



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**MISCELLANEOUS CIVIL APPLICATION NO. E152 OF 2021**  
**SAMBA PLATINUM LIMITED.....APPLICANT**  
**VERSUS**  
**MARY ONYWONDI NYABOKE.....RESPONDENT**

**Coram - R. Nyakundi**

Ms. Kigamwa Advocete for the Respondent

Ms. Kukul, Fozah Advocate for the Applicant

**RULING**

At first hearing of this matter, the applicant by way of notice of motion for court orders supported by an affidavit sought the following orders: -

1. That the said Application be certified as urgent and service in the first instance be dispensed with;
2. That the Applicant be hereby granted leave to file an Application for reference for review out of time based on the ruling dated 18<sup>th</sup> June, 2021 and certificate of taxation on the bill of costs dated 24<sup>th</sup> August, 2021;
3. That there be an interim stay of execution of the proclamation and warrants of attachment dated 16<sup>th</sup> September, 2021 and issued by Seventy Seven Auctioneers pending the hearing and determination of this Application.
4. That the proclamations and warrants of attachment dated 16<sup>th</sup> of September, 2021 be hereby lifted as being irregular.
5. That the costs of this application be borne by the Respondent.

The grounds on which the orders are lodged are that:-

1. That a ruling on the taxation of the bill of costs was granted in absentia of the Application herein;
2. That the Applicant seeks leave to file an Application for reference for review out of time based on the ruling dated 18<sup>th</sup> June, 2021 and certificate of taxation on the bill of costs dated 24<sup>th</sup> August, 2021;
3. That the Applicant who was an Objector in Eldort CMCC No. 306 of 2009; sought to record a consent with the decree holder in which the same agreed to pay the judgment together with the auctioneers charges as a basis of the release of the attached bust which was registered in the name of the Applicant herein and was erroneously attached.
4. That the basis of the consent was to procure the release of the attached asset after agreeing on the auctioneers charges; failure of which the respondent would proceed and have its bill of costs taxed.
5. That the respondent herein agreed to take Kshs. 45,000/- as a basis of procuring the release of the attached asset and hence the matter was resolved amicably; and that the applicant was not entitled to pay extra fees.

6. That the Respondent despite having received the said remittance, proceeded and had its bill of costs taxed in a court of law.
7. That parties are bound by the terms of the agreement, and should not renege on the terms voluntarily engaged thereto.
8. That proclamations and warrants of attachment were served upon the Applicant herein, without notice of the same or certificate of taxation having been rendered; and hence incurring further irregular costs of Kshs. 35,000/- which the respondent is not entitled thereto.
9. That the due date of execution has since lapsed and unless the interim orders are so granted, then the respondent shall be at liberty to execute hence rendering the said application a nugatory.

The application is made pursuant to Section 1A, 1B, 3A, S 3A of the Civil Procedure Act, Section 4(1) and 22 of the Limitations of Actions Act Article 50 and 159 of the constitution of Kenya. However the applicant omitted to mention Rules 55(4) and 5 of the Auctioneer Rules 1997 hence produces for the procedure on grievances on matter arising over of a taxation of an Auctioneer bill of costs. The respondent is opposed to the application on the basis of a preliminary objection that the motion as fixed contravenes rule 55(4) and 5 of the Auctioneer Rules 1997.

**BACKGROUND: -**

It is clear and undisputed from the recourse of the taxing master and her ruling that she issues being raised on the consent order referred to by the applicant were appropriately dealt with at that primary forum. It is not an issue as to who was to bear the brunt of making the Auctioneer fees who had full instructions to execute the decree. The applicants have alleged that owing the grounds they will be relying to challenge the taxation is on the basis of the consent which went as far as factoring in the release of the attached assets that in that consent the respondent herein had agreed to take Shs. 45,000 as Auctioneer fees as a final settlement of that claim.

As a result of those concerns the applicant initiated these proceedings against the Respondent asking the court to grant leave to file the appeal out of time and a further stay of execution. The applicant served the proclamation as irregular which ought to be lifted upfront. It is within this center that I now address the other issues in this matter.

**ISSUES: -**

From the stand point of the application the ultimate issue to be decided is whether the leave to file an appeal out of time against the taxing masters decision on the Auctioneer's bill of costs is pleasurable and capable of being granted by this court. The other issues on stay are purposefully collated to the prayer on execution of time to file an "appeal" or as the applicants, calls it a reference for review of the taxation ruling there is further the question of standing of the preliminary objection raised by the Respondent.

