



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. 595 OF 2014

URBAN PROPERTIES CONSULTANTS AND DEVELOPERS....APPLICANT

VERSUS

HENKAM LIMITED.....RESPONDENT

AND

G.T MATHU.....1<sup>ST</sup> INTERESTED PARTY

WAQAMBO QAMBO.....2<sup>ND</sup> INTERESTED PARTY

SAMUEL KINYA.....3<sup>RD</sup> INTERESTED PARTY

PAUL MACHARIA NJOGU.....4<sup>TH</sup> INTERESTED PARTY

STEPHEN NDIRANGU WAIGWA.....5<sup>TH</sup> INTERESTED PARTY

ELIJAH NGUGI MACHARIA.....6<sup>TH</sup> INTERESTED PARTY

RULING

1. This ruling settles the application dated 9<sup>th</sup> June 2020 wherein the applicant/defendant **Henkam Limited** seeks the following orders;

1. Spent

2. That this court do issue a stay of execution of the decree dated 24<sup>th</sup> October 2018 issued by the honourable CM Wattimah Deputy Registrar and set aside all consequential proceedings thereto from the date of delivery of the ruling of the honourable C M Wattimah Deputy registrar dated 14<sup>th</sup> December 2016 pending the hearing and determination of this application.

3. That this honourable court be pleased to enlarge and extend the time within which the respondent may give notice in writing to the taxing master of the items of taxation to which he objects.

4. THAT the annexed Notice of objection be deemed as having been duly filed and served and properly on record.

5. That the costs of this application be in the cause.

2. The application is premised on Rule 11(4) of the Advocates Remuneration Amendment Order 2014, Sections 1A, 3, 3A and 95 of the Civil Procedure Act, Order 50, rule 6 of the Civil Procedure Rules 2010, Article 159(2)(d) of the Constitution of Kenya 2010, the inherent powers of the court and all other enabling provisions of the Law.

3. The application is supported by the affidavit of the applicant's Director **Ms CHRISTINE KAHIGU** who states that the plaintiff/respondent filed its Bill of Costs and served it upon the defendant/applicant's former advocates on 10<sup>th</sup> October 2015 but that the

said advocates did not inform the applicant of the bill of costs and the date set for the ruling. She states that because there was no opposition to the said Bill of Costs, the same was taxed at Kshs 5,066,831 thus precipitating the filing of the instant application for the extension of time to enable it file a notice of objection to the taxing officers award of 14<sup>th</sup> December 2016.

4. The plaintiff/respondent opposed the application through the replying affidavit of **EARNEST STEPHEN KAMAU** who states that based on the ruling delivered by Justice Farah Amin, the plaintiff applied for costs and was awarded Kshs 5,066,831.36 on 14<sup>th</sup> December 2016. He states that the defendant/applicant has not given any explanation for its failure to object to the bill of costs for over four years. It is the plaintiff's/ respondent's case that the application is bad in law and, if allowed, will prejudice the plaintiff.

5. The application was canvassed by way of written submissions which I have considered. I find that the main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

6. The applicant/defendant submitted that even though its advocate was allegedly served the bill of costs it was never informed of the same and was therefore not aware that it had been filed. The applicant referred to the case of **Oderah Obara & Co Advocates v Aly enterprises Limited & 3 others** [2015] eKLR where the court granted the extension of time to file and serve the notice of objection to taxation. The applicant further stated that by the time the ruling on taxation was delivered, the applicant had already been dissolved vide gazette notice No 4077 of 19<sup>th</sup> May 2016. It was the applicant's case that it was not responsible for the delay in filing the notice of objection.

7. The respondent/plaintiff on the other hand submitted that the delay was inordinate and that the applicant was well represented by counsel who was all along aware of the pendency of the suit. It was further submitted that the defendant did not explain the inordinate delay.

8. With regard to stay of execution, the plaintiff submitted that the defendant had not met the criteria laid out in order 42 rule (6)(2) for granting of stay.

### **Enlargement of Time**

9. The applicant invoked Paragraph 11(4) of the Advocates Remuneration (Amendment) Order 2014 (ARO). Paragraph 11 of the ARO provides that;

**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 subsection (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) 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.**

10. The defendant sought for extension time on the basis that the Bill of Costs was served on its former advocate who never informed it of its existence or any proceedings arising from the same. It was further alleged that the said advocate did not respond to the bill of costs or participate in its taxation.

11. In a rejoinder, the respondent/plaintiff submitted that the applicant had not satisfactorily explained the delay having been well represented by counsel who was aware of the pendency of the suit.

12. In *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR the court discussed the principles for extension of time and 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.”

13. The above principles were restated in the Court of Appeal decision in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR where the Court stated as follows:

“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 the 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.”

14. Further, in *Stanley Kahoro Mwangi & 2 Others v Kanyamwi Trading Company Limited* [2015] eKLR the court held that;

“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.”

15. The common thread that runs through the above cited cases is that an order for extension of time is discretionary and that the delay should be satisfactorily explained. This means that an applicant for the discretionary orders for extension of time must place material before the court to show that it is entitled to the said orders.

16. In the present case, I note that the delay is not only inordinate but that the applicant has not satisfactorily explained it. It is also noteworthy that while the applicant heaps blame on his former lawyers for failing to notify it of the taxation, it does not explain why it took more than 4 years to challenge the outcome of the taxation so as to justify the court’s exercise of its discretion in its favor. Courts have taken the position that a litigant has a duty to pursue his or her case and diligently follow up on the outcome of the case. This was well enunciated in the case of *Savings & Loan Limited v Susan Wanjiru Muritu Nairobi (Milimani)* HCCC NO.397 OF 2002.

17. Having found that the prayer for extension of time is not merited, it logically follows that there would be no basis for granting the prayer for stay of execution which I similarly disallow. The respondent/plaintiff argued that any further delay of the case would cause it grave injustice as it has been more than four years since the ruling on taxation was delivered.

18. The principles that guide the court in exercising discretion to stay the execution of the judgment are clearly provided for in the Civil Procedure Rules and in several decisions of the superior courts. Under Order 42 Rule (6) (1) of the Civil Procedure Rules, an application of stay of execution 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. [Emphasis added]**

19. My finding is that the instant application does not meet the first criteria regarding the filing of an application for stay of execution without unreasonable delay. It is well settled law that an applicant seeking stay of execution must demonstrate sufficient reasons for depriving the judgment creditor of the fruits of his judgment. In *Labh Singh Harnam Singh Limited v Attorney General & 2 Others* [2016] eKLR the court therein held that “*taxation of costs is part of the execution process, complete with its provisions for stay of execution, under Civil Procedure Rules...*”

20. For the reasons that I have stated in this ruling, I find that the application dated 9<sup>th</sup> June 2020 is not merited and I therefore dismiss it with costs to the plaintiff/respondent.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Wangui for Gichohi for the plaintiff.

Miss Mwaniki for Kimathi for respondent

Court Assistant: Sylvia.