



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**MISCELANEOUS CIVIL APPLICATION NO. 7 OF 2017**

**ANN WAIRIMU MWANGI.....1<sup>ST</sup> APPLICANT**

**MICHAEL MWANGI KINYUA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**NANCY WANJIRA WARUINGI T/A PROVIDENCE AUCTIONEERS.....RESPONDENT**

**RULING**

The applicants filed a motion dated 20<sup>th</sup> March, 2017 seeking in the interim a temporary stay of execution of the taxing master's decision of 21<sup>st</sup> November, 2016 on the respondent's bill of costs filed in court on 12<sup>th</sup> July, 2016; the stay was sought, initially, pending the hearing and determination of the motion and subsequently, pending the hearing and determination of an intended reference or appeal. They also sought for leave from this court to file a reference against the taxing master's decision of 21<sup>st</sup> of November 2016 out of time. In their bid, the applicants invoked **order 42 rule 6** apparently of the **Civil Procedure Rules, order 51 rule 1** of those rules and **rule 11 (4) and (5)** of the **Auctioneers Remuneration Order** together with **section 3A** of the **Civil Procedure Act**.

The motion was supported by the affidavit of the 2<sup>nd</sup> Applicant sworn on 20<sup>th</sup> of March 2017. He swore that on 12<sup>th</sup> of July 2016, the respondents filed an auctioneers' bill of costs claiming the sum of Kshs. 347,901.80 against the applicants. The applicants objected to the bill of costs. Upon considering the parties' written submissions on the bill and the objection thereto, the taxing master delivered her ruling on 21<sup>st</sup> of November 2016 according to which the respondent's bill was allowed and taxed as drawn at Kshs 347,901.80.

One of the reasons why the applicants objected to the bill was because the items listed in the bill comprising the particulars of work which the auctioneers were seeking payment for had been nullified by the judgment of this honourable court on 8<sup>th</sup> May, 2015. Being so aggrieved, the applicants initially filed an application seeking a temporary stay of execution of the said ruling pending a review of the same. When the application came up for hearing on 13<sup>th</sup> of March 2017, the applicant's counsel withdrew it when he realised that it was apparently misconceived. According to him, the applicants were caught out of time in the process because the time within which they should have filed a memorandum of appeal against the ruling of the taxing master had since lapsed.

The applicant swore that they were vigilant to act at the earliest opportunity possible except that the initial application they filed against the ruling of the taxing master was defective. They contented that their intended appeal has high chances of success and it is only meet and just that they should be allowed to file the same out of time.

The respondent objected to the application on the ground that the application is frivolous, bad in law and a gross abuse of the process of the court. Her counsel also filed a replying affidavit and deposed that the impugned ruling was delivered in court on 21<sup>st</sup> of November 2016 and that the applicant's application to review it was dated 26<sup>th</sup> of January 2017. The respondent objected to the application for review and apparently it is as a result of the respondent's objection that the applicants withdrew their initial application.

It is the counsel's position that the delay in filing the application has not been explained and in any event the filing of a misconceived application is not sufficient reason for extension of time to file the memorandum of appeal.

The depositions in the respective affidavits in support of and in opposition to the applicant's motion constituted a large part of the parties' representatives' submissions when the motion came up for hearing.

Rule 55 of the Auctioneers Rules is the applicable rule and by and large the rule that is in contention here; it provides as follows:

**55. Fees and disbursements payable to an auctioneer**

**(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 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.**

There is no doubt that the applicants were dissatisfied with the ruling delivered by the taxing master on 21<sup>st</sup> November, 2016 and thus going by the tenor of rule 55(5) of the Auctioneers Rules, they ought to have filed their appeal to this court by way of a chamber summons within seven days of the date of the ruling. This they did not do and it was not until the 26<sup>th</sup> January, 2017, that they filed a motion in the magistrates' court seeking to review the ruling. In their own words, it turned out that this motion was not the appropriate course to take against the impugned ruling and so they were compelled to withdraw it. By this time, they were way long out of time.

The applicants appear to suggest that the motion they erroneously filed in the magistrates' court was, somehow, the cause of the delay but this is not so because even by the time they filed this motion they were way out of time to file the appeal. They could not possibly have filed the appeal at the time they filed the motion without seeking leave of this court to extend time.

I would have been prepared to exercise my discretion in favour of the applicants and extend the time of filing the appeal if they had offered a plausible explanation for the delay between the time the ruling was delivered and the time they moved into action and filed a notice of motion in the magistrates' court, though as noted, it was not the appropriate step to take. As far as I can see, no explanation has been given whatsoever for this delay and without such an explanation, there is obviously no material before me upon which I can exercise my discretion in favour of the applicants.

As much as I agree with the applicants that their intended appeal would have had high chances of success in view of the fact that by allowing the respondent's bill of costs the taxing master may probably have allowed payments for work which had earlier been nullified by this court in its judgment dated 4<sup>th</sup> April, 2015, I hold that they did not discharge the burden of explaining the delay in taking action against the ruling of the taxing master. I find this to be a proper case where the applicants may be said to have been indolent and slept on their rights. For this reason, I dismiss the applicant's application but parties will bear their own respective costs. It is so ordered.

**Dated, signed and delivered in open court this 16<sup>th</sup> June, 2017**

Ngaah Jairus

**JUDGE**