



REPUBLIC OF KENYA



Njau t/a The Place v Onsongo t/a Hegeons Auctioneers (Miscellaneous Reference Application 12 of 2022) [2023] KEELRC 1435 (KLR) (6 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1435 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS REFERENCE APPLICATION 12 OF 2022**

HS WASILWA, J

JUNE 6, 2023

BETWEEN

NICHOLAS NJAU T/A THE PLACE APPLICANT

AND

**HEZRON GETUMA ONSONGO T/A HEGEONS
AUCTIONEERS RESPONDENT**

RULING

1. Before me for determination is the applicant's Chamber Summons dated April 3, 2023 filed pursuant to rule 55(5) of the [Auctioneers Rules](#) and all other enabling provisions of the law, seeking for the following Orders;
 1. That the decision by the Deputy registrar, Hon. Margaret Kyalo, on taxation of the auctioneers Bill of costs in Miscellaneous Application 21 of 2022, by the Respondents against the the Applicant herein, dated February 14, 2023 be set aside in its entirety.
 2. That the Honourable Court do find that the Applicant herein is not liable to pay auctioneers costs.
 3. That the costs of this Application be provided for.
2. The Application is premised on the following grounds;
 - a. That the Application herein emanates from a certificate of costs passed by this Court in ELRC Cause Number 99 of 2016; Gladys Nyambura V Nicholas Njau T/A The Place, which ordered for the claimant to be paid Kshs 130,080, which was duly paid on the 28th April, 2022 without any proclamation or attachment ever being made.
 - b. After paying the decretal sum, the Applicant noted that the Respondent herein had on 11th April, 2022 proceeded and proclaimed goods for attachment belonging to Ripple grill and



lounge limited in the mistaken belief that the establishment belonged to the Applicant herein. That the said attachment was made in purported execution of the decree in ELRC Cause no. 99 of 2016, which Ripple Grill and lounge was not a party. The said Ripple grill filed an objection to the proclamation which was upheld on the 17th May, 2022.

- c. Notwithstanding the aforementioned, the Auctioneers /Respondent herein filed their Bill of costs, arising from the wrongful proclamation, for taxation on the 30th May, 2022 which was erroneously granted by the taxing master.
 - d. That the Applicant raised the issue of wrong proclamation and sought guidance of the taxing master but the taxing master failed to make a determination as to whom between the applicant and the instructing party was liable to pay the auctioneers costs, before taxing the Bill of costs.
 - e. It is contended that the taxing master failed to appreciate that the proclamation for which the auctioneers was claiming costs was never made against the applicant's goods but a third party and as such the costs of the same could not be claimed from the Applicant herein.
 - f. That by taxing the said Bill of costs, the taxing master proceeded on the wrong principle in exercising her discretion to tax the auctioneers Bill of costs.
3. The Application is supported further by the Affidavit of P. A Omondi, the Advocate ceased of the conduct of this matter on behalf of the Applicant, sworn on the April 3, 2023. The Affidavit reiterated the grounds of the Application and in addition annexed the payment cheque of April 28, 2022 and the Ruling of the taxing master.
 4. The Respondent in opposition of this Application filed a replying affidavit deposed upon on the 17th April, 2023 together with a notice of preliminary objection on even date. The grounds of opposition are as follows;
 1. That this Court lacks jurisdiction to hear the Reference as it offends the express provisions of rule 55 (4) of the Auctioneer Rules 1997 for reasons that:
 - a) The Auctioneer rules provide for an appeal from a decision of a magistrate under sub rules 2 and 3 to be made to a judge in chambers.
 2. That the orders sought can only be issued in an appeal by way of chamber Summons and not as a reference hence the orders sought are untenable in law.
 3. That in the premise, this reference is an abuse of the court process as this Honourable court clearly lacks jurisdiction to hear and determine it.
 4. That in the premise of the foregoing, this reference ought to be dismissed with costs to the Respondent.
 5. In the affidavit, Hezron Getuma Onsongo, the Respondent herein, stated that he was issued with warrants of attachment and sale of the Applicant's property on April 11, 2022 which he proceeded and attached the Applicant property in accordance with the law.
 6. He stated that the Applicant is the owner of the property knows as Ripple Grill and Lounge Limited as such the proclamation was proper. Further, that since the Applicant was the debtor in this case, he is the one that should pay auctioneers fees as per rule 7 of the Auctioneers Rules.
 7. He stated that it's after he proclaimed the Applicant's goods that they made the payment of the decretal sum on 28th April, 2022.



