



REPUBLIC OF KENYA



KENYA LAW
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**Advocates v Ndungu (Judicial Review Miscellaneous Application 37 of 2019)
[2022] KEHC 488 (KLR) (Judicial Review) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 488 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 37 OF 2019**

AK NDUNG’U, J

MAY 19, 2022

BETWEEN

MAINA & MAINA ADVOCATES APPLICANT

AND

BENEDICT KABUGI NDUNGU RESPONDENT

RULING

1. The Client/Applicant moved this court vide a Chamber Summons application dated 15th October, 2021 seeking the following ORDERS:
 1. Spent
 2. THAT the firm of Matheka Oketch & Company Advocates be granted leave to come on record for the Respondent/Client.
 3. THAT pending the hearing and determination of this Application inter-partes, this Honorable Court be pleased to grant orders of stay of execution of the Notice to Show Cause why Execution should not issue against the Defendant dated 13th August 2021 and scheduled for 3rd November 2021.
 4. THAT the Respondent/Client be granted leave to file an Objection and a Taxation Reference to this Honorable Court against the Ruling of the Honorable Court’s Taxing Officer.
 5. THAT this Honorable Court be pleased to grant orders of stay of execution of the Notice to Show Cause why execution should not issue against the Defendant dated 13th August 2021 and scheduled for 3rd November 2021.



6. THAT this Honourable Court be pleased to set aside and/or declare null and void the Decree issued in respect to this matter for Kshs. 274,982.46.
7. THAT the cost of this application be provided for.
2. The application is founded on the grounds set out on the face therein, the Supporting Affidavit of Benedict Kabugi Ndungu sworn on even date and a Supplementary Affidavit sworn on 26th January, 2022. In summary, the main grounds are that pursuant to the taxation of the Advocate/Client Bill of Costs, the Taxing master taxed the Advocate/Respondent's Bill of Costs at Kshs. 239,775.49. Thereafter the Advocate proceeded to extract a Certificate of Taxation and a decree for Kshs. 274,982.46 and commenced execution of the said decree. There was also a Notice to Show Cause why Warrants of Arrest should not issue against the Defendant set for 3rd November 2021.
3. It was further their case that the Taxing Master erred in law and fact in taxing the Advocate's Bill of Costs at Kshs. 239,775.49 whereas the parties had an agreement dated 21st June 2019 on the advocate's costs to be paid and fees paid in line with that agreement. However, the advocate in a bid to abuse Court processes and with the aim of unfairly enriching himself, deliberately failed to disclose the agreement of 21st June 2019 to the taxing master.
4. Further, Section 45 of the *Advocates Act* allows an advocate and client to enter into an agreement on remuneration as was the case between the parties herein and therefore the taxing master did not have jurisdiction to tax the Advocate's Bill of costs. It is urged that the delay in filing this reference arose from the fact that the Applicant has been financially handicapped with no income nor property to secure/instruct an advocate to challenge the decision of the Taxing master and this need not be a reason for him to be denied the benefit of the law as envisaged in *the constitution*. There is also a risk of the Client/Applicant liberties being curtailed as a result of an illegal taxation of the Advocate/Client Bill of Costs. Counsel urged the Court to grant the orders sought.
5. The question that therefore arose in their written submissions dated 2nd February, 2022 was whether the Respondent/Client ought to be granted leave to file an Objection and a Taxation Reference to this Honorable Court against the Ruling of the Honorable Court's Taxing Officer and whether the Respondent has an arguable case to warrant the granting of stay of execution orders and set aside and/or declare null and void, the decree issued in respect to this matter for Kshs. 274,982.46.
6. On the first issue, counsel submitted that the client has ably discharged the burden placed upon him to explain the basis why he seeks the extension of time because the Taxing Master lacked jurisdiction to tax the Advocate/Client's bill of costs in line of the Agreement whose legality is an issue to be considered by this Court. Further, the reason for the delay in bringing the Application has been explained coupled with the challenges introduced by the COVID-19 Pandemic as demonstrated and the Advocate/Respondent will not suffer any prejudice if the orders sought are to be granted.
7. On the second issue, counsel submitted that the decree in place ought to be set aside on the basis that the Advocate has sought and obtained a judgment in a bid to obtain a different remuneration from what was agreed in the Agreement between the advocate and the client. Indeed, it was submitted that it is an abuse of the court process for the advocate to seek the court's intervention in basing his fees on the Advocates Remuneration Order whose provisions he had in the first instance deliberately ignored at the time of entering into the agreement with the client. It is contended that the advocate has not provided any evidence why the leave sought ought to be denied and this Court should therefore set aside the decree on this basis in the interest of justice.



