



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC. CIVIL CASE NO. 42 OF 2019**

**ODHIAMBO OWITI & CO. ADVOCATES ....ADVOCATE/APPLICANT**

**-VERSUS-**

**EMMANUEL OTIENO.....CLIENT/RESPONDENT**

**RULING**

The application dated 11<sup>th</sup> September 2020 was brought by **EMMANUEL LABAN OTIENO**, (hereinafter “*the Client*”)

1. It is an application for extension of time, for the filing of a Reference arising from the Ruling by the Taxing Officer.
2. The Respondent, **ODHIAMBO OWITI & CO. ADVOCATES**, is a Law Firm, which had previously represented the Client in the case of **EMMANUEL OTIENO Vs DENNIS ODUOL, KISUMU CMCC NO. 349 OF 2019**.
3. The Client appreciates that he ought to have lodged a Reference from taxation within 14 days, from the date when the Taxing Officer rendered her Ruling.
4. However, the Client told this court that he had been unable to attend court because at the material time he was unwell. He said that due to his ailment, he had to seek further treatment in Nairobi, and that he was admitted into hospital.
5. In the circumstances, the Client said that his inability to attend court was attributable to matters which were beyond his control.
6. The Respondent pointed out that the Applicant failed to meet the guidelines for stay of execution.
7. In the case of **RUNDA WATER LIMITED & ANOTHER Vs TIMOTHY JOHN NICKLIN & ANOTHER CIVIL APPEAL NO. 490 OF 2016**, the Court re-emphasized that a person seeking stay of execution pending an appeal, pursuant to **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**, must satisfy the court that;
  - a. **substantial loss would result from *a refusal to grant stay***;
  - b. **the application was made without *unreasonable delay***; and
  - c. **he is ready and willing to provide security for the due performance of the Decree or order.**
8. The Respondent herein submitted that the application must fail because the Applicant has failed to furnish security.
9. Secondly, the Respondent submitted that the Applicant had failed to demonstrate that he would suffer substantial loss if execution was not stayed.
10. The Respondent cited the case of **ESTHER BOSIBORI MINYONGA Vs SOSYTENUS MBOYA SIMON & 2 OTHERS, ELC MISC. CAUSE NO. 10 OF 2018 (Migori)**, to back its contention that the application should be rejected because the same had been brought after a period of inordinate delay.
11. There is absolutely no doubt at all that Equity does not aid the indolent.

12. In the case of **Esther Bosibori Minyonga** (above-cited), the court dismissed the application for leave to file a suit out of time. The primary reason for that decision was that the Applicant had waited for a period of 13 years before seeking leave to institute court proceedings.

13. I share the views expressed by the learned Judge in that case, when he noted that the delay had been extremely inordinate and deliberate.

14. I find that the circumstances of that case are distinguishable from the facts before me.

15. The Applicant stated on oath that it was not until August 2019 that he first became aware of the fact that the Bill of Costs had been taxed on 13<sup>th</sup> June 2019.

16. Considering that the application before me was filed on 11<sup>th</sup> September 2019, I find that the Applicant cannot be said to have been guilty of deliberate and inordinate delay in moving the court.

17. In this case, the Applicant asserted that the process server never served him with the Notice of Taxation.

18. The situation before me is therefore distinguishable from that in the case of **ALFRED OCHIENG OPIYO T/A OCHIENG OPIYO & CO. ADVOCATES Vs EXPORT HYDRO PUMP & SERVICE (AFRICA) LIMITED, MISC. CIVIL APPLICATION NO. 423 OF 2017**, wherein the learned Judge made a finding that the Client had failed to challenge the service which the process server had recorded in his Affidavit of Service.

19. In that case, the court adopted the following words which were used by the learned commentators Chitaley and Annaji Rao in “**The Code of Civil Procedure Vol. II**”, page 1670:

**“3. Presumption as to Service –**

***There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence, and in the absence of contest, it would normally be construed as sufficient evidence of the regularity of the proceedings.***

***But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”***

20. As the Applicant had, in an affidavit, denied service, the Respondent ought to have offered to make available the process server, so that he could have been cross-examined by the Applicant.

21. But the process-server was not made available for cross-examination. In the event, the Applicant’s contention concerning non-service of the Notice for the taxation, remains uncontroverted.

22. It therefore follows that the Applicant was not accorded an opportunity to participate in the process of taxation.

23. A decision that was arrived at after a process at which the Applicant did not have an opportunity to participate in, is deemed as constituting an unmitigated prejudice against the Applicant, as he was condemned unheard.

24. Whether or not the decision appeared fair would not be a sufficient basis for upholding the said decision, as the dictates of justice demand that no party should be condemned unheard.

25. The failure to accord a hearing to the Applicant is sufficient reason to warrant the setting aside of the decision that had been arrived at.

26. I also wish to make it clear that the application before me was largely about extension of time for the lodging of a reference.

27. It was not a substantive application for stay of execution.

28. The quest for stay was of an interlocutory nature, so that whilst the substantive application was still pending, the Respondent could not proceed to execution.

29. Furthermore, there was no judgment yet, in favour of the Respondent. Therefore, at that stage of proceedings, there would have been no need for an order for stay of execution.

30. In the final result, I allow the application, and grant to the Client a period of **SEVEN (7) DAYS** from today, to file and serve the Reference from taxation.

31. The costs of the application dated 11<sup>th</sup> September 2019 are awarded to the Applicant.

**DATED, SIGNED and DELIVERED at KISUMU This 27<sup>th</sup> day of July 2020**

**FRED A. OCHIENG**

**JUDGE**