8. Thereafter, he taxed his Bill of costs and his advocates wrote a letter to the Applicant seeking for the payment of the taxed fees to no avail, forcing him to employ the services of crater view auctioneers to execute the said costs on their behalf which the Applicant through Ripple Grill wrote a cheque of Kshs 51,410 to stop any further execution.
9. That the subsequent application seeking to file a reference out of time was served on the Respondents advocates on March 24, 2023 at 4 p.m., which the advocates were unable to respond, leading to the Applicant obtaining ex parte Orders in their favour.
10. The Respondent urged the Court to dismiss the Application herein for being frivolous and a waste of judicial time and aimed at denying the Respondent his well-deserved and earned costs.
11. The Application was canvassed by written submission with the Applicant filing its Submissions on the May 16, 2023 and the Respondent on May 29, 2023.

Applicant's Submissions.

12. The Applicant submitted first with regard to the preliminary objection and argued that as much as the Application is tiled Reference, the same is brought by way of Chamber Summons in compliance with rule 55 (5) of the Auctioneer Rules which was duly cited as the enabling provisions of the law. It was submitted further that the titling of the Application as reference does not make it a reference but the substance of the Body of the Application which is an Appeal. Therefore, that it does not affect this Court jurisdiction to determine the Application on merit as the same defects can be cured under Article 159(2)(d) of *the Constitution*. To support this argument, they relied n the case of *Sinohydro Corporation Limited V Samson Itonded Tumbo t/a Dominion Yards Auctioneers* [2021] where the Court stated that:

“... I hold the considered view that by terming an Appeal as a Reference does not convert the said Appeal to a Reference... It is clear that the Applicant filed a Memorandum of Appeal, by way of a Chamber Summons. Therefore, I find that the Applicant complied with the provisions of rule 55 (5) of the Auctioneers Rules.I further find that the use of the word ? Reference? in the Chamber Summons dated October 21, 2020 does not alter the fact that the document before the Court is a Memorandum of Appeal. Accordingly, the Preliminary Objection herein is overruled. The Respondent will pay to the Applicant, the costs of the said Preliminary Objection.”
13. It was further submitted that, their position is supported by rule 2 of the *Employment and Labour Relation Court Procedure Rules*, which define Appeal to mean an appeal made to the Court by a party against any decision, Orders, or proceedings under any written law and includes appeals from the Cabinet Secretary, Director of Work Injury and Benefits Authority, Registrar of Trade Unions, Subordinate Courts and Tribunals. He added that the Court herein is the Employment and Labour Relations Court as such, their case is properly before this Court.
14. It was also submitted that the Preliminary objection fell short of what amounts to matters on pure points of law as was held I n *Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Company Limited* [1969] EA 696. On that basis it was submitted that the issues raised in the Preliminary Objection is whether the Application before Court is a reference or Appeal, which issue is factual and cannot be raised under a preliminary objection.
15. On whether the Applicant has made out a case for granting of the Orders sought, it was submitted that the taxing master failed in proceeding to taxation of the Auctioneers Bill of costs without first determining who was liable for payment of the said Costs when the said auctioneers and proceeded for



proclamation against a third party. It was argued that the issue of proclamation of third party goods was raised before the taxing master who failed to address her mind to that issue and proceeded to tax the Bill of costs, resulting to miscarriage of justice. To support this argument, the Applicant relied on the case of *James O Makori T/A Lifewood Traders Auctioneers vs Star Publications Ltd* [2022] eKLR where the Court held that:-

“In view of the foregoing finding, I am convinced that the Taxing Master ought not to have just taxed the Bill of costs and left undetermined, the other prayers and issues raised by the parties and especially whether the respondent to the bill was the proper party to pay the auctioneer for the irregular execution that was nullified by the court.”

16. Similarly, the Applicant urged this Court to nullify the decision of the taxing master and proceed to address the issue of who is liable to pay auctioneers fees between the Applicant herein and the instructing party, considering that the proclamation was irregularly carried out against a third party.
17. On the issue of who was liable to pay auctioneers costs, the Applicant referred to section 7 of the *Auctioneers Act* and submitted that in the event that the auctioneers do not find any goods belonging to the debtor, the Creditor is the one that should pay the auctioneers charges as per Section 7(c) of the *Auctioneers Act*. Being that Maraga Ogara Advocates are the ones that instructed the auctioneers herein who proceeded to execute against a wrong party, their client should be held liable to pay auctioneers charges and not the debtor. In any event that Ripple Grill filed objection proceedings in the parent file which objection orders were upheld on May 17, 2022. To support this The Applicant relied on the case of *Cooperative Bank of Kenya Ltd V Jeoffrick N Muinde t/a Kimu Auctioneers* [2019] eKLR where the Court held that :-

“It is not enough to state as he did that he incurred expenses and was therefore entitled to his fees. Neither can his argument that neither the debtor nor the appellant has reached an agreement with him to settle the costs held. The law is clear and it ought to be followed.”

