Tom Ojienda & Associates v County Government of Meru (Miscellaneous Civil Application E005 of 2020) [2022] KEHC 2987 (KLR) (25 May 2022) (Ruling)

Neutral citation: [2022] KEHC 2987 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

MISCELLANEOUS CIVIL APPLICATION E005 OF 2020

PJO OTIENO, J

MAY 25, 2022

BETWEEN

TOM OJIENDA & ASSOCIATES ..... APPLICANT

AND

COUNTY GOVERNMENT OF MERU ..... RESPONDENT

RULING

1. Before the court for determination are two applications by either party, in each of the consolidated files. On the basis of the order on consolidation, parties only urged the application in this lead file with the understanding that it determination binds the other files with the attendant variation being only on the various sums taxed and certified in each file.

2. The 1st application is by the advocate, Notice of Motion under certificate of urgency dated 6/8/2020 pursuant to section 51(2) of the *Advocates Act* in which the applicant, (henceforth called the advocate), seeks that this honourable court enters judgement for the applicant against the respondent (client) for the sum of Ksh.26,157,228.60 (Kenya Shillings Twenty Six Million, One Hundred and Fifty Seven Thousand, Two Hundred and Twenty Eight Shillings and Sixty cents only) being the taxed costs as appears in the Certificate of Taxation dated 23/7/2020 with interest from the date of the application until payment in full and further that the advocate be allowed to execute the judgement herein against the respondent, the County Government of Meru.

3. The application is grounded on the fact that the respondent has failed to comply with the advocate's demand for payment of the taxed amount as contained in the Certificate of Taxation issued by the taxing officer. In his supporting affidavit, Prof. Tom Ojienda, the advocate, swore that it was only fair that judgement be entered against the respondent for the said amount as the certificate has become final.

4. The respondent (henceforth called the client) opposed the application by the Replying Affidavit sworn by Irah K. Nkuubi, its legal officer, who averred that the application was premature as there had been preferred a reference against the decision of the taxing master which reference would be prejudiced if the application was heard and judgment entered. Nothing else was said in opposition to the application and therefore once the reference was heard and dismissed, the same deponent swore a further affidavit on 4/10/2021 in which he avers that the advocate's application should await the hearing and determination of their application seeking leave and extension of time to appeal, as the client has a right to prefer an appeal against the impugned ruling. He adds that the intended appeal raises very serious triable issues for consideration by the Court of Appeal as shown in the exhibited draft memorandum of appeal.

5. The 2nd application is also by Notice of Motion by the client dated 28/5/2021 under Order 50 Rule 6 & Order 51 Rule 1 of the *Civil Procedure Rules*. The sole prayer sought by the client therein is the leave to appeal and extension of time to file a notice of appeal and record of appeal out of time against the ruling delivered on 19/3/2021.

6. The grounds upon which the application is premised as set out in the body of the application and Supporting Affidavit of Irah K. Nkuubi, the client's legal officer sworn on even date are to the effect that a request was made to court on 24/3/2021 for supply of a copy of the impugned ruling and the same was delivered on 26/3/2021 and subsequently forwarded to the client's offices on 30/3/2021. After receipt thereof, and in view of the prevailing Covid 19 pandemic, the letter dated 26/3/2021 and the impugned ruling were quarantined for 7 days in line with MOH protocols. Thereafter, the impugned ruling was forwarded to the county attorney for advice and consideration. However, due to the amount involved and bearing in mind that such payment would impact on the finances of the client, the impugned ruling was forwarded to the county secretary for discussion in the cabinet where it was not immediately attended to because the governor was away on medical leave and was unable to call and convene the meeting. It was thus not until the 4/5/2021 when it was agreed that an appeal be lodged against the impugned ruling. In view of the aforestated, it was not possible to lodge the Notice of Appeal within 14 days and serve the Record of Appeal within 60 days as mandated by the Court of Appeal Rules. It is then contended that the delay in filing this application had been explained as clearly not inordinate but excusable, and the court urged to allow the application, because no prejudice will be occasioned upon the advocate.

7. The said second application was opposed by the replying affidavit sworn by Prof. Tom Ojienda, the advocate's managing director on 12/7/2021. In the Affidavit the deponent avers that he represented the client in Constitutional Petition 1/2016, but the client refused to settle the amount in question even after being served with the ruling and the certificate of taxation. That immediately the advocate filed the application for entry of judgement, the client lodged a reference challenging the taxing master's decision. The court after hearing the matter dismissed the reference on 19/3/2021 and upheld the taxing master's award. The client then took no immediate step to pursue the intended appeal and neglected to observe the strictly set timelines in lodging its notice of appeal in time. He views the delay as being intentional, a way to slow down the process towards closure of the file and an affront to Article 159(2) b of *the constitution*. According to him, the application ought to be struck out as it is unnecessary, totally annoying, fundamentally incurable, fatally defective, bad in law, an abuse of the court process and misconceived. He avers that the client is out of time and no good and/or justifiable reason for the same has been advanced and relied on *Nicholas Salat v Independent Electoral & Boundaries Commission & 7 others*(2014)eKLR, on the underlying principles a court ought to consider in exercise of its discretion to extend time. He avers that the degree of attention and the nature of the matter were put into consideration while taxing the bill of costs, and the client had not

