



**Wainaina t/a Seventy Seven Auctioneers v Crown Bus Services Limited (Miscellaneous Application 25 of 2022) [2024] KEHC 4682 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4682 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS APPLICATION 25 OF 2022  
RN NYAKUNDI, J  
APRIL 18, 2024**

**BETWEEN**

**RICHARD WAINAINA T/A SEVENTY SEVEN AUCTIONEERS ... APPELLANT**

**AND**

**CROWN BUS SERVICES LIMITED ..... RESPONDENT**

**RULING**

1. By a Chamber Summons dated and filed on 14/2/2022, the Applicant seeks the following orders:
  1. That the time within which the Appellant ought to file an appeal against the decision on assessment of the auctioneer's charges made on 28/1/2022, in Eldoret Chief Magistrate Court Miscellaneous Application No. E098 of 2021 and the appeal herein deemed as validated by virtue of the extension of time.
  2. That the decision of the 28/1/2022 delivered in Eldoret Chief Magistrate Court Miscellaneous Application No. E098 of 2021; Richard Wainaina T/A Seventy Seven Auctioneers V Crown Bus Service Limited be set aside in so far as it denied the Appellant entitlement to fees on attachment on the basis that only a proclamation of the property had been done.
  3. That a finding that a proclamation of property by auctioneer amounts to an attachment and an award as sought in item (3) of the auctioneers Bill of costs dated the 27/5/2021 be made to the Appellant.
2. The application was based upon the Supporting Affidavit of the Applicant and the grounds on the face thereof.
3. The Applicant deposed that he is a licensed Auctioneer trading under the name and style of Seventy Seven Auctioneers. That on 28/5/2021 he instituted a motion for the assessment of his charges in Eldoret Chief Magistrate Court Miscellaneous Application No. E098 of 2021; Richard Wainaina



T/A Seventy Seven Auctioneers V Crown Bus Service Limited. The Applicant maintains that the Respondent herein was served with the motion and filed a Replying Affidavit on 19/10/2021 and the Court directed that the motion be canvassed by way of written submissions and that he filed his submissions on 19/11/2021 while the Respondent filed on 15/10/2021 respectively and the Court delivered a ruling on the assessment of the Bill of costs on 28/1/2022 wherein the Bill was assessed in sum of Kshs.33,100/=. Aggrieved by the award the Applicant sought to know the reason for the low award and sought to find the ruling and his Advocates on 7/2/2022 informed him that they were able to get the ruling and upon studying the same he noted that the Learned Magistrate had denied him, his entitlement to charge fees on attachment on the basis that he had only proclaimed. In light of this finding the Applicant instructed his Advocates to lodge an appeal but the time within which to appeal had expired. The Applicant maintains that he could not appeal on time as at the time he did not have the decision with him. The Applicant urged the Court to extend time within which he ought to appeal and that the appeal be deemed as duly filed.

4. The application is unopposed. There is an Affidavit of Service on record filed on 8/3/2022 showing that the Respondent were served with the application but they chose not to respond.

### Determination

5. I have considered the application by the Applicant, the grounds and the supporting affidavit. In my view, the main issue for determination is whether the application has any merit and therefore whether the orders sought should be granted.
6. Being equitable reliefs, they are underpinned on well settled principles which guide the Court to decline or grant the applications in the case of *Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] KLR-SCK, the Court held as follows on extension of time to file an appeal out of time:
  1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;
  5. Whether there would be any prejudices suffered by the respondents if the extension was granted;
  6. Whether the application had been brought without undue delay; and;
  7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
7. The time stipulation is a requirement of the law as clearly stated in Section 79 G of the *Civil Procedure Act*. In short, parties cannot, either unilaterally or by agreement between them, metaphorically, waive away the rules of the Court. The rules of the Court are meant to achieve timely and orderly commencement, progress and proper determination of litigation of proceedings. Given the statutory limit, principally, the delay is inexcusable unless the applicant shows sufficient cause to justify the delay and that any such extension shall not prejudice the respondent. In this regard, the Court in *Paul*



Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR the Court of Appeal while referring to other authorities observed:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy and caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted and whether the matter raises issues of public importance. In Henry Mukora Mwangi v Charles Gichina Mwangi-Civil Application No. Nai 26 of 2004, this Court held:- “It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize his principle by referring to the decision in Mwangi v Kenya Airways Ltd. [2003] KLR 486 in which this Court stated: \_ “Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing an application for extension of time under rule 4 of the Rules.

For instance, in Leo Sila Mutiso vs Rose Hellen Wangari Mwangi- Civil Application No Nai. 255 of 1997 (unreported), the Court expressed itself thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of the time are: first, the length of delay; secondly the reason for delay; thirdly(possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

8. The legal authorities demonstrate that it is *indeed* a balancing exercise between the need for there to be a good reason for the delay and the prejudice that may be caused to the other party if the extension were granted. That’s why in the Salat case (*Supra*) observed “Extension of time being a creature of equity, one can only enjoy if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it”.
9. In the present case, the ruling was delivered on 28/1/2022 and the Notice of Motion to extend time was filed on 14/2/2022. This is 17 days after the date of the ruling as such there was no delay in view of the 30 days stipulated in Section 79 G of the Civil Procedure Act.
10. As such the Application herein is allowed in terms of prayer (1), prayer (2) and (3) can be canvassed in the appeal.
11. Accordingly, the Applicant is here by directed to file and serve his Memorandum of appeal within (21) days from the date of this ruling. Costs shall abide the outcome of the appeal.
12. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 18<sup>TH</sup> DAY OF APRIL 2024**

.....

**R. NYAKUNDI**  
**JUDGE**

