



REPUBLIC OF KENYA



Odoyo & another v George Arunga t/a Maywood Auctioneers (Civil Miscellaneous Application E077 of 2023) [2023] KEHC 19316 (KLR) (26 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL MISCELLANEOUS APPLICATION E077 OF 2023**

RE ABURILI, J

JUNE 26, 2023

BETWEEN

ANDREW OTIENO ODOYO 1ST APPLICANT

MOSES OCHIENG ONYANGO 2ND APPLICANT

AND

GEORGE ARUNGA T/A MAYWOOD AUCTIONEERS RESPONDENT

RULING

1. The applicants herein filed their application dated 14th June, 2023 seeking leave of this court to file an appeal out of time from the ruling on taxation of the auctioneer's bill of costs made on in Nyando SPM CC No. 133 of 2019. They also sought for stay of execution for recovery of the said bill of costs but that prayer was overtaken by events as the applicants have already settled to taxed bill of costs hence this ruling will only determine the prayer for leave to appeal out of time.
2. The grounds upon which the application is grounded are on the face of the application and supported by the affidavit sworn by Mr. Peter M. Karanja Advocate for the applicants.
3. The applicants' case is that on 26/1/2023, the court assessed the auctioneer's costs in respect of Nyando SPM Civil suit No. 133 of 2019 in the sum of kshs 813,536 against the applicants herein and being aggrieved by the said assessment, the applicants filed an appeal to this court vide HCCA No. 19 of 2023 on 3/2/2023 a day out of the stipulated seven days which appeal was struck out by this court on 12/6/2023 for being filed out of time. The applicants then immediately filed this application for enlargement of time within which to file the appeal against taxation of the auctioneer's bill of costs. The applicants' counsel deposes that the intended appeal has excellent chances of success and that there has been no delay in bringing this application upon the striking out of the appeal which was filed one day late. The applicants' counsel's explanation for the filing of the appeal out of time hence the misfortune of it being struck out was because when the clerk went to have the appeal assessed for filing into court,



the court's network had a downtown/breakdown in the judiciary's online network hence the filing was done the following day by which time it was late.

4. Opposing the application, the respondent auctioneer filed his replying affidavit sworn by Mr. George Arunga Sino on 26th June, 2023 contending that the orders sought have been overtaken by events as the applicants had already settled the taxed bill of costs and that the application does not meet the threshold for the grant of the orders sought. He reiterated the process of what followed after taxation of his bill of costs was done, with a conditional stay being granted by the lower court and the striking out of the appeal which was filed out of time without leave of court. That the applicants failed to oblige by the conditional leave prompting the respondent to engage a Ikimwanya Auctioneers to attach the applicants' property to recover the taxed costs. That the application is made in bad faith and is an afterthought as it was made after the applicants had defaulted in complying with the stay orders which were conditional and that the applicants are abusing the court process.
5. According to the respondent, no sufficient reasons have been given for filing the appeal late and that the allegations of a technical network hitch are hearsay. That in any event, the applicant had already handed him a cheques and that they never informed the respondent that they were filing an application for leave to appeal out of time. That the costs having been settled, the intended appeal has been rendered nugatory as there is no substratum of the appeal; that the respondent will suffer prejudice if the orders sought are granted; that there is no such person in the High Court called George Ngayo and that the applicants intentions are to frustrate the respondent and waste the court's time.
6. The application was argued orally and the parties reiterated their averments and depositions as summarized above hence I need not rehash them here.
7. The issue for determination is whether the application for leave to appeal out of time is merited. As earlier stated, the application for stay of execution of the taxed bill of costs is overtaken by events as the respondent has already been paid after he attached the properties belonging to the applicants.
8. The principles for extension of time to file an appeal out of time were discussed by the Supreme Court in the case of *Nick Salat v Independent Electoral & Boundaries Commission & 7 other* [2014] eKLR thus; extension of time is not a right but an equitable remedy, that it is available to a deserving party, a party seeking extension of time must lay a basis to the satisfaction of the court, the discretion to extend the time is a consideration to be made on a case to case basis, the reason for the delay must be explained to the satisfaction of the court, the court ought to consider if the opposite party will suffer prejudice if the extension is granted, whether the application has been brought without undue delay, and the public interest in matter.
9. In the instant case, the impugned decision of the Taxing Master was rendered on 26th January 2023 which means the appeal ought to have been filed by 2nd February of 2023 and not 3rd May 2019 as was the case here, upon which the respondent herein raised the preliminary objection and this court upheld the preliminary objection and struck out the said appeal No HCCA 19 of 2023.
10. However, it is important to mention here that striking out of a pleading does not bar a party from bringing a similar pleading or application, subject, off course, to the law of limitations. Under Rule 55(5) of the *Auctioneers Rules*, the applicants had seven days to file an appeal against the said decision. Rule 55(5) stipulates as follows:

