



Musya t/a Makuri Auctioneers v Tamarind Management Ltd (Miscellaneous Application E037 of 2021) [2023] KEELRC 311 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 311 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E037 OF 2021**

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

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

RULING

1. On 25th June 2021, the Applicant herein filed an Auctioneer’s Bill of Costs dated 24th June 2021. The said Bill of costs was, *vide* this Court’s Deputy Registrar’s Ruling shown to have been delivered on 27th September 2021, taxed at ksh. 213,556.
2. On 30th September 2021, the Respondent/Applicant filed a Chamber Summons dated 28th September 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 27th September 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 27th 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 28th September 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 costs awarded herein were on account of execution of a decree issued in CM ELR No. 449 of 2018 (Peter Sombo -vs- 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 28th May 2021, the Respondent/Applicant filed an application for contempt of Court in Mombasa ELRC Appeal No. 10 of 2022 (Anderson Fedha Buni & Another -vs- 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 at 28th May 2021.
 - d. that the Respondent's Advocate on record, M/s Opolu & Company Advocates, appeared in Court on 15th June 2021 when Counsel informed the Court that they had executed on misinformation, sought the Court's forgiveness, and the Court ordered that by consent the execution proceedings commenced by way of the proclamation of 28th May 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 28th May 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 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 Respondent 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 17th August 2022, after directions had been given on hearing of the foregoing application herein, the Auctioneer/Respondent filed a Notice of Preliminary Objection dated 15th June 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 21st September 2021 and filed on 30th September 2021.
 - c. that the application is incurably defective and incompetent, and should be struck out.
5. On 21st September 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-rule(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 27th September 2021. The appeal against the Registrar's said decision is dated 28th September 2021 and was filed in this Court on 30th September 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 28th September 2021 and filed in Court on 30th September 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. Maithya for Applicant

N/A Respondent

