



Sino Hydro Corporation Limited v Tumbo t/a Dominion Yards Auctioneers (Civil Appeal E105 of 2021) [2022] KEHC 15545 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E105 OF 2021
RE ABURILI, J
NOVEMBER 17, 2022**

BETWEEN

SINO HYDRO CORPORATION LIMITED APPELLANT

AND

**SIMON ITONDE TUMBO T/A DOMINION YARDS
AUCTIONEERS RESPONDENT**

(Being an Appeal from Ruling and order of the Hon. W K. Onkunya, Senior Resident Magistrate in Kisumu CMCC No.331 of 2016 delivered on 25/8/2021)

RULING

1. By an application dated November 30, 2021 brought under rule 55(4) (5) of the [Auctioneers Rule](#). The respondent herein Samson Itonde Tumbo T/A Dominion Yards Auctioneers seeks from this court orders that this court be pleased to strike out the instant appeal with costs to the respondent/applicant and that costs be borne by the appellant.
2. The application is premised on the grounds that the respondent in the appeal herein filed the bill of costs in Kisumu CMCC No 331 of 2016 against the appellant which bill emanated from the execution levied against the appellant. The ruling on the bill of costs was made on August 25, 2021 then the appellant upon being aggrieved by the said ruling, filed this appeal on September 7, 2021 challenging the ruling of the Hon Magistrate. The respondent lists 9 grounds upon which the application is predicated which can be crystalized into two namely, that no memorandum of appeal lies from the decision of the taxing master in taxation or assessment of auctioneers costs. Instead, that rule 55(4) of the [Auctioneers Rules](#) provides that the appeal on assessment of auctioneers charges be by way of memorandum of appeal in the form of chamber summons yet the appellant has filed a memorandum of appeal, a document unknown in the [Auctioneers Rules](#).



3. Secondly, that rule 55(5) of the *Auctioneers Rules* provides that the appeal from the assessment be lodged 7 days from the date of the decision but that instead, the appeal herein was filed on September 7, 2021 which was over 13 days since the impugned decision was rendered.
4. It was therefore asserted in the grounds and supporting affidavit sworn by Samson Itonde Tumbo on November 30, 2021 that the appeal herein was not compliant in terms of the procedure for filing of appeals as per the *Auctioneers Rules* and the timelines for filing of such appeals, which are mandatory hence there is no competent appeal.
5. It is argued that there being no competent appeal, this court has no jurisdiction to hear and determine this appeal on its merits and therefore the only remedy is for the court to strike out the said appeal with costs.
6. It is further asserted that to strike out the appeal will not prejudice the appellant but will ensure that procedural and substantive issues which go to the jurisdiction of the court are addressed and followed and that it is in the interest of justice that the orders sought are granted.
7. Opposing the application, the appellants counsel filed grounds of opposition dated March 8, 2022 contending that the application is bad in law, incompetent and fatally defective and thus ought to be struck out; that the application does not satisfy the established principles of law for the striking out of an appeal; and that the orders sought are incapable of being granted under the provisions of the law on which the application is based.
8. Both parties' counsel filed written submissions to canvass the application.
9. The respondent's submissions supporting the application are dated January 11, 2022 and filed on January 13, 2022 while the appellant's submissions were filed on May 17, 2022.
10. The respondent/applicant's submissions reiterate the grounds and sworn affidavit and maintain that the appeal herein is not in conformity with rule 55(4) and (5) of the *Auctioneers Rules* hence the same should be struck out.
11. According to the respondent/applicant, an applicant from a decision of a registrar or a magistrate or the board under sub rules (2) and (3) of rule 55 of the *Auctioneers Rules* shall be to a judge in chambers and that under sub rules (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. Counsel maintained that failure to comply with the above provisions as is in the instant appeal, renders the appeal incompetent and the only remedy is to strike out the appeal.
12. Reliance was placed on the cases of *Ezekiel Kiminza T/A Auto Land Auctioneers v Mistry Valji Naran Mulji* [2017]eKLR where the court struck out an appeal for non-compliance with rule 55(5) of the *Auctioneers Rules*; and therefore for being filed outside the permitted time without leave of court.
13. Further reliance was placed on *Joel Titus Musya T/A Makuri Enterprises v Southern Credit Trading Corporation* [2007]eKLR where the 'reference' instead of an appeal was filed out of the 7 days stipulated in rule 55(5) of the *Auctioneers Rules*, the court struck out the application as being incompetent and beyond redemption. A similar situation ensued in *Stephen Kenyere Nanth v Oscar Orieno Odongo T/A Odongo Investment Auctioneer* [2021]eKLR.
14. The applicant urged this court to take the cue taken in the above decisions as cited and strike out this appeal.



