



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

MISC. APPLICATION NO. 67 OF 2015.

MOSES KALERWA LUTTA.....APPLICANT.

VERSUS

KURONYA AUCTIONEERS.....1ST RESPONDENT.

JAMES SUNDULI WATAKO..... 2ND RESPONDENT.

R U L I N G.

1. The applicant has lodged notice of Motion dated 25th June, 2015 seeking orders for extension of time to file a memo of appeal and leave to appeal out of time and costs.
2. The application is supported by the affidavit of Moses Kalerwa Luta and the grounds that the court made ruling on 24th June, 2014 which aggrieved him thus desire to appeal against the same.
3. However, due to want of money the plaintiff/applicant was not able to lodge appeal within requisite time. He avers that the intended appeal has high chances of success. The applicant avers that he is not inordinately late in filing application herein.
4. The applicant reiterates the same grounds in his supporting affidavit. He attributes his lateness to have been caused by lack for finance to file the appeal. To oppose the application, the 1st respondent lodged a replying affidavit sworn on 12th October, 2015 which he relies on wholly. The parties agreed to canvass the application via written submissions on 27th July, 2016 but to date only the 1st respondent has filed and served the written submissions. The applicant has not complied with the said directions.
5. The respondent No. 1 submits that application is untenable as the applicant cannot be appointed to substitute deceased auctioneer under Succession Act. This is because section 15 of the Auctioneers Act allows the appointment of nominees to be appointed to wind up the Auctioneers business.
6. Further the application for substitution had been filed outside prescribed period of the one year since the auctioneer passed on and thus the suit had by then abated. There can never be substitution in abated suit.
7. In the ruling annexed by the applicant in his affidavit delivered on 24th June, 2014, the court rejected application for substitution on the ground that by the time application was filed, the suit had abated. This is the ruling the applicant intends to appeal against.
8. I have perused the ruling aforesaid. In the application aforesaid, the applicant never sought to revive

the suit but to be substituted. As matter stands now, the suit has never been revived and there is no evidence of institutions of an application to revive the suit.

9. The court thus finds that even if leave and extension of time are granted, the same will be an academic exercise and add no value to the applicant cause as there is no pending suit. Court do not issue orders in vain.

10. The court therefore holds that the application lacks merit and therefore dismissed with no orders as to costs.

SIGNED, DATED and DELIVERED this 22ND day of **SEPTEMBER**, .2016.

C. KARIUKI.

JUDGE.

In the presence of:-

.....**for the Applicant.**

..... **for the 1st Respondent.**

.....**for the 2nd Respondent.**

.....**Court Assistant.**