUARY 2, 2023**

**BETWEEN
JOEL TITUS MUYSA T/A MAKURI AUCTIONEERS APPLICANT
AND
TAMARIND MANAGEMENT LTD RESPONDENT**

RULING

1. On June 25, 2021, the applicant herein filed an auctioneer's bill of costs dated June 24, 2021. The said bill of costs was, *vide* this court's deputy registrar's ruling shown to have been delivered on August 30, 2021, taxed at ksh 213,556. Taxation of the said auctioneers bill of costs was done on the court file herein, and although the typed and signed copy of the ruling has August 30, 2021 printed on it as the date of delivery of the ruling, the original hand written record/proceedings of the deputy registrar clearly show that the bill of costs came up for taxation on July 22, 2021 and that the matter was fixed for ruling on September 24, 2021. Ruling is, however, shown to have been delivered on September 27, 2021. The date of the registrar's decision/ruling, according to the court's handwritten record, is September 27, 2021.
2. On September 30, 2021, the respondent/applicant filed a chamber summons dated September 28, 2021. The application, expressed to be an appeal, is expressed to be brought under rule 55(4) & (5) of the [Auctioneers Rules 1997](#), and the following orders are sought:-
 - a. that there be a stay of execution of the decision of Hon Lesootia Saitabau delivered on September 27, 2021 pending hearing and determination of the appeal.
 - b. that this court be pleased to set aside the ruling of the Hon Lesootia Saitbau delivered on September 27, 2021 and any resultant certificate of costs.
 - c. that the appeal be allowed with costs.



3. The application sets out grounds on which it is based, and is supported by a supporting affidavit of Nicholas Weru advocate sworn on September 28, 2021. The grounds set out on the face of the application are replicated in the supporting affidavit. It is deponed in the said supporting affidavit:-
 - a. that auctioneers coasts awarded herein were on account of execution of a decree issued in CM ELR No 450 of 2018 (Anderson Fedheha Buni v Tamarind Management Limited).
 - b. that the respondents were guilty of material non-disclosure during the proceedings, which non-disclosure goes to the magistrate's jurisdiction.
 - c. that following proclamation of the applicant's goods on May 28, 2021, the respondent/applicant filed an application for contempt of court in Mombasa ELRC Appeal No 10 of 2022 (Anderson Fedha Buni & Another v Tamarind Management Limited) because the respondent had executed illegally as there was an order of stay of execution issued by the Employment and Labour Relations Court as on May 28, 2021.
 - d. that the respondent's advocate on record, M/s Opulu & Company Advocates, appeared in court on June 15, 2021 when counsel informed the court that they had executed on misinformation, sought the court's forgiveness and the court ordered that by consent execution proceedings commenced by way of the proclamation of May 28, 2021 were set aside and the respondents herein were discharged of the contempt proceedings.
 - e. that in obvious contempt of court, the respondent proceeded to file and serve the bill of costs which is the subject of these proceedings, with the full knowledge that the same had been set aside by the Employment and Labour Relations Court with their consent.
 - f. that the Hon Magistrate did not have jurisdiction to tax the said bill of costs as the proclamation of May 28, 2021 was set aside by the Employment and Labour Relations Court at Mombasa in Appeal No 10 of 2020 with the consent of parties and the same is null and void *ab initio*.
 - g. that the appeal (herein) has been filed without undue delay, and that there is no bar to the issue of jurisdiction being raised in the appeal (herein) as such an issue may be raised at any time during proceedings, including on appeal.
 - h. that it is in the interest of justice that orders sought be granted as the respondent may execute against the applicant for the entire sum of costs and may benefit from an illegal execution.
 - i. that the respondent will in no way be prejudiced.
4. On August 17, 2022, after directions had been given on hearing of the foregoing application, the auctioneer/respondent filed a notice of preliminary objection dated June 15, 2022, stating:-
 - a. that the application is time barred as it is filed outside the (7) days period allowed under rule 55 (5) of the [Auctioneer's Rules of 1997](#).
 - b. that this court lacks jurisdiction to entertain the application dated September 28, 2021 and filed on September 30, 2021.
 - c. that the application is incurably defective and incompetent, and should be struck out.
5. On September 21, 2022, I directed that the preliminary objection be heard first, and ordered parties to file submissions thereon, which I have considered.
6. Rule 55(3) of the [Auctioneers Rules 1997](#) permits an auctioneer to file before a magistrate their bill for assessment where a dispute arises as to the amount of fees payable, while rule 55(4) provides 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. Rule 55(5) on the other hand provides that an appeal challenging the decision of a magistrate or registrar shall be filed within seven (7) days of the decision.

7. In the instant case, the deputy registrar's taxation order/decision, which was made on the court file/record herein, was clearly made on September 27, 2021. The appeal against the registrar's said decision is dated September 28, 2021 and was filed in this court on September 30, 2021. That was three (3) days from the date of the decision under challenge; and was within the seven (7) days period allowed by the law, that is rule 55(5) of the [Auctioneers Rules 1997](#). The objection raised on ground that the appeal is time-barred is without merit. The appeal was filed within time and this court has jurisdiction to hear and to determine the same.
8. The preliminary objection is without merit, and is hereby overruled with costs.
9. The chamber summons dated September 28, 2021 and filed in court on September 30, 2021 (the appeal) shall be fixed for hearing forthwith.
10. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND FEBRUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. maithyafor Applicant

N/A Respondent

