



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO**

**MISC. APPLICATION NO. E001 OF 2021**

**JAMES O'MAKORI T/A LIFEWOOD**

**TRADERS AUCTIONEERS.....APPLICANT**

**AND**

**THE STAR PUBLICATIONS LIMITED.....RESPONDENT**

**RULING**

1. This Ruling relates to the respondent's Chamber Summons dated 29/9/2021 in Auctioneers Bill of Costs hereinafter called the Applicant. The application is brought under Article 159 (2) (d) of the Constitution of Kenya, Section 1 A & B, 3A, 79G and 95 of the Civil Procedure Act and Rule 55 (4) & (5) of the Auctioneers Rules. The application seeks the following orders:-

- a) Stay of execution of the Taxing Master's ruling dated 2/6/2021 pending the intended appeal.
- b) The time within which to lodge an appeal against the ruling of the Taxing Master Hon SK Ngetich delivered 2/6/2021 be extended from 16/6/2021 and the instant appeal be deemed as duly filed within the prescribed time.
- c) The ruling of the Taxing Master Hon SK Ngetich delivered on 2/6/2021 in the matter of taxation of the Auctioneer's Bill of Costs dated 14/1/2021 between the parties herein be set aside.
- d) The appeal be allowed and the Auctioneer's Notice of Motion dated 14/1/2021 be determined on the merits by a Taxing Master other than Hon SK Ngetich.
- e) Costs of the application be provided for.

2. The application is supported by the affidavit sworn by the applicant's counsel Mr. Dennis C Mungai on 29.7.2021. The respondent/auctioneer has opposed the application vide the replying Affidavit sworn on 4/10/2021 by his counsel Mr. Raphael Wambua Kigamwa. The application was disposed of by written submissions.

**APPLICANT'S CASE**

3. The applicant's case is that the Taxing Master delivered ruling on the Auctioneers Bill of Costs on 2/6/2021; that the ruling was to be delivered on 2/3/2021 but it was delivered on 2/6/2021 without proper notice to it; that it only became aware of the ruling on 27.7.2021 when the matter was mentioned before Wasilwa J for adoption of the taxed costs as judgment of the court; that upon perusal of the ruling it noted that the Taxing Master did not determine all the issues it raised in opposition to the Auctioneers Bill of Costs; that the purported execution was irregular because the court stayed execution; that the costs of the said irregular execution should be met by the decree-holder; and that it is in the interest of justice that the application be allowed.

4. The applicant submitted that the failure to properly serve its advocates with a notice of the ruling has prejudiced it and caused injustice to it and as such the leave sought should be granted. It urged that the respondent has not demonstrated any prejudice that it would suffer if the leave is granted. It contended that judicial discretion gives the court flexibility to provide a determination for ends of justice and to prevent abuse of the court process.

5. In the applicant's view, the failure to file an appeal against the taxing Master's decision is directly attributable to the applicant's improper service. It maintained that it stands to suffer great prejudice if the application is disallowed because it will be forced to bear the costs for an irregular execution by the auctioneer. For emphasis, it relied on **Margaret Anindo t/a Igare Auctioneers v Harambee Sacco society limited & another [2010] eKLR.**

## RESPONDENTS CASE

6. The respondent/auctioneer's case is that on 25/5/2021 the Taxing Master gave notice to both parties that the ruling would be on 2/6/2021; that after the delivery of the ruling, his counsel wrote to the taxing officer and copied to applicant requesting for copy of the ruling; that the applicant failed to lodge any appeal and on 14.7.2021 he wrote to the court and copied to the applicant, for the ruling to be adopted; that the matter was fixed for mention before the court on 27.7.2021 when the counsel attended and claimed ignorance of the ruling; that on the same day it served the applicant with a copy of the ruling and it filed the instant application on 13/9/2021.

7. Hesubmitted that the applicant has not explained the reason for the failure to file appeal within 7 days of the impugned ruling as required under rule 55(5) of the Auctioneer Rules. For emphasis he relied on **Ann WairimuMwangi& another v Nancy WanjiraWaruingi t/a Providence Auctioneers [2017] eKLR, Kenya Oil Company Limited v Jovah H Kariuki t/a Moran Auctioneers [2020] eKLR, and Dilpack Kenya Limited v William MuthamaKitonyi [2018] eKLR** where the courts held that delay in filing appeal against the auctioneers costs like in this case for 95 and 43 days respectively was unreasonable delay.