15. Opposing the application, and relying on the grounds of opposition dated March 8, 2022, the appellant's counsel submitted that the issue raised by the respondent/applicant is not a jurisdictional issue but a technical and formalistic justice question which our jurisprudence and decisional law no longer countenances. Counsel relied on article 159(2)(d) of the Constitution and submitted that justice shall be administered without undue regard to procedural technicalities. Further reliance was placed on Kenya Ports Authority v Kenya Power & Lighting Co Ltd [2012]eKLR on the definition of procedural technicalities.
16. The appellant's counsel further relied on DT Dobie & Co. (K) Ltd v Muchina (1982)KLR 1 on the caution given by the Court of Appeal against courts striking out pleadings. A similar caution was given in Coast Projects Ltd v M.R Shah Construction (K) Ltd (2004)2 KLR 119 against resorting to radical remedies.
17. Counsel for the appellant invoked section 79G of the Civil Procedure Act which deals with the time for filing of appeals from subordinate courts and submitted that the time for filing of this appeal was therefore 30 days from the date of the decision and not 7 days stated by the respondent in his application. He relied on Union Insurance Company of Kenya Ltd v Ramzan Abdul Dhanji CA 179/1998 (Court of Appeal) where it was held that a party must be heard in every litigation.
18. Further reliance was placed on Mwangi v Kenya Airways Limited (2003)KLR 486 on the guidelines to be considered when dealing with an application for extension of time under rule 4 of the Court of Appeal Rules.
19. Further reliance was placed on Leo Sila Mutiso v Rose Hellen Wangari Mwangi CAPP Nai 255/1977 on the settled principles for extension of time for appealing which is discretionary.
20. Counsel for the appellant submitted that the delay in filing of the appeal herein was only two weeks which cannot be inordinate hence the court should exercise discretion and allow the appellant to file the appeal out of time because the appellant stands to suffer prejudice unlike the respondent and that the appeal has high chances of success.

Analysis And Determination

21. I have considered the application dated November 30, 2021, the grounds in support and supporting affidavit. I have also considered the grounds of opposition and the respective parties' rival positions as per their written submissions on the matter before hand.
22. I find the main issue for determination to be whether this appeal is competent.
23. The respondent/applicant has attacked this appeal on two fronts. First, is that the appeal is fatally defective because the appellant filed a memorandum of appeal instead of a chamber summons as contemplated, in mandatory terms, in rule 55(4) of the Auctioneers Rules.
24. The second front is that the appeal is incompetent for having been filed out of time without any leave of court contrary to rule 55(5) of the Auctioneers Rules which stipulates that an appeal from the decision of a registrar or magistrate or board shall be filed by way of chamber summons to a judge within 7 days of the impugned decision.
25. In the instant appeal, it is alleged that the appeal was filed 13 days outside of the 7 days stipulated in law.
26. On the part of the appellant, it is contended that the application is devoid of merit and is incompetent because on the first front, it is a mere procedural technicality frowned upon by the courts as stipulated in judicial pronouncements cited herein and article 159(2)(d) of the Constitution hence this court



should not countenance such objection that deny a party the right to be heard in litigation on the basis of a mere procedural technicality.

27. On the second front of whether or not the appeal is incompetent for being filed out of the seven days stipulated in rule 55(5) of the *Auctioneers Rules*, the appellant argues and invokes the provision of section 79G of the *Civil Procedure Act* which stipulates the timeliness for filing of appeals in civil cases from the magistrate's courts to the High Court which is 30 days and not 7 days.
28. Secondly, the appellant argues that the 13 days out of time in filing of the appeal is not inordinate and that this court can exercise discretion in the interest of justice and extend such time since the appellant shall suffer irreparable loss if the appeal which has high chances of success is struck out.
29. I observe that the arguments by the appellant's counsel on the second front were made in the submissions only, not in the grounds of opposition filed or via an application for enlargement/extension of time for filing of a state appeal.

