



**Climax Coaches Ltd v Onsongo t/a Hegeons Auctioneers (Miscellaneous Civil Case E043 of 2022) [2023] KEHC 1836 (KLR) (7 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1836 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
MISCELLANEOUS CIVIL CASE E043 OF 2022**

**KW KIARIE, J**

**MARCH 7, 2023**

**BETWEEN**

**CLIMAX COACHES LTD ..... APPLICANT**

**AND**

**HEZRON GETUMA ONSONGO T/A HEGEONS  
AUCTIONEERS ..... RESPONDENT**

**RULING**

1. Climax Coaches Ltd, the applicant herein, moved the court by way of Notice of Motion dated September 26, 2022. The application is brought under sections 1, 1A, 3A 63(e) & 95 of the Civil Procedure Act, Orders 22 Rule 22, 50 Rule 5 & 6, and 51 of the Civil Procedure Rules & Rules 55 (4) & 55 (5) of the Auctioneers Rules. The applicant is seeking the following orders:
  - a. That this application be certified urgent and service thereof be dispensed with and the application herein be heard *ex-parte* and in the first instance.
  - b. That the court grants stay of execution of the ruling delivered by honorable Nicodemus Mosei, SRM on August 17, 2022 pending the hearing and determination of this application.
  - c. That this honorable court does grant the applicant leave to appeal against the said ruling out of time by directing that they file their memorandum of appeal out of time.
  - d. That this honorable court be pleased to give any other and or further orders that it may deem fit, just and expedient in the circumstances and in the interest of justice.
  - e. That the cost of this application be in the cause.
2. The application is premised on the following grounds:



- a. That on August 17, 2022, the respondent's Bill of Costs was taxed at kshs 200,472 by the Honourable Nicodemus Moseti, SRM, a figure that is too greatly aggravated wherein the decretal sum proclaimed against is ksh 420,550/- only and kshs.719,788 when interests and costs are factored in.
  - b. That the applicant is dissatisfied with the court's ruling and the period within which to prefer their appeal has lapsed hence the present application seeking leave to appeal the ruling out of time.
  - c. That there is no stay of execution currently and the applicant herein is exposed as the respondent might execute based on the said the said ruling.
  - d. That unless the honorable court issues stay of execution orders, the respondent shall proceed and execute therefore rendering this application nugatory and the applicants will have been condemned unheard.
  - e. That unless this application is certified urgent and heard immediately, this application would be rendered nugatory as the applicants herein are exposed and the respondent might execute the said ruling.
  - f. That unless the honorable court grants stay of execution, the respondent shall proceed and execute the ruling therefore rendering this application and the intended appeal nugatory and the applicants will have been condemned unheard.
  - g. That unless this application is certified urgent and heard immediately, this application would be rendered nugatory as there exists no stay of execution that unless this application is certified urgent and heard immediately, this application would be rendered nugatory as there exists no stay of execution.
  - h. That the applicant is ready and willing to abide by any other or further orders as may be issued by this honorable court.
  - i. That this application has been made without unreasonable/inordinate delay.
  - j. That in any event this application has been filed in timely fashion.
  - k. That the application has been made in good faith.
  - l. That this application ought to be granted in the interest of equity and justice.
3. The application was opposed by the respondent on the following grounds:
    - a. That the application before court is frivolous, vexatious and defective and as such an abuse of the court process.
    - b. That the supporting affidavit to the application is defective as it has been sworn by the advocate who appears for the applicant therefore the advocate has descended into the arena of litigant.
    - c. That justice delayed is justice denied.
  4. The taxation order which the applicant is seeking leave to appeal against was made on August 17, 2022.
  5. Section 79G of the *Civil Procedure Act* provides for extension of time to appeal as follows:  
Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the



lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

6. The order sought by the applicant is discretionary and the court must be satisfied that it is merited. The Supreme Court of Kenya in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR said:  
Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time the whole period of delay should be stated and explained to the satisfaction of the court.
7. The applicant had up to September 18, 2022 to file the appeal. The present application was filed in court on October 5, 2022. This was 17 days after the time to appeal had elapsed.
8. Upon perusal of the supporting affidavit, I find no attempt whatsoever to explain the delay. I therefore find that I have no basis to exercise the discretion judiciously. The application is therefore dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 7<sup>TH</sup> DAY OF MARCH, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**