8. The respondent denied that the execution was irregular and averred that the alleged stay order was a nullity for being granted by the Deputy registrar who lacked jurisdiction. He contended that the said stay order did not stay the execution as it was a nullity. For emphasis he relied on **Macfoy v United Africa co. Ltd [1961] 3 ALL ER 1169**.

9. Finally, the respondent submitted that the applicant did not challenge the quantum of claimed in his Bill and as such the applicant is raising a new matter in the appeal. He contended that such a move cannot be allowed at this stage. For emphasis he relied on **Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] e KLR** where M'noti JA held that an appellate court does not metamorphose into a trial court and make first-instance determinations.

## ISSUES FOR DETERMINATION AND ANALYSIS

10. There is no dispute that the taxing officer of this court rendered a ruling in respect of the Auctioneer's Bill of Costs on 2/6/2021. There is also no dispute that the applicants did not file any appeal within the 7 days required by Rule 55(5) of the Auctioneers Rules. The main issue for determination in the instant application are:-

*a) Whether the leave to file appeal out of time should be granted as prayed.*

*b) Whether stay of execution or further proceedings herein pending the intended appeal.*

*c) Whether the impugned ruling dated 2/6/2021 should be set aside and the auctioneer's Bill of Costs determined by another Taxing Master.*

11. The court will not deal with the second and the third issues because they are prematurely before the court. It is common sense that they can only be considered if the leave to file the appeal is granted and the substantive appeal filed under Rule 55 of the Auctioneers Rules. Consequently, the only issue to consider herein is whether applicant has laid before this court sufficient ground upon which the leave to lodge an appeal out of time can be granted.

12. The criteria for extension of time was discussed by the Supreme Court in **Nick Salat –v Independent Electrol& Boundaries Commission & 7 other [2014] eKLR**, thus; extension of time is not a right but an equitable remedy, that it is available to a deserving party, a party seeking extension of time must lay a basis to the satisfaction of the court, the discretion to extend the time is a consideration to be made on a case to case basis, the reason for the delay must be explained to the satisfaction of the court, the court ought to consider if the opposite party will suffer prejudice if the extension is granted, whether the application has been brought without undue delay, and the public interest in matter.

13. I have carefully considered the rival submissions herein, the applicants case is that it was not notified of the new date for the delivery of the ruling by the Taxing Master and that it only became aware of the same on 27/7/2021 when the matter was mentioned before the Judge for adoption of the ruling as judgment.

14. I have confirmed from the court record that indeed the email address used to communicate the ruling date to the applicant was different from the one given as the address for service in the Notice of Appointment. Consequently, I agree with the applicant that the notice of the ruling by the Taxing Master was not properly served.

15. In view of the foregoing I find that as at the time the applicant became aware of the ruling, the 7 days within which to file appeal against the ruling had lapsed. Accordingly, it is obvious that the failure to file appeal within the required time was not deliberate and therefore the explanation given for the delay in filing the appeal is excusable. The court is satisfied that the application for extension of time herein has met the legal threshold set out by the Supreme Court in the case of **Nick Salat –v Independent Electrol& Boundaries Commission & 7 other, supra**.

16. However, the instant case is distinguishable from **Ann WairimuMwangi& another v Nancy WanjiraWaruingi t/a Providence Auctioneers [2017] eKLR, Kenya Oil Company Limited v Jovah H Kariuki t/a Moran Auctioneers [2020] eKLR, and Dilpack Kenya Limited v William MuthamaKitonyi [2018] eKLR** because in those cases the applicants did not explain the delay in filing the appeal in time.

17. The applicants contends that it stands to suffer prejudice and injustice if the leave sought is denied because it will be condemned to pay costs for an irregular execution which proceeded in breach of stay orders granted by the court. The respondent has not demonstrated that he

will suffer any prejudice which cannot be remedied by costs.

18. Denying the leave sought means that the applicant is forever banished from the seat of justice and condemned to pay the taxed costs to the auctioneer. However, granting the leave will avail an opportunity to both parties to argue the appeal and resolve the matter on merits.

19. In the end I grant the leave to the applicant to file its appeal within 7 days of this ruling. Thereafter, there will be liberty to seek stay of execution or further proceedings on the taxed costs. The respondent/Auctioneer is awarded throw-away costs of Kshs. 10,000 to be paid before the hearing of the appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY OF DECEMBER 2021.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**