The Advocate/Respondent's case

8. The Advocate opposed the application through the Replying Affidavit of Gideon Mutai sworn on 2nd November, 2021. The gist of the Respondent's case is that this matter came up for taxation of the Respondent's Bill of Costs on 12th November, 2019 but Client/Applicant did not challenge the same nor did he present any agreement on legal fees. The Taxing Master proceeded to tax the Bill of Costs and delivered the Ruling on taxation on 27th November, 2019 and the Applicant now seeks to challenge the Taxing Master's decision on taxation close to 2 years since delivery of the Ruling.
9. Counsel further submitted that pursuant to paragraph 11 (1) & (2) of the Advocates (Remuneration) Order 2009, it is clear that party who wishes to object the Taxing Master's decision should file an objection within 14 days of delivery of the decision and the Applicant cannot therefore challenge the decision. In any event, the agreement which the Client/Applicant seeks to be considered by the court expressly provided that the Client/Applicant had an option of undertaking taxation if legal fees was not settled by the Client/Applicant in addition to 60% of the damages or settlement received by the Client/Applicant. Therefore, the Client/Applicant's claim that the Taxing Master erred in law and fact by failing to consider the agreement between the parties does not arise as the agreement was never presented by the Client/Applicant.
10. It is further the Respondent's case that the decree upon which execution is sought is valid and has not been altered or set aside by this court and the Notice to Show Cause why the Applicant should not be committed to civil jail in execution of the decree is a recognized mode of execution under the Civil Procedure Act which the Respondent has resorted to due to the refusal and/or neglect by the Client/Applicant to settle the decretal sum. Further, that the Applicant is guilty of undue delay in bringing this application close to 2 years since the ruling on taxation was delivered and the reason advanced by the Client/Applicant is not plausible. Furthermore, he has not adduced any evidence to prove economic hardship and that he has borrowed funds to instruct his advocate neither has he challenged the validity of the Certificate of Taxation upon which the decree is based. In any event, the Respondent stands to suffer prejudice if the application is allowed as it will be denied fruits of its judgment and the application is frivolous, scandalous, vexatious and abuse of court process as the same is simply purposed to delay, scuttle, prejudice and bring hardship to the Respondent's entitlement to the decretal sum and should be dismissed with costs.
11. In their written submissions dated 3rd February, 2022, counsel submitted that the issues that arose for determination was whether the Client/Applicant is guilty of inordinate delay and whether the prayers sought should be granted. On the first issue, counsel submitted that the inordinate delay portrayed by the Applicant is an act of indolence on his part and allowing the instant application is only meant to frustrate the execution process. On the second issue, counsel submitted that while the Applicant has provided proof of his financial difficulty, the evidence he has adduced should be put to strict proof as it is not plausible. Furthermore, in an application of this nature, the Applicant ought to have shown the damages he would suffer if the order for stay is not granted. Secondly, the application for stay should be filed without unreasonable delay. Indeed, counsel submitted that the Respondent ought to be allowed to carry out the execution process to enjoy the fruits of their judgement.

Analysis and Determination

12. I have considered the pleadings and the arguments advanced by the parties herein. The issue for determination is whether the Client/Applicant has provided sufficient reasons to warrant this court to stay the execution of the Notice to show cause dated 13th August, 2021 and/or set aside the decree dated 6th November, 2020 and to enlarge time to file a reference.