“ 55



(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. The applicants filed the appeal one day late and they never sought leave of court to enlarge the time and have the appeal deemed filed hence this court had no option but to strike out the appeal. Immediately the court struck out the appeal, the respondent embarked on execution process to recover his taxed costs as the conditional stay had lapsed. In the process, the applicants settled his costs but they reserved the right to approach this court pursuant to Article 50(1) of the Constitution which guarantees every person the right to have their disputes which can be resolved by application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. I cite this provision of the constitution because section 79G of the Civil Procedure Act is specific on appeals to the High Court from the subordinate court in civil cases is to be filed within thirty days. The Auctioneers Act and Rules made thereunder are an independent statute which provides for appeals from the orders under the Act to be filed within seven days of the order.
12. Granting leave to appeal out of time is no doubt in the discretion of this Court It is however trite that like all discretionary orders, the discretion to grant leave to appeal out of time is not an automatic right and can only be exercised where the applicant has placed before the court, sufficient grounds to explain the delay in the filing of the appeal.
13. I have carefully considered the rival submissions herein and the applicants’ explanation that through their counsel Mr. Peter Karanja that he did prepare an appeal for filing within the stipulated time of seven days from the date of ruling on taxation of the auctioneer’s costs but that there was a challenge at the court registry in that the network which affected their filing of the said appeal until the following day hence the delay by one day.
14. On the part of the respondent, he maintains that there is no reason for the delay and that no email has been annexed to show that indeed the appeal was sent for filing in court. That the application is not made in good faith and that the applicants have not come to court with clean hands.
15. I reiterate that indeed the applicants filed an appeal out of time by one day and it was on that basis that the respondent herein raised a preliminary objection to the appeal which was struck out. The striking out of the appeal was predicated on the fact that in the said appeal, no leave had been sought to extend the time for filing of the appeal or to deem the appeal as duly filed.
16. It is obvious that the appeal was filed out of time by one day as a result it was struck out and this application lodged expeditiously. I am not persuaded by the respondent’s argument that there was inordinate delay in filing the appeal.
17. Neither do I find that the failure to file appeal within the required time was deliberate and therefore the explanation given for the delay in filing the appeal is excusable. I say excusable because more often than not, the court internet connectivity is down and even the court operations come to a halt. I have had to personally use my own airtime hot sporting to continue with matters in open court. It is therefore not new that matters which ought to be filed within time get delayed and in this case, the delay was only one day which is not inordinate.
18. Although the respondent claims that the application is made in bad faith and that the costs having been settled, the appeal is nugatory, I disagree. The costs are quantifiable and if the appeal succeeds, nothing stops the applicants from recovering the same from the respondent. I find that no prejudice has been shown to be suffered by the respondent is the leave sought is granted as he has already been



paid his assessed costs and he can rest easy until the intended appeal is filed, heard and determined on its merits. On the other hand, the applicants will be prejudiced as they would not have had their day in court challenging the assessed costs.

19. This court is satisfied that the application for extension of time herein has met the legal threshold set out by the Supreme Court in the case of *Nick Salat –v Independent Electoral & Boundaries Commission & 7 other, supra.*
20. I reiterate that settlement of a decree in itself does not invalidate an appeal. A party who is aggrieved by the decision of the court in money decree may or may not obtain a stay pending appeal and may even settle the decree and still pursue the appeal if the settlement of decree would not render the appeal nugatory.
21. As to the merits of the intended appeal, that is not within my province to determine at this stage, save that I have perused the draft memorandum of appeal and in my view, it is not frivolous. The applicants will have their day in court and so will the respondent have an opportunity to challenge the merits of the intended appeal, once it is filed and prosecuted. Thus, granting the leave will avail an opportunity to both parties to argue the appeal and resolve the matter on merits, noting that the court's internet challenges should not inconvenience or deny the parties opportunities of accessing justice. Even if it was not the internet issue, one day lateness cannot in any way prejudice the respondent if leave is granted to appeal out of time.
22. In the end, I grant the leave to the applicants to file their appeal within 7 days of this ruling. Each party shall bear their own costs of this application.
23. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF JUNE, 2023

R.E. ABURILI

JUDGE