Determination

30. Rule 55(4) of the *Auctioneers Rules* provides that:

“An appeal from a decision of a registrar or magistrate or the board under sub rule (2) and (3) shall be to a judge in chambers.”
31. In the instant appeal, the appellant filed a memorandum of appeal dated September 7, 2021 on September 7, 2021 being an appeal from the ruling of W.K Onkunya SRM delivered on August 25, 2021 in Kisumu CMCC No 331 of 2016.
32. From the record of appeal already filed on November 23, 2021 and dated the same day by the respondent's counsel, the appeal arises from the ruling on the assessment/taxation of the auctioneers' bill of costs dated August 12, 2020 which bill was assessed at Kshs 713,667.
33. From my search engine at kenyalaw.org, this is not the first time that the respondent herein has raised a similar objection against the same appellant herein, on the mode of filing an appeal from the decision of a magistrate in assessment of auctioneers' bill of costs - in Kisumu HC Misc civil cause No E012 of 2020 between the same parties herein, Hon F.A Ochieng J had the opportunity to determine a preliminary objection filed by the same respondent herein against the appellant seeking to strike out the appellant's application dated October 21, 2020 for offending among others, the mandatory provisions of:
 - i. rule 55(5) of the *Auctioneers Rules*,
 - ii. order 42 rule(2) of the *Civil Procedure Rules*,
 - iii. article 47(1) of the *Constitution* and
 - iv. article 50(1) of the *Constitution*.
34. The basis upon which the preliminary objection was raised was that the applicant filed a reference instead of an appeal. The learned judge, in dismissing the preliminary objection, relied on *Oscar Otiemo Odongo T/A Odongo Investment Auctioneers v Sukari Industries Ltd* Misc civil application 293/2018 at Migori High Court and stated that:

“16. I hold the considered view that by terming an appeal as a reference does not convert the same appeal to a reference.”



35. Njagi J in *Joel Titus Musya T/A Makuri Enterprises v Southern Credit Trading Corporation* Misc application 544/2004 held that:

“for the failure to file a memorandum of appeal in the place of reference, I find that the applicant strayed, and renders his applicant incompetent.”

36. It should however be noted that in the above case, the applicant had lodged a reference under paragraph 11 of the *Advocates Remuneration Order* instead of a memorandum of appeal by way of chamber summons under rule 55 of the *Auctioneers Rules*. The court dismissed the reference on account that it was deemed to be incompetent beyond redemption.

37. In *Ezekiel Kimiza T/A Auto Land Auctioneers v Mistry Valji Naran Mulji* (supra) C. Yano J struck out a reference from the decision rendered by the taxing master following the taxation of the auctioneers bill of costs, holding that the application failed to comply with the procedure prescribed by rule 55(5) of the *Auctioneers Rules*.

38. Thus, 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*.

39. Unlike in the above cited cases referred to extensively by F.A Ochieng J (as he then was), in the present case, the appellant has filed an appeal. He did not file a reference or a chamber summons. The chamber summons is what is contemplated in rule 55(4)(5) of the *Auctioneers Rules*.

40. Therefore, does that defect render this appeal fatally defective and irredeemable?

I disagree. In my humble view, want of form cannot be a ground for dismissal or striking out of an otherwise competent or meritorious appeal. This is because form does not go to the root or to the jurisdiction of the appeal or suit. In addition, failure to comply with the format provided for in rule 55(4) (5) of the *Auctioneers Rules* would not in any way occasion a miscarriage of justice to any party to this appeal.

41. Long ago in *DT Dobie & Co (K) Ltd v Joseph Mbari Muchina & another*, cited by the appellant’s counsel, the Court of Appeal held that:

“a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal...and that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment...”

42. Post 2010, courts have invoked the supreme law of the land at article 159(2)(d) of the *Constitution* which commands that justice shall be administered without undue regard to procedural technicalities. For that reason, want of form of the appeal which is filed by way of memorandum instead of a chamber summons, is not fatal to the appeal, although parties should always read the law and procedure for initiating proceedings before filing the same into court to avoid wasting precious judicial time of writing rulings on preliminary objections which could have been avoided and the time spent on rendering decisions on their merits. In addition, parties are reminded that where a specific procedure is prescribed by law, that procedure should be followed to the letter, to avoid objections to form.



