



REPUBLIC OF KENYA



**KENYA LAW**

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**Shikuku t/a Eshikhoni Auctioneers & another v National Bank of Kenya Ltd (Civil Miscellaneous Application 64 of 2022) [2023] KEELRC 1043 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1043 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CIVIL MISCELLANEOUS APPLICATION 64 OF 2022**

**CN BAARI, J  
APRIL 27, 2023**

**BETWEEN**

**KENNEDY SHIKUKU T/A ESHIKHONI AUCTIONEERS ..... APPLICANT**

**AND**

**FREDRICK KOMBIJA ..... CLAIMANT**

**AND**

**NATIONAL BANK OF KENYA LTD ..... RESPONDENT**

**RULING**

1. This ruling relates to the Respondent's notice of motion dated February 7, 2023, expressed to be brought pursuant to Section 3A of the *Civil Procedure Act*, Order 10 Rule 11 (1) and Order 22 Rule 22 of the *Civil Procedure Rules*. The Respondent seeks orders that:
  - i. Spent.
  - ii. Spent.
  - iii. The Honourable Court be pleased to review and set aside the proceedings of February 7, 2023, assessing the Applicant's Bill of costs *Ex parte* and reinstate the same for assessment inter parties.
  - iv. The costs of the application be provided for.
2. The application is supported by the grounds on the face of the motion and the affidavit of Geoffrey O Yogo, Counsel for the Respondent.
3. The Respondent avers that the matter proceeded *ex parte*, Counsel having sent his Court Assistant to file his memorandum of appearance and replying affidavit to the auctioneer's bill of costs, but that the documents could not be filed due to the court system's down time.



4. It is the Respondent's position that by the time the court assistant got someone to hold his brief and inform the court of his reply to the bill, the bill had already been taxed *ex parte*.
5. The Respondent avers that it has a good opposition to the auctioneers bill of costs and that the instant application has been brought in good faith. It is his position that this being the mistake of counsel, the same should not be visited upon the Respondent.
6. The application is opposed vide the Applicant's replying affidavit sworn on February 21, 2023 by one Kennedy K Shikuku. The Applicant avers that it sought leave for taxation of their bill of costs vide a motion dated December 2, 2022, and that the application was served upon the Respondent herein on December 8, 2022.
7. The Applicant avers that his bill of costs was allowed on February 7, 2023, at Kshs 146,188/- upon the Deputy Registrar confirming that an affidavit of service was on record, and the non-appearance of the Respondent or his counsel.
8. The Applicant states that the Respondent's allegation that he could not file his documents as a result of the court's filing system, has not been proved. He prays that the application be dismissed with costs.
9. Parties urged the application through written submissions and which have been duly considered.

Determination

10. Rule 55 and of the Auctioneers Rules states thus: -

- 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 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 subrules (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.”
11. To start with, and as correctly submitted by Counsel for the Applicant/Respondent (Auctioneer), before this court is a notice of motion application, expressed to be brought pursuant to Section 3A of the *Civil Procedure Act*, Order 10 Rule 11 (1) and Order 22 Rule 22 of the *Civil Procedure Rules*, seeking to review and set aside the proceedings of February 7, 2023, assessing the Applicant’s Bill of costs *Ex parte* and reinstate the same for assessment inter parties.
  12. The Bill that was taxed by the Taxing Officer, and which is the subject of this application is an Auctioneers Bill of costs. The application has been termed incompetent, for not being one contemplated under Rule 55 of the *Auctioneers Rules*.
  13. Rule 55 (4) and (5) of the Auctioneers Rules, provides that a party who is dissatisfied with the decision of the Registrar or Magistrate, shall file an appeal to a Judge in Chambers, and is required to do so within 7 days of the decision appealed against.
  14. In *Ezekiel Kiminza t/a Auto Land Auctioneers v Mistry Valji Naran Mulji* (2017) eKLR, the Court had this to say: -

“In this case, the Respondent has approached the Court by what is referred to as a “Reference” filed on March 16, 2017. This is obviously an unknown procedure under the Rules and certainly one filed outside the time permitted and without leave. These are both procedural and substantive issues which go to the jurisdiction of the Court. It is clear that the Respondent has not only failed to come to Court under the prescribed form but also failed to come within the time specified by the law.”
  15. The provisions of Rule 55 prescribe the procedure to be followed in challenging the decision of a Taxing Officer in respect of Auctioneers Bill of cost. Further, the provisions referred to herein, are couched in mandatory terms leaving the Court no room for contrary interpretation.
  16. In *Aprim Consultantz vs Parliamentary Service Commission & Another*, Civil Appeal No E039 of 2021, also cited by the Respondent, the Court held that where terms of a provision are plain and unambiguous, it leaves the court no interpretive wiggle room.
  17. I thus find and hold that the Applicant having filed a motion application/reference, and not an appeal against the decision of the Taxing Officer, renders the application incompetent, devoid of merit and an abuse of the Court process.
  18. The application is dismissed with costs to the Auctioneer.
  19. Orders accordingly.

**SIGNED, DATED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF APRIL, 2023**

**C N BAARI**

**JUDGE**

**Appearance:**



**N/A for the Respondent/Applicant (Auctioneer)**

**N/A for the Claimant**

**Mr Yogo present for the Applicant/Respondent**

**Ms Christine Omolo - Court Assistant**