18. In conclusion, the Applicant urged this Court to find in their favour and allow the Application as prayed and hold that the Applicant is not liable to pay auctioneers charges.

Respondent's Submissions.

19. The Respondent filed two sets of submission in Support of its Preliminary Objection and in response to the Chamber Summons Application.
20. On the preliminary objection, the Respondent submitted that this Court lack jurisdiction to hear and determine the chamber summons herein because the same is a reference under the *Advocates Act* which is distinct from a Chambers summons Appeal contemplated under the *Auctioneers Act*. It was submitted that since the legislature in its wisdom expressly provided for the Auctioneers Bills to be challenged by an Appeal, the reference filed by the Applicant cannot suffice. To support this Position, the Respondent cite the locus classicus case of *Owners of Motor vessel 'Lilian S' V Caltex Oil (K) Limited* [1989] eKLR where the Court held that;

“the appellate jurisdiction of any court is a creation of statute and must be exercised within the strict edicts of the Statutory jurisdiction.”



21. They also relied on the Supreme Court of Nigeria Decision in *Ocheja Emmanuel Dangana v Hon. Attai Aidoko Alo Usman & others* SC 480/ 2011 and SC 11/2012 (Consolidated) where the Court held that; -

“A court is competent, that is to say, it has jurisdiction when-

1. It is properly constituted ...and
2. the subject matter of the case is within its jurisdiction and no feature in the case... prevents the court from exercising its jurisdiction; and
3. the case comes before the court initiated by the due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction”.

22. On that basis, they submitted that the chamber summons before Court is filed under rule 11 of the *Advocates Remuneration Order* and cannot be the same as the Appeal contemplated under rule 55(5) of the Auctioneers Rules, 1997, which mandates the party to file an Appeal. To support this they relied on the case of *Kiminza t/a Auto land auctioneers V Mistry Valji Naran Mulji* [2017] eKLR where the Court held that;-

“In addition, Rule 55 (5) of the Auctioneers Rules only allows a window of 7 days within which to file an appeal after the decision is made. There is no doubt that the procedure prescribed and the time within which to file an appeal is mandatory. In this case, the Respondent has approached the Court by what is referred to as a “Reference” filed on 16th March 2017. This is obviously an unknown procedure under the Rules and certainly one filed outside the time permitted and without leave.”

23. They also relied on the case of *St Elizabeth Academy Karen Limited V Joseph Gikonyo t/a Garam Investment* (Miscellaneous Application no. 488 of 2013) [2022] KEHC 133 (KLR) Where the Court held that;

“I also note that the parties have been using the terms “reference” and “appeal” interchangeably with the Applicant insinuating that the two mean one and the same thing. They do not. This court, in *Sinohydro Corporation Limited v Samson Itonde Tumbo t/a Dominion Yards Auctioneers* KSM HC Misc E012 of 2020 [2021] eKLR held as follows:

I hold the considered view that by terming an Appeal as a Reference does not convert the said Appeal to a Reference. In the case of *Joel Titus Musya T/A Makuri Enterprises vs Southern Credit Trading Corporation* Misc. Civil Application No. 544 of 2004, Njagi J. held that; “For the failure to file a memorandum of Appeal in place of a reference, I find that the applicant strayed, and renders his application incompetent.”

18. By necessary implication, I understand L. Njagi J. to have been saying that a Reference cannot be transformed into an Appeal. In that case, the Applicant had lodged a Reference under Paragraph 11 of the *Advocates (Remuneration) Order*. The court dismissed the Reference because it was deemed to be incompetent beyond redemption. In the case of *Ezekiel Kiminza T/A Auto Land Auctioneers vs Mistry Valj. Naran Mulji*, ELC Misc. Application No. 21 of 2016}}(At Mombasa), C. Yano J. struck out the Reference from the decision rendered by the Taxing Master following the taxation of an Auctioneer’s Bill of Costs. The learned Judge held that the application was incompetent and a non-starter in limine, for failure to comply with the procedure prescribed by Rule 55 (5) of the Auctioneers



Rules. To my mind, that decision constitutes a further affirmation of the legal position that a Reference from Taxation, pursuant to Paragraph 11 of the Advocates (Remuneration) Order is not synonymous with an Appeal pursuant to Rule 55 (5) of the Auctioneers Rules.