13. The law on stay of execution is provided in Order 42 Rule (6) (2) of the [Civil Procedure Rules 2010](#). An application of stay of execution according to the Civil Procedure Rules can only succeed if the applicant satisfies the following criteria: -
- “(1) The applicant must show that he or she has filed the notice of appeal and that the stay of execution has been filed without undue delay.
 - (2) Secondly, from the facts of the case appealed from the applicant would suffer substantial loss unless stay of execution is granted.
 - (3) That the application has provided security for due performance of the decree or any such order which may be issued by the court at the end of the determination of the appeal.”
14. In the instant application, the Applicant has stated that the delay to file the reference was because he experienced enormous economic hardship during the Covid-19 pandemic and it is only now that he was able to obtain funds to instruct an advocate. From the proceedings, it is clear that the Applicant stayed close to two (2) years after the bill was taxed and was only jolted to action on 15th October, 2021 way after the Respondent had started execution proceedings to file the instant application. The question is whether the delay was inordinate or unreasonable.
15. The question of unreasonable delay was dealt with in the case of [Jaber Mohsen Ali & Another v Priscillah Boit & another](#) (2014) eKLR where it was stated:-
- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir*, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”
16. In [George Kagima Kariuki & 2 others v George M. Gichimu & 2 others](#) (2014) eKLR, the court clarified the issue of delay. It was held that: -
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.” (see also [Stanley Kaboro Mwangi & 2 others v Kanyamwi Trading Company Limited](#) (2015) eKLR)
17. The Applicant had adduced electronic evidence through his Supplementary Affidavit sworn on 26th January, 2022 demonstrating that from around July 2019, he was financially distressed and was borrowing from family and friends in order to even provide for his family which the Respondent submits is not a plausible explanation and ought to be subjected to strict proof. It is a fact that the pandemic came with its challenges. While one may be inclined to believe that the applicant underwent a rough patch in the period, and even if the delay was to be found excusable, the applicant fails to meet the other condition for grant of a stay, that is, he has not offered security for the performance of the said decree which is a condition precedent in granting the application. Neither has he demonstrated



substantial loss that he would suffer or that the Advocate would not be in a position to reimburse any loss he may suffer should he be successful. In the premises, I find that the Client/Applicant has not adduced sufficient grounds to warrant a stay of execution.

18. The other issue is on enlargement of time to file a reference. Taxation of bill of costs is governed by Paragraph 11 of the [Advocates' Remuneration Order](#) which states as follows: -

“ 11. Objection to decision on taxation and appeal to Court of Appeal.

- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

19. The provisions of this paragraph were further expounded by the Supreme Court in the case of [County Executive of Kisumu v County Government of Kisumu & 8 others](#) (2017) eKLR where the court held that: -

“ 23] 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; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
20. The Applicant is disputing the entire Advocate/Client Bill of Cost dated 17th October, 2019 based on an agreement for legal fees dated 21st June, 2019 which was not presented before the Taxing Master. There is no explanation why the said agreement was not placed before the taxing master. The taxing master cannot be faulted for not considering any evidence not presented to her at the taxation hearing. There is no iota of evidence that the fees agreed in the purported agreement have been paid to the advocate as per the said agreement. Suffice it to note that a party can only object to matters presented before a taxing master and in which the objector is of the view that the taxing master got wrong.
21. In *Council of Governors v Nyakundi & Company Advocates Judicial Review* Miscellaneous Application 40 of 2019, Nyamweya J, (as she then was) held;
- “The fact of a valid agreement must therefore be established before the jurisdiction of the taxing master is ousted by section 45(6) of the *Advocates Act*, and this ground cannot therefore be raised as a pure question of law in a preliminary objection. In any event, the proper forum to raise such an objection is before the taxing master and not this Court, whose jurisdiction is limited to hearing and determining references challenging decisions of taxing masters under the procedure provided by Rule 11 of the Advocates Remuneration Order.
10. The Client/Respondent did not bring any evidence of having urged the issue of existence of a fee agreement with the Advocate/Applicant before the taxing master, to now purport to raise it before this Court as a preliminary objection. The Client/Respondent’s Notice of Preliminary Objection dated 20th January 2021 is therefore found not to have merit for these reasons.
22. This matter having been filed in the year 2019 and a ruling delivered on 27th November, 2019, a further delay is likely to cause prejudice to the Respondent/Advocate. As held in *George Kagima Kariuki & 2 others v George M Gichimu & 2 others* (2014) eKLR, a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised. In the circumstances, I find that the application dated 15th February, 2021 is not merited. The upshot is that the same is dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 19th day of May, 2022.

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A. K. NDUNG’U

JUDGE