established whether its appeal is arguable with possibility of success or the loss it would likely suffer if the impugned ruling is not stayed. He relied on J.P Machira t/a Machira & Company Advocates v Wangethi Mwangi & Anor (2002)eKLR, on when a court can refuse leave to appeal adding that since the client's application raises no novel or legitimate arguable point and is of no public interest, the same ought to be dismissed, because the proposed appeal exhibited in the draft memorandum of appeal depicts no realistic prospect of success.

Submissions

8. The applications were canvassed by way of written submissions which were duly filed on 5/8/2021 and 6/10/2021 respectively. In its submissions, the advocate emphasised to the court the underlying principles to be considered while exercising the discretion to extend time as was set out in *Salat v Independent Electoral & Boundaries Commission & 7 others* (2014)eKLR for the proposition of the law that extension of time is not a right but an equitable remedy available at the discretion of the court. He submitted that the client's delay is intentional, deliberate and by design, as no reasonable and sufficient cause has been shown to justify the same. He urged the court to be guided by *Muka Mukuu Farmers' Co-operative Society Ltd v BM Mungata & Company Advocates*(2021)eKLR, where it was held that, "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." He submitted that the advocate will be prejudiced if the application is allowed as it will be kept away from the enjoyment of the fruits of its ruling by commencing the execution process. He urged the court to struck out the client's application for failure to comply with the provisions of the law and cited *Boy Juma Boy & 2 others v Mwamlole Tchapu Mbwana & Anor*(2014)eKLR, where the court stressed on the mandatory requirement of complying with the Court of Appeal rules. He beseeched the court to dismiss the application and allow the execution to proceed.

9. The client filed composite submissions respecting the two applications. In praying for the dismissal of the advocate's application, the client submitted that the advocate cannot, in law, commence execution against it without first adhering to the provisions of Section 21 of the *Government Proceedings Act* then cited *Maggy Agulo Construction Co. Ltd v Ministry of Public Health & 4 others*(2020)eKLR and *Republic v County Secretary Migori County Government & Anor Ex parte Linet Magambo*(2020)eKLR in support of the mandatory nature of the procedure to enforce a decree against the government.

10. In support of its application, the client submitted that Rule 11 Sub Rule 4 of the Advocates (Remuneration) order, 2014, provided that an appeal to the Court of Appeal shall be with leave of the High Court first sought and obtained. It then submitted that no prejudice shall be visited upon the advocate if its application is allowed, and that the delay in filing its application had been reasonably explained. It relied on *Kenya Shell Limited v Kobil Petroleum Limited* (2006)eKLR, on the discretionary nature of the grant of leave to appeal. In urging the court to exercise its discretion in its favour, the client relied on *Mwangangi & Company Advocates v Machakos County*(2018)eKLR, where the court granted leave to appeal even when it was not sure whether the appeal had chances of success or not.

Analysis and determination

11. Even though the Client takes the position that a decision on it application ought to have a bearing on the outcome of the application by the advocate, I see that not to be the position. The two applications are distinct of each other in their purport and effect whichever way the court decides either. That is to say, whether or not the leave to appeal is granted and time extended to file the appeal out of time does not necessarily impact on whether or not the advocate gets a judgment on the certificates of costs.

12. I have anxiously considered the affidavits as well as the annextures thereto as well as the submissions on record together with the authorities cited by both parties and I chose to consider the two applications in the order they were filed. That order is that the advocate's application being the earlier goes fast then the client's follows.

Application for judgment on the certificate of costs

13. On the advocate's application for entry of judgement, one may only need to cite *Lubulellah & Associates Advocates v N. K. Brothers Limited* [2014] eKLR where the court observed that; "The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs."

14. That pronouncement is the enactment under section 51(2) of the *Advocates Act* which stipulates that a certificate of costs issued by the taxing master, unless set aside or altered by the court, shall be final as to the amount of costs covered thereby, and the court may make any orders deemed fit and expedient including an order that judgment be entered for the sum certified as due, unless there be a dispute as to retainer.

