



REPUBLIC OF KENYA



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Rai Cement Company Limited v Oduor t/a Heath Auctioneer Services (Civil Miscellaneous Application E067 of 2024) [2026] KEHC 646 (KLR) (30 January 2026) (Ruling)

Neutral citation: [2026] KEHC 646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL MISCELLANEOUS APPLICATION E067 OF 2024**

OA SEWE, J

JANUARY 30, 2026

BETWEEN

RAI CEMENT COMPANY LIMITED APPLICANT

AND

**ERICK ERGINE ODUOR T/A HEATH AUCTIONEER
SERVICES RESPONDENT**

RULING

1. Before the Court for determination is the Chamber Summons dated 26th September 2024. It was filed pursuant to Sections 79G of the *Civil Procedure Act*, Cap 21, Section 7 of the *Appellate Jurisdiction Act*, Cap 9 of the Laws of Kenya, Order 42 Rule 6 of the Civil Procedure Rules and Rules 55(3), (4) & 5 and the Fourth Schedule Part 11 of the Auctioneers Rules 2009. The applicant thereby prayed for orders that:
 - (a) Spent
 - (b) That the application be deemed as an appeal as envisaged by the provisions of Rule 55(3) and (4) of the Auctioneers Rules, 2009
 - (c) That the applicant be granted leave and extension of time to file an appeal against the decision of Hon. B.K. Toroitich, Deputy Registrar, delivered on the 9th September 2024 in Homa Bay MCCMisc. No. E016 of 2014 and that the present appeal against the said ruling between the parties herein though lodged out of time be admitted out of time; and upon such time being extended, be deemed as duly filed and valid.
 - (d) That the order and ruling of the subordinate court, Hon. B.K. Toroitich, Deputy Registrar, delivered in Homa Bay MCCMisc. No. E016 of 2024 allowing item 10 on Further Court Fees in the Auctioneers Bill of Costs filed at Kshs. 70,500/= be set aside.



- (e) That the Court be pleased to order the respondent to refund to the applicant, the sum of Kshs. 70,500/= paid to him on account of the award of Further Court Fees through the Ruling Hon. B.K. Toroitich, Deputy Registrar, delivered in Homa Bay MCCMisc. No. E016 of 2024 in respect of Item 10 of his Bill of Costs dated 8th March 2024.
- (f) That the costs of the appeal by way of a Chamber Summons, be prescribed and paid for.
2. The application was premised on the grounds that, on the 9th September 2024, the Taxing Officer delivered her ruling in Homa Bay MCCMisc. No. E016 of 2024 on the Auctioneers Bill of Costs filed by the respondent as the Auctioneer. The said Bill of Costs was taxed in the sum of Kshs. 175,838.84 and the contention of the applicant was that neither of the parties was given notice of the date of delivery of the ruling and were therefore not in attendance.
3. It was further the averment of the applicant that it only got to know of the Ruling on the 24th September 2024, nearly 20 days later, when the respondent forwarded to the applicant's Advocates a request for payment of Kshs. 175,838.84 in satisfaction of the Ruling and Orders of the Taxing Officer. It was further the contention of the applicant that the Taxing Officer erred in fact and in law in failing to consider the fact that the payment of the Further Court Fees was a condition for issuance of the Decree and as such the respondent was not obligated to pay and did not pay as claimed in the Bill of Costs dated 8th March 2024.
4. Being aggrieved by that aspect of the Ruling on Taxation, the applicant filed the instant appeal in accordance with Rule 55(3) & (4) of the Auctioneers Rules and Section 65(1) of the Civil Procedure Act, albeit out of time, as the 7 days' window for filing an appeal under Rule 55(3) & (4) of the Fourth Schedule Part II of the Auctioneers Rules had since lapsed.
5. The applicant now seeks an extension of time to file an appeal and the validation of the present appeal against the ruling delivered on 9th September 2024; contending that it raises serious triable issues for the Court's determination.
6. The grounds aforesaid were elaborated on in the applicant's Supporting Affidavit sworn by Stacy Twena, Advocate, on 26th September 2024. The applicant explained that failure to file his appeal within time was due to the fact that no notice of the ruling was ever served on the parties; and that by the time it got wind of the ruling the ruling some 20 days later, the prescribed period for appeal had already lapsed.
7. The respondent opposed the application. He relied on his Replying Affidavit sworn on 15th January 2025. The respondent deposed that he is an Auctioneer trading as such in the name of Heath Consult Auctioneers, with jurisdiction in Homa Bay among other areas. He averred that the application is improperly before the Court, having been filed outside the 7 days provided for in Rule 55 of the Auctioneers Rules. He pointed out that the decision of the lower court was delivered on 9th September 2024 and is therefore the application is time-barred.
8. The respondent then proceeded to explain the circumstances under which he paid the Further Court Fees of Kshs. 70,500/=.
9. The application was canvassed by way of written submissions, directions having been given to that effect on 26th February 2025. The applicant proposed the following issues for determination:
- (a) Whether the appellant sought leave and extension of time to file the appeal out of time;
- (b) Whether the applicant has demonstrated good reasons for extension of time to file the appeal out of time;