43. On the second objection raised that this appeal is incompetent for offending rule 55(5) of the *Auctioneers Rules*, the rule provides that
- “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.”
44. The impugned ruling was rendered by Hon W.K Onkunya, SRM on August 25, 2021. Aggrieved by that decision assessing the auctioneers costs, the appellant filed this appeal on September 7, 2021. From August 25, 2021 which was a Wednesday to September 7, 2021 which was a Tuesday are 13 days, September 7, 2021 being the last day and excluding August 25, 2021, as contemplated in section 57 of the *interpretation and General Provisions Act*.
45. For this appeal to have competence and for this court to exercise jurisdiction determine it on its merits, it ought to have been filed on or before the 1st day of September, 2021, as per the provisions of rule 55(5) of the *Auctioneers Rules*.
46. This appeal was filed outside the 7 days stipulated by the rules that permit the filing of an appeal to challenge the decision of the registrar or magistrate.
47. Although the appellant invokes section 79G of the *Civil Procedure Act* which grants 30 days of the date of the decision of the magistrate’s court in civil cases for filing of civil appeals to the High Court, I find that argument frivolous for reasons that the *Auctioneers Rules* have provided timeliness for challenging decisions of the registrar, the board or magistrate and therefore this court cannot import the *Civil Procedure Act* where it is inapplicable.
48. Furthermore, the appellant has, in some way, conceded that the appeal was filed out of time but argues that the delay is not inordinate and that this court can exercise discretion to extend time for filing of the appeal out of time.
49. With utmost respect to the appellant’s counsel, there is no application seeking to extend time for filing of the appeal or admission of the appeal out of time.
50. Where an appeal or proceeding is filed outside the stipulated timeliness in law, the only cure would have been for the appellant to file a substantive application seeking for leave of court to file the appeal out of time or to admit the appeal out of time. It is now over one year since the application subject of this ruling was filed, seeking to strike out this appeal and the appellant has not found it necessary to file such application for leave to enlarge time for filing of an appeal as contemplated in the *Auctioneers Rules*. Instead, his counsel argues quite vigorously that section 79G of the *Civil Procedure Act* is applicable and reprobates by saying that the delay was not inordinate hence this court can invoke its discretion to enlarge time. That in my humble view is not an acceptable argument from an advocate of this court to merely submit for arguments sake.
51. Where a proceeding or appeal like this particular one is filed out of the stipulated statutory timelines the court is deprived of jurisdiction to hear and determine the appeal on its merits. The appeal is stale. It is incompetent before this court and without jurisdiction, a court of law cannot make any one more step as its decision amounts to a nullity. (see R. Wendo J in *Transmara Sugar Co Ltd v J.N Marwa Kimwanya Auctioneers limited and another*[2022]eKLR (March 31, 2022).
52. See also the decision by Ogola J (December 20, 2021) at Eldoret High Court in *Jafred Wamukoya & Gideon Osundwa v Kennedy Shikuku T/A Esbikboni Auctioneers & Ibrahim Muhamed* [2021]eKLR where the learned judge struck out with costs an application filed by way of a reference to challenge



assessment of auctioneers costs, which application was filed outside the 7-day period prescribed under rule 55(5) of the *Auctioneers Rules*.

53. I can't agree more that where proceedings are filed outside the timelines stipulated in law, the court is deprived of jurisdiction to determine such proceeding which is incompetent and a nonstarter.
54. Accordingly, I find this appeal incompetent. It is hereby struck out for having been filed out of the stipulated statutory timelines without leave of court being sought to enlarge the time.
55. The application dated November 30, 2021 is therefore found to be meritorious on the second limb/front. It is hereby allowed. This appeal is hereby struck out with an order that the advocates for the appellant, who ought to have advised his client in accordance with the law, as they ought to have known the law to file the appeal within 7 days of the date of the decision and have maintained a hard stance for nearly one year that the appeal is not incompetent, shall pay to the respondent costs of this application and the appeal assessed at Kshs 30,000/= within 30 days of the date hereof in default, the respondent shall be at liberty to execute for recovery.
56. I so order.
57. This appeal file is therefore closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF NOVEMBER, 2022

R.E. ABURILI

JUDGE