24. In *MAchira & Co. Advocates vs Magugu* [2002] 2 EA 428, Ringera J. (as he then was) said; “As regards the point that the client’s objections to the taxation itself having been overruled, the proper remedy to adopt was an appeal to the High Court and not a reference under paragraph 11 of the Remuneration Order, I have the following to say: First, the Advocates (Remuneration) Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. It does not provide for an appeal from any sort of decision by the taxing officer.”

In as much as this ground of opposition by the Auctioneer fails, the Applicant should take note of the difference between a Reference under the Advocates Remuneration Order and an Appeal under the Auctioneers Rules.”

24. Accordingly, it was submitted that since a reference was filed instead of an Appeal, this court lacks the requisite jurisdiction to hear and determine this Application. To further reinforce its argument, they relied on the case of *Jafred Wamukoya & Gideon Osundwa V Kennedy Shikuku t/a Esbikboni Auctioneers and Ibrahim Mubumed* [2021] eklr.

25. On the Application, the Respondent submitted on three issues; whether the reference has been overtaken by events, whether the applicant is duty bound to pay the auctioneers fees and whether the orders sought are tenable under the Auctioneers Rules, 1997.

26. The Respondent submitted with regard to the first issue that the Application is overtaken by events because the auctioneers’ fees have already been paid by the Applicants. In this they relied on the case of *Nadeem A Kana V Lucy Wambui Mwangi* [2021] eklr where Karanjah J held that;

“The court then ruled that a matter overtaken by events cannot be tenable anymore and if it proceeds to success the victory would be pyrrhic. In the circumstances, the application dated 19th October 2020 was treated as having been overtaken by events and struck out accordingly with each party bearing their own costs of the application... It is instructive to note that the striking out of the impugned application rendered any submissions that may have been filed in respect thereof obsolete and not worthy of any consideration by the court. In sum, this application is wanting in merit and is hereby dismissed with costs to the respondent.”

27. On the second issue, the Respondent relied on the case of *Oscar Otieno Odongo t/a Odongo Investment Auctioneers V Sukari Industries Limited* [2019] eklr where he Court held that;-

“A Court dealing with a reference on assessment or taxation of costs must exercise caution since the assessment or taxation is based on exercise of discretion on the part of the assessing or taxing officer. Such assessment or taxation can only be interfered with when it is demonstrably shown that the decision was based on an error of principle or the fee awarded was manifestly high as to justify an interference.”

28. The Respondent submitted that it proclaimed using a valid proclamation and it is on the basis of this proclamation that the Applicant settled the decretal sum. It was argued that the Respondent carried out due diligence in establishing ownership of the said properties before proclamation which fact was affirmed by the Applicant in its supporting affidavit dated April 13, 2022 and the cheque paid to them through Ripple Grill and Lounge limited.



29. On whether the Orders sought are tenable under the Auctioneers Rules, 1997, the Respondent submitted that the present application is not tenable because it has been overtaken by events. Further that the allegation that the Applicant is not the owner of Ripple Grill and Lounge Ltd has already been settled by the Applicant in his affidavit confirming that he was and still is the owner of the said establishment.
30. The respondent in conclusion urged this court to disallow the application herein with costs to them.
31. I have examined the averments and submissions of the parties herein.
32. The respondents filed a preliminary objection contending that this court lacks jurisdiction to hear the application herein being a reference instead of an appeal.
33. Rule 55 of the Auctioneers Rules mandates a party opposed to the determination on auctioneers costs to file an appeal within 7 days.
34. The applicants herein chose to file a reference and not an appeal which is a procedure not contemplated by the rules.
35. The application is therefore irregularly before me. Apart from the fact that the application is irregularly before court, the rules contemplate that the appeal be filed within 7 days.
36. The decision by the Deputy Registrar in this case was rendered on February 14, 2023 and this application was filed on April 3, 2023 after obtaining leave to file the same out of time.
37. That notwithstanding, I found the application untenable for being before court as reference instead of an appeal.
38. It is therefore found without merit and is dismissed accordingly.

RULING DELIVERED VIRTUALLY THIS 6TH DAY OF JUNE, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Morata for Respondent – present

Omondi for Appellant - present

Court Assistant – Fred