On issue No. 1 which deals with leave to extend time, it must be determined whether: -

- a. The affidavit supporting the application discloses any pleasurable and sufficient excuse for the applicants failure to file the "appeal" in time
- b. The delay in filing the appeal was inordinate
- c. The proposed appeal has the prospect of succeeding on the merits.

**THE LAW: -**

Timeliness is a manifest exemplary standard and a requirement of the law under procedural law and goes to the order of rule administration of Civil Justice.

The vital primary actors in the realm of adjudication of disputes ought to discharge their functions within a descriptive time frame set out under various statutory scheme, if they are not to render the delivery of justice, suffer the consequences of dilatoriness. Its indeed the prescribed time frame incases of this number there opens the jurisdiction of the court on enlargement of time. The superior courts have eminently spoken on the element of observing timelines expressing provided for in the enabling of statutes.

The case of Salat -Vs- IEBC [2014] eKLR is instructive as it sets over the principles that are applicable when court are faced with issues of this nature being raised by the applicant in making this assessment. The courts are expected to pay special attention to:-

- i. The extension of time is not a right any litigant to a litigant process.
- ii. The length of the delay.
- iii. The explanation for the delay.
- iv. If there is any prejudice to the other party.
- v. The merits of the case.

vi. The effect of delay in the administration of justice.

vii. The importance of compliance with time limits since it's a requirement of the law that they are expressing legislated for compliance.

viii. The costs and resources of the parties might also be a question which is relevance in determining whether prejudice is likely to be occasioned to an adverse party.

See also the participants in *Dapane Parry -Vs- Murray Alexander Carson* [1963] EA 5N6. *Feroz Bequm Qureshi and another -Vs- Maganbhai Patel* [1964] E.A. 633, which deals with sufficient cause as one of the characteristic features to be demonstrated by an application seeking this equitable remedy on extension of time. Indeed, this is not a question of sympathy, since part of the concern but a burden to be discharged by the aggrieved party to an appeal persuading for exercise of discretion or cogent reasons and evidence. See further *Paul Wanjohi Mathenge -Vs- Duncan Gichuru Mathenge* [2013] Eklr. *Leo Sila Mutiso -Vs- Rose Hellen Wangari Mwangi* [1999(E.A) 231]

Giving efficacy to the above principles, in response to the applicants notice of motion, everything being constant an appeal should have been preferred within (7) seven days from the date of the ruling of the taxing master referenced as 18.6.2021. This is in consonant with Rule 55(4) and 5 of the Auctioneer Rules 1997 counsel for the applicant submits that the delay in complying with the set timeline was as a result of the ruling delivered without notice, hence the expiry of time. We foundation of the expression of grievance in a case of this nature is the importance of emuable and reliable evidence to qualify the assertion on lapse of time for reason of not being aware of the date of delivery of the ruling. It is on record that the applicant did participate in the proceedings leading to the outcome of the taxing master's decision. Pursuant to those proceedings a ruling date was scheduled on 11.6.2021 but as explanation by the taxing master due to exigency of duty the same was delivered and dispatched to the counsels, on 18.6.2021. As the counsel never provided an email to the court which is a policy dictate he failed to reap the benefits of real time of the decision on pronounced on 18.6.2021.

In further analyzing the issue at hand regarding the context of this motion it is unclear when the applicant came to know of the existence of the impugned ruling. He maintained the issue of not being made aware of the ruling but failed to inform this court evidentially on the averment on the phenomenon of knowledge as to the decision of the court. I am now with respect in agreement with Learned Counsel that the length of the delay of three months to file an appeal is excusable in absence of substantial and compelling evidence on non-compliance. It is apparent to the court why the legislature provided for a period of (7) seven days time hence which to challenge an Auctioneers bill of costs. In the explanation that has been given further delay is not pleasurable for the applicants failure to adhere to Rule 55(4) and (5) of the Auctioneers Rules 1997.

It is undisputed that the advocate involved in the litigation before the taxing master knew that it was a live matter awaiting the ruling. It should be expected that certain inquiries would have been made by his office on the anticipated ruling scheduled for 11.6.2021 it is pleasurable tht this kind of professional conduct could have affected the timely preparation and filing of the appeal. Irrespective of the averments made by the applicant in his affidavits the general discretion provided I Article 159 (2) (d) of the Constitution and Section 1A and 1(b) of the Civil Procedure Act. On oxygen a principle would not apply as the applicant fails to meet the threshold.

