



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Miscellaneous Application 1667 of 2007

**IN THE MATTER OF THE AUCTIONEERS RULES NO. 5 OF 1996 AND AUCTIONEERS RULES OF 1997
AND**

IN THE MATTER OF AN APPLICATION FOR TAXATION OF AN AUCTIONEERS BILL OF COSTS

BETWEEN

MARGARET ANINDO T/A IGARE AUCTIONEERS.....APPLICANTS

AND

HARAMBEE SACCO SOCIETY LIMITED1ST RESPONDENT

ALNASHIR JURJI & RIAZ KURJI

TA/ ELITE COMPUTERS.....2ND RESPONDENT

RULING

1. The Notice of Motion dated 18th February 2010 seeks for an order of extension of time under **Rule 55** of the **Auctioneers Rules** to enable the Applicant file an appeal. Consequently upon granting the order of enlargement of time, the applicant also applied for an order of stay of execution pending the hearing of the appeal. This application is premised on the grounds that the Bill of Costs was taxed as drawn on 6th May 2009. The Advocates for the 1st Respondent were not present when the Ruling was delivered. The advocate who was recorded as holding brief for the 1st Respondent's advocate was not instructed by M/s Oraro & Co. Advocates. As a result, the 1st Respondent's Advocates were not aware of the Ruling until they were served with the application dated 17th September 2009 seeking to convert the certificate of costs into a decree.

2. The 1st Respondent, therefore, seeks leave to enlarge the time within which to file the appeal. These grounds are also supported by the matters deposed to in the affidavit of **Mr. Samuel Makori** counsel for the 1st Respondent, and also the affidavit of **J. N. N. Wandera** the General Manager of the 1st Respondent. Although the Auctioneers Act does not provide for an appeal, counsel urged the court to be guided by the provisions of **Section 79G** of the **Civil Procedure Act** which gives the court general powers to extend time. The court should also invoke the inherent jurisdiction as provided for under **Section 3A** of the **Civil Procedure Rules**. The Applicant is ready to deposit the entire decetal sum so that the outcome of the appeal is not rendered nugatory.

3. This Application was opposed, counsel for the Applicant relied on the replying affidavit of **Geoffrey Muranya** sworn on 26th February 2010. The application is faulted for lacking in merits, principally because no reasons were given why the applicant failed to file the

appeal (if any) within the stipulated period. The application to convert the costs into a decree was filed on 19th September 2009 and it was heard on 27th November 2009. All that time the applicant did not file an appeal. According to the Applicant, the Respondents came to court when they were served with a decree to a forestall execution, thus the application for leave to file the appeal out of time is a mere afterthought merely meant to frustrate the Applicant from accessing the fruits of their litigation.

4. As regards the allegation that a Mr. Otieno who held brief for the firm of Ms. Oraro & Co Advocates had no instructions, that is a serious allegation which is not supported even by the records. Counsel drew the attention of the court to the record of proceedings before the taxing officer where Mr. Otieno indicated that he held brief for Mr. Makori who had filed his submissions. Mr. Makori had a duty to demonstrate that he had not given instructions to Mr. Otieno which is a common practice among advocates to hold brief for a colleague as a matter of courtesy. There is no correspondence written by Mr. Makori protesting to Mr. Otieno or even to the Law Society that Mr. Otieno held brief without instructions which is a professional misconduct.

5. This application invokes the inherent jurisdiction of this court to ensure the ends of justice are met depending on the circumstances of the case. It is trite that judicial discretion gives court flexibility to provide a definition according to the specifics of a case, for ends of justice and to prevent the abuse of the court process. In this particular case, the Applicant is seeking for enlargement of time within which to file an appeal against the decision of the Taxing Officer. Although the Applicants states that they have annexed a draft memorandum of appeal, I cannot see any on record, therefore, I am not able to tell whether it demonstrates an arguable appeal. The Auctioneers Rules have not provided for the filing of an appeal that is why the Applicant has invoked the inherent jurisdiction of this court. I see no prejudice that can be caused if the applicant is granted leave to file an appeal.

6. On the issue of stay of execution, that may prejudice the Applicant who might be kept away from the fruits of their litigation indefinitely. If one was to be guided by the provisions of **Order 41 Rule 4(2)** of the **Civil Procedure Rules**, the Respondent is entitled to provide security for due performance of the decree. The Respondent is also supposed to show that it will suffer substantial loss unless the order of stay of execution is granted. The Respondents did not demonstrate that they will suffer substantial loss, in any case the Applicant is an Auctioneer who is an officer of this court and in the event that the appeal will be successful, there is nothing to show that they cannot pay the decretal sum.

7. Accordingly the Respondent is granted leave to file an appeal, however the prayer for stay of execution is not granted. The Applicant shall have the costs of this application.

RULING READ AND SIGNED ON 7TH MAY, 2010 AT NAIROBI

**M. K. KOOME
JUDGE**