



Azicon Kenya Limited v Kinyua and Company Auctioneers (Miscellaneous Application E780 of 2024) [2025] KEHC 5115 (KLR) (Commercial and Tax) (28 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E780 OF 2024**

JWW MONG'ARE, J

APRIL 28, 2025

BETWEEN

AZICON KENYA LIMITED APPLICANT

AND

KINYUA AND COMPANY AUCTIONEERS DEFENDANT

RULING

1. What is before this court is a Notice of Motion Application filed on 29th October 2024 under Order 45 and 51 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the [Civil Procedure Act](#) Cap 21 Laws of Kenya and it seeks the following orders:-
 1. That the Honourable Court be pleased to set aside the Orders issued on 29th October 2024 by Justice J.W.W. Mongare.
 2. That upon granting of the prayer (1) above, This Honourable Court be pleased to schedule the matter for hearing on priority.
 3. That cost of this application be in the cause.
2. The application is supported by the grounds set out on its face and the supporting affidavit of Collins Njagi Mugendi sworn on the 29th October 2024. The Application is opposed and the Auctioneer has filed a replying affidavit dated 6th November 2024. Both parties have filed written submissions which I have carefully considered.
3. The Applicant argues that failure to attend the hearing on the date scheduled was occasioned by factors beyond their control and they seek another opportunity to defend the claim arising from the taxed costs before the court and on merit. That the orders being challenged having been given ex parte will



greatly prejudice the Respondent if not set aside. They further argue that they were not served with the reference application.

4. In opposing the application, the Respondents argue that the Applicants has not provided sufficient explanation as to their failure to attend court when the matter came up and neither have they explained why they did not file a response to the reference when the same was served upon them. The Respondents argue that the orders being sought are not as of right but can only be granted at the discretion of the court. That discretion is intended to be exercised to avoid injustice or hardship to a party before the court.
5. I have carefully considered the arguments made by the parties before me. I note that article 48 of *the Constitution* guarantees all citizens right to access to justice. Article 48 provides “48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.” It is therefore the duty of the court to ensure that there is no impediment to this right to a party before it. The court in my view is called to balance the scales of justice between the two competing parties before it. The one with a judgment and the one seeking to set it aside.
6. I have considered the reasons and the explanation as to why the Applicant was absent during the hearing of this matter. The Applicant has not put forward any new evidence to warrant this court review its orders of 29th October 2024 and or vacate them. I find what the court is being called upon is equivalent to sitting on appeal on its own ruling. The Applicant has indeed been indolent and as the old adage goes “equity does not aid the indolent”. In failing to attend court and file their responses in a timely fashion, I find that the Applicant has contributed to its current state of affairs. I am therefore not persuaded that the present application has merit. I dismiss the same with costs to the Respondent.
7. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Njagi for the Auctioneer
2. Mr. Taliti for the Applicant
3. Amos - Court Assistant

