



**Chege & another v Nyangwansa (Miscellaneous Civil Application
E177 of 2023) [2023] KEHC 25861 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E177 OF 2023
RE ABURILI, J
NOVEMBER 22, 2023**

BETWEEN

DAVID KAMAU CHEGE 1ST APPLICANT

MUSA OWILI 2ND APPLICANT

AND

DENNIS GICHANA NYANGWANSA RESPONDENT

RULING

Introduction

1. This application by way of a chamber summons dated 20th September, 2023 seeking the following orders:
 - i. Spent
 - ii. Spent
 - iii. That the applicants be granted leave to file an objection and a taxation reference to this honourable court against the assessment of costs delivered in 29.8.2023 in Winam PMCC No. 190 of 2022 *Dennis Gichana Nyangwansa v David Kamau Chege & Musa Owili*.
 - iv. That the objection to the taxing officer and the application for reference annexed hereto be deemed as duly filed and served upon payment of requisite fees.
 - v. That costs of this application be borne by the respondent
2. The Chamber summons is supported by the Affidavit of the applicant's counsel, Theldred Wesonga and the grounds on the face of the summons.



3. It was the applicants' case that on 29th August 2023, the court in Winam PMCC No. 190 of 2022 delivered its ruling on the plaintiff's party & party bill of costs dated 5.7.2023 in the absence of the applicants due to power outage in the office as counsel had logged in virtually.
4. The applicants further averred that their efforts in getting a copy of the ruling proved difficult as the court file could not be traced until they wrote a letter dated 14.9.2023 and subsequently they were supplied with a copy of the ruling on the 19.9.2023.
5. Further to the above, the applicants deposed that as a result of the delay in obtaining the copy of the ruling, they were unable to advise their client on time hence the delay in filing the reference.
6. It is the applicants' case that they are opposed to the assessment made on the 29.9.2023 on costs and that their intended reference will be rendered nugatory if orders of stay of execution are not granted.
7. In response, the respondent contended that he was opposed to the application on the ground that the reference had no chances of success as the taxing officer had already subjected the costs to 30% liability.
8. The application was argued orally, with both parties' counsel reiterating their positions as above.

Analysis and Determination

9. Having considered the averments and depositions by both parties' counsel and the oral submissions by both counsel, reiterating their respective positions, the issues for the Court's determination are:
 1. Whether or not extension of time under paragraph 11 (1) and (2) and 4 of the [Advocates Remuneration Order](#) should be granted.
 2. Whether or not execution should be stayed.
10. Paragraph 11 (1) (2) of the [Advocates Remuneration Order](#) provides for extension of time for filing a reference. However, the Paragraph does not speak to the relevant factors that the Court should consider when exercising its discretion on whether or not an extension of time should be granted. Guidance must therefore be sought from case law. In [Paul Wanjobi Mathenge v Duncan Gichane Mathenge](#)[2013] eKLR the Court of Appeal citing other decisions observed that:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or 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 this 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 with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso V 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 matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reasons 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.”

11. As stated in the above cases, the length of the delay and reasons for non-compliance of the time lines are important factors that influence the exercise of discretion of the Court. In calculating the length of delay in making the application for an extension of time, the period will start running from 29th day of August, 2023 when the bill of costs was taxed by the taxing master to the 20th day of September, 2023 which time the aggrieved applicant lodged the chambers summons for extension of time.
12. The delay in filing the application was 7 days. In seeking to balance the interest of the respective parties, the failure to comply was not inordinate. In addition, the applicants in the supporting affidavit have explained the reasons which let time to lapse. That hurdle has therefore been satisfied as a sufficient cause for this Court to extend time in favor of the applicants to file a Reference under paragraph 11 (1) (2) of the [*Advocates Remuneration Order*](#).
13. As to whether or not execution should be stayed, the Statutory anchorage of the discretion to consider stay of execution rests on order 42 rule 6 (1) of the [*Civil Procedure Rules*](#). This is on the basis that the Reference is a path way for an aggrieved party from the Certificate of Costs of the taxing master hence the principles for stay pending hearing and determination of the reference apply Mutatis Mutandis.
14. The Court has considered numerous decided cases on the exercise of judicial discretion. The guiding principles for determining whether or not to stay execution are:
 - i. Where special circumstances of the case so require
 - ii. There is proof of substantial loss that may otherwise result
 - iii. There is substantial question of law to be adjudicated upon by the appellants court
 - iv. Where if the stay is not granted, the appeal is successful, would be rendered nugatory. See for example;- [*Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another*](#)[2015]eKLR, [*Reliance Bank Ltd\(In liquidation\) v Noriake Investments Ltd, Rep v kenya Anti-Corruption Commission & 2 Others*](#)[2009]KLR 31,[*Carter & Sons Ltd v Deposit Protection Fund Board & 2 others, Edward Kamau & another v Hannah Mukui Gichuki & another*](#)[2015]eKLR.
15. The Court in [*RWW v EKW*](#) [2019] eKLR held that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is



discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

16. Having set out the general principles, the question is whether the subject matter of the reference if successful will be rendered nugatory. It has also been stated that the applicant is likely to suffer substantial loss in the event that the respondent is allowed to proceed with entry of judgment and subsequent execution.
17. For the reasons given in the affidavit of the applicants herein, the Court accepts the reasons advanced for the applicant which discloses material averments necessary for the court to exercise discretion to grant a stay of execution of the Certificate of Costs pending the determination of the reference.
18. In the end, I find and hold that the application dated 20th September 2023 is meritorious and the same is allowed in the following terms:
 - a. The applicants are granted extension of time and leave to file and serve a reference within fourteen (14) days from today;
 - b. There is hereby granted a stay of execution of the taxed bill of costs pending the filing, hearing and determination of the reference.
 - c. Each party to bear their own costs of the application herein.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER, 2023

R.E. ABURILI

JUDGE