15. In this matter, as things stand today, there has not been a contestation as to retainer. The dispute all along has been on the quantum of the costs incurred and earned by the advocate which dispute has been determined in the reference. That there is intention to challenge the decision on reference is no bar to the court making an order it thinks fit to move the file towards closure. In my view and finding, in the words of section 51(2), the only time the court may be hesitant to enter judgment is where there is put forth a contestation as to retainer in which event, the advocate is obligated to file a recovery suit. Here, there being no contest on retainer I find that it is not only expedient, but equally in the interests of justice that a judgment be entered and I do enter judgment for the advocate against the client in the sum certified in the four related files being Misc. Applications No 75, 76 and 78 all of 2018.

16. On the second limb of the application seeking leave to commence execution, I understand that the law to be trite that execution against Government can never be by issuance of warrant of attachment and sale of any movable or immovable assets as is the norm on execution against private individuals and entities. Rather, the decree holder is obligated to call upon the accounting officer of the government department of entity concerned to settle the decree. Such requires no leave of the court and it would be a superfluity or just a frolic to give such an order. That prayer is misconceived and is dismissed.

Application for leave and extension of time

20. By dint of Rule 11(3) of the *Advocates Remuneration Order,* there is no right of appeal against a decision on reference. One can only appeal with the leave of the court. The principles guiding leave to appeal are settled to that the applicant must demonstrate an arguable appeal, not an appeal that must succeed, but one that is not merely fanciful. See *Sango Bay Estate Ltd & Others v Dredner Bank A. G.* [1971] EA 17. The essence of this requirement underscores that where there is no right of appeal, there must be a genuine matter to be allowed to employ the otherwise judicial resource in time so that every flippant intention is uplifted to unnecessary clog the appellate system and chock the administration of justice. That principle, when applied to the context of this matter and the jurisprudence from the court of appeal on when it would interfere with a decision on reference, constrains me to find that the appeal has no realistic chances of success.

21. Additionally, whether to decline or grant a request for leave to appeal is a matter at the unfettered discretion of the court which would pass anytime provided reasons are proffered and it is not a demonstration of a judicial whim. In *Machira t/a Machira & Company advocates v Mwangi & Another* [2002] 2 KLR 391, the Court of Appeal stated that granting or refusing an application for leave to appeal is a matter within the discretion of the court, that the court will only refuse leave if it is satisfied that the applicant has no realistic prospects of success on appeal and that the court can grant leave even when it is not so satisfied that the issue is of public interest or raises a novel point requiring clarification. This court understand the principle to be that leave needs to be granted freely where there is demonstrated an arguable point however even where there is no such arguable point, leave may be granted if there is shown to be a novel point of public interest in the matter. Here I discern no novel point nor a matter to be pursued on public interest just as I have found no arguable point with realistic prospects of success. On that finding, I decline to grant leave and therefore dismiss the prayer for leave.

    Having so decided, the next prayer for extension of time becomes moot and unnecessary. Unnecessary because if no appeal can be filed without leave and there being no leave, it would be a waste of time and resources to delve into the applicable principles for consideration on an application for extension of time to appeal out of time.

22. In summary, the application by the client fails and is dismissed with costs while that by the advocate succeeds and is allowed with costs.

23. As intimated at the onset of this decision, by the consent order recorded in court on the 5.11.2020, four files, Meru Misc. Applications No. 75, 76 and 78 all of 2018 were consolidated with No 77 of 2018 just like the corresponding files by which the taxation by the Deputy Registrar were challenged, being Meru Misc. App No E003, E004, E005 and E006 all of 2020 were directed to be dealt with in the corresponding files. On the basis of such consolidation, counsel have always argued their respective applications in this file and agreed that a determination applies to the other three files. I allow the four applications by the advocate in the four files, all dated 6/8/2020 and enter judgment as follows; -

    a. Meru Misc. Application No 75 of 2018 Kshs 10,505441.40

    b. Meru Misc. Application No 76 of 2018 Kshs 10,533,281.40

    c. Meru Misc. Application No 77 of 2018 Kshs 26,157,228.60

    d. Meru Misc. Application No 78 of 2018 Kshs 8,781,910.50

24. The advocate did prayed for interest on the taxed costs from the date of the applications till payment in full. I take the law to be that interest is the penalty one pays for keeping the money from the person adjudged to be entitled. Put the other way, it is the way to assuage the party deprived or kept away from an entitlement. Rule 7 of the Advocates Remuneration Order stipulates the rate of interest to be 14 % from the expiration of 30 days after service of the bill upon client. I would have awarded interest from that date had the same had been disclosed and had the advocate not bound itself with the prayer for interest from the date of the application, but based on the pleadings, interest is awarded at 14% from the 6th August 2020 till payment in full.

25. I assess the costs of the two applications I have awarded to the advocate, being the disbursements and attendance costs at Kshs 30,000 to cover all the four files.

26. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 25TH DAY OF MAY 2022

PATRICK J O OTIENO

JUDGE

In the presence of:

No appearance for the Advocate

Mwirigi Kaburu for the Client

Court Assistant: Mwenda