- (c) Whether the Ruling and Order of the Deputy Registrar allowing Item No. 10 in the Auctioneer’s Bill of Costs should be set aside.
10. The applicant reiterated his assertions in the Supporting Affidavit and relied on Rule 55(4) and (5) of the Auctioneers Rules in urging the Court to allow the application for extension of time and for deeming the appeal duly filed.
11. On its part, the respondent proposed the following issues for determination:
- (a) Whether the applicant has locus standi to ask for refund of Further Court Fees of Kshs. 70,500/=.
- (b) Whether the Deputy Registrar rightfully awarded Further Court Fees of Kshs. 70,500/= to the respondent.
12. The general principle is that the Court has the discretion to set grant extension of time in situations where such discretion is deserved. In the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR the Supreme Court restated the guiding factors as follows:
- ...It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the *Nicholas Salat* case to which all the parties herein have relied upon. The Court delineated the following as:
- “the under-lying principles that a Court should consider in exercise of such discretion:
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 should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay;”
13. Rule 55 of the Auctioneers Rules is explicit. It provides for fees and disbursements payable to an auctioneer. It states:
- (1) Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.
 - (2) Where a dispute arises as to the amount of fees payable to an auctioneer—
 - (a) in proceedings before the High Court; or
 - (b) where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar,



as defined in the Civil Procedure Rules (Cap. 21, Sub. Leg.), may on the application of any party to the dispute assess the fee payable.

- (3) In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.
 - (4) An appeal from a decision of a registrar or a magistrate or the Board under subrules (2) and (3) shall be to a judge in chambers.
 - (5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.
- 14 It is common ground that the impugned ruling was delivered on 6th September 2024; and therefore that the instant application was filed outside the period of 7 days provided for in Rule 55(5) of the Auctioneers Rules. The explanation for the delay was also not contested, namely, that the applicant was not given notice of the ruling date. The documents annexed to the Supporting Affidavit include Annexure ST-02, an extract from the CTS which confirms that notice of the ruling date was to be issued. There is no indication that such notice was issued by the court registry.
- 15 In the same vein, it cannot be said that the delay was inordinate. Nevertheless, the onus was on the applicant to also demonstrate that the appeal is arguable. The applicant is aggrieved that the Deputy Registrar awarded the respondent Further Court Fees as a reimbursement. The applicant's contention, based on Section 107 of the *Evidence Act* was that no proof was given that such payment was made by the respondent.
- 16 In the Replying Affidavit, the respondent explained that, at the time of obtaining instructions from the decree-holder's counsel, they agreed that the respondent would pay any Further Court Fees due; a precondition for the issuance of Warrants of Attachment and Sale. The respondent further averred that he deposited Kshs. 70,500/= with counsel for the decree-holder and that the same was paid through the Judiciary e-filing system on the understanding that he would recover the same as a disbursement.
17. Contrary to the applicant's contention that there was no proof of payment of the Kshs. 70,500/=, the respondent attached a receipt marked Annexure EEO-1 in proof of payment of that sum. Additionally, the applicant also attached a schedule of all payments made in the primary suit, and item 4 is proof of payment of the disputed sum. The PRN number EZN7HD3A tallies with the receipt marked Annexure EEO-1. It is therefore pointless for the applicant to dispute the conclusion reached by the Deputy Registrar that payment was indeed proved. Under The Fourth Schedule of the Auctioneers Rules, an auctioneer is entitled to claim such disbursements as may be proved to have been paid by such auctioneer.
18. Lastly, and more importantly, the applicant has already paid the disputed amount. The said amount was due and payable before execution and was ultimately recoverable from the applicant. In the premises, it cannot be said that the appeal is arguable.
19. I therefore find no merit in the application dated 26th September 2024. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 30TH DAY OF JANUARY 2026

OLGA SEWE



JUDGE