In addition the language of the rule is couched in mandatory terms and in such a scenario a clear duty is vested on a party to ensure that his or her evidence presented in the support of the motion is accurate and of high probative value. It is to be appreciated that the application did not entail exactly sufficiency and good causes on the question of exercise of discretion to grant the relief on execution of time. I seem to lean more towards the Respondents preliminary objection to interpret the law as not to confer a benefit of discretion to the applicant. I now sum to the issue of the purported consensus covenanted core between both parties to settle the matter or Auctioneer fees and costs.

In every respect consistent with the principles in *Flora Wasike -Vs- Destimo Wamboko* [1982 – 1988] KAR 625, the court observed that it is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify seeking a contract aside, it is certain conclusion remain to be fulfilled which are not carried out. *Hith Hirani V. Kassam* [1952] 19EACA 131' prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them and cannot be varied or discharged unless observed by fraud, or collusion or by an agreement contrary to the policy of the court or if consensus was given without sufficient material facts, it is misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement I would make it clear.

In the instance case and from the issues it raises, as articulated by learned counsel, it has become evidence to me that there was no proper consensus with regard to the fees and costs payable to the Auctioneer. The overall sphere of the competence of the purported censure is a question of great significance and a precise manner, the taxing master accorded to it in her ruling. The contemplated issues as where parties agreed upon were also distilled by the taxing master. There was nowhere the issuing fees and costs crystallized into a consent adopted as an order of the court to bench both parties to the dispute. From the averments thus seated by the applicant it is clear to me that no such consensus was reached capable of being enforced by the court. It is against the background the taxing master went ahead to invite parties to canvass the issue on Auctioneer Fees and costs. In absence of the consent it was open to the court to consider such issues on the merits. Consequently, there becomes a non suited issue before this forum. It was also urged on behalf of the applicant that the purported appeal has high chances of success.

The issue likely to dominate the appeals were if the matter was even to see the light of the day whether the taxing master erred I her assessment of the due Auctioneer Fees and Costs payable by the applicant. The answer truen on a classic interlocutory considerations as to whether, there exist a serious issue to be tried with high chances of success. On the record before me it appears tht the taxing master dealt with the subject matter through the substantive law; Auctioneer & Act and Rules of 1997 as thereafter amended and appearance on fees and costs for professional work undertaken on instructions by a judgmental creditor.

As for the argument that the total costs will form into a punitive and exorbitant assessment does not by itself convert its character as an issue on appeal with high chances of succeeding in the case at bar. I am the view regardless of the dissatisfaction by the applicant on the certificate of costs by the Taxing Master, the degree of success of the appeal is a moor question.

Also relevant to grant the relief sought is whether it might require continued enforcement of the certificate of costs, especially where the terms of the order cannot be precisely challenged and where any further action may rescue in wasteful litigation order compliance the grave man of the applicant's claim to the intended appeals precisely to that the certificate of costs contrasted the consensus order previously endorsed by both parties that the consent so reached estopped them from relegating the issue once more.

Unfortunately, and with respect to learned counsel for the applicant there has been no attachments in the paperwork before me to show the terms of the consent and the adoption of it be a court to give it legality And efficacy of enforcement it would be futile or ineffective in achieving the purpose for which the relief on extension of time is sought to rely on presumptions on existence of a fact so contested by the respondent. The more that can be said is that the applicant never entered into a consent with the Respondent or certainty of Fees and Costs.

This essence on the prospects of an appeal with high chances of success is clearly within the province of this court's jurisdiction and competence. To that extent the applicant has failed to discharge the burden and the standard of proof to entitle him the relief of extension of time.

Finally, the limitation period in this case of (7) seven days was substantive, because it created an accrued light in the respondent to plead a time bar. The limitation defence was properly pleaded here by the Respondent and parties ought not to have proceeded on the assumption that the court would exercise discretion contrary to the statutory provisions. Under these circumstances it is incumbent on this court to reiterate that the notice of motion dated 27.9.2021 lacks merit and its good for dismissal with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2021**

**R. NYAKUNDI**

**JUDGE**