



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**HC. MISC. CASE NO.99 OF 2019**

**JAPHETH OMARI OMBEO.....APPLICANT**

**-VERSUS-**

**ROBERT NYAMACHE SIOCHA.....1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER FOR**

**BOBASI COSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**I.E.B.C.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicant, Japheth Omari Ombeo, filed the instant application under certificate of urgency on the grounds that the 1<sup>st</sup> respondent had sought warrants of arrest in execution of a certificate of costs taxed by the trial court at Ogembo. He had been committed to serve 30 days in jail and is apprehensive that the 1<sup>st</sup> respondent will proceed with execution if his application is not granted.

2. The applicant sought the following orders in his Notice of Motion dated 20<sup>th</sup> June 2019;

1) Spent;

2) *THAT pending the hearing and determination of this application, this court be pleased to issue orders of stay of execution of the ruling, taxation and or certificate of costs dated 3<sup>rd</sup> December, 2014 in Ogembo Election Petition No. 2 of 2013;*

3) *THAT pending the hearing and determination of the intended appeal, this court be pleased to issue orders of stay of execution of the ruling, taxation and or certificate of costs dated 3<sup>rd</sup> December, 2014, in Ogembo Election Petition No. 2 of 2013;*

4) *THAT this Honorable court be pleased to grant leave to the applicant to file an appeal against the ruling, taxation and or certificate of costs in favour of the 1<sup>st</sup> respondent out of time from Election Petition No. 2 of 2013;*

5) *THAT the costs of this application be in the cause;*

6) *THAT this court be pleased to issue any such orders as it may deem just and expedient.*

3. In the general elections that were held on 4<sup>th</sup> March 2013, the applicant herein and the 1<sup>st</sup> respondent were vying for the position of County Assembly representative for Bassi Chache ward. The applicant, who came second after the 1<sup>st</sup> respondent in the contest, filed Election Petition No. 2 of 2013 challenging the election of the 1<sup>st</sup> respondent. That petition was dismissed by the trial court with costs which were assessed at Kshs. 3,842,010.95/=.

4. The instant application relates to the assessment of costs which the applicant contends was excessive and had been assessed without following due procedure. He therefore wishes to file an appeal against the trial court's decision out of time.

5. The applicant swore an affidavit on 20<sup>th</sup> June 2019 stating that he had filed his election petition through the firm of Moriasi Osoro & Co. Advocates but the same was struck out since his advocate, Mr. Osoro did not have a practicing certificate for the year 2013. He avers that the 1<sup>st</sup> respondent's counsel proceeded to file his party to party bill of costs. The applicant avers that he sought an opportunity to engage another advocate and the trial court reluctantly gave him a few days to do so. Before he could engage another advocate, the 1<sup>st</sup> respondent's advocate

went on and fixed the matter for taxation. The applicant avers that the trial court proceeded to tax the bill at Kshs. 3,842,010.95/=despite his lack of jurisdiction to tax it. The court signed a certificate of costs which he states was not served upon him.

6. After 4 years the 1<sup>st</sup> respondent's counsel had taken out a notice to show cause against the applicant. He claims that he was unable to pay the amount hence his committal to civil jail. He further avers that his family was compelled to raise Kshs. 1,050,000/= which was paid to the 1<sup>st</sup> respondent's counsel to secure his temporary release. He claims that he learnt about the conditions of appeal after his release from civil jail and that from the time of his committal to civil jail that is 10<sup>th</sup> January 2019, to the time he filed the present application barely 5 months have passed. He seeks the leave of this court to file an appeal out of time against the taxation and certificate of costs.

7. In response, the 1<sup>st</sup> respondent averred in his affidavit sworn on 1<sup>st</sup> July 2019 that after his election as a Member of County Assembly, Bassi Chache Ward, the petitioner filed Election Petition No. 2 of 2013 against his election which was eventually struck out with costs on 8<sup>th</sup> July 2013. The 1<sup>st</sup> respondent avers that a bill of costs dated 26<sup>th</sup> February, 2014 was filed in court on 28<sup>th</sup> February 2014 and served upon the applicant. Upon perusal of the court records, the 1<sup>st</sup> respondent noted that when the bill came for assessment on 10<sup>th</sup> September 2014, the petitioner's advocate was in court but the court ordered that the petitioner be served in person after his advocate indicated that the petitioner wanted to be served.

8. The same matter came up for taxation on 8<sup>th</sup> October 2014 and the applicant who was present in person sought 2 months to engage an advocate. The court allowed the application and adjourned the matter to 12<sup>th</sup> November 2014. On that day, the applicant sought a week to consult and the matter was adjourned further. On 3<sup>rd</sup> December 2014, the applicant stated that his advocate had spoken to the 1<sup>st</sup> respondent but there was no evidence of such correspondence. The court proceeded to tax the bill as drawn and notified the petitioner who was present in person of his right to appeal. The respondent states that the applicant had sought leave to appeal from the judgment of the court striking out the election petition and that was also disallowed. He opposes the application which he states the applicant has brought after an inordinate delay.

9. The parties canvassed the application through oral submissions. Mr. Nyambati counsel for the applicant highlighted the averments in the applicant's affidavit. He further submitted that the intended appeal against costs had high chances of success as the applicant was unrepresented and could not appreciate the legal procedure involved in the taxation of costs. Further, that the amount taxed by the lower court was excessive and did not abide to the **Elections Act, Rules & Regulations 2013** as well as **Schedule VII** of the **Advocates Remuneration Order**. He insists that the applicant's appeal has merit and relies on the case of **Cyrus Bosire Ogega & 3 Ors vs Timothy Mokuia Nyarango & 2 Ors Civil Appeal No. 43 of 2014 (Unreported)** in support of the argument that the trial court had no jurisdiction to tax the bill of costs. He further submits that the delay in filing the application for leave to appeal has been sufficiently explained and urges the court to grant the application.

10. For the respondent, Mr. Ochoki pointed out that the application had been filed after a delay of 5 years; after the 1<sup>st</sup> respondent's term had ended and the applicant was now a Member of the County Assembly. Counsel rejected the suggestion that time should begin running from date when the certificate of costs had been issued which is 19<sup>th</sup> November 2018 and submitted that before the court taxed the bill of costs, the applicant had been given a chance to respond to it and was present himself during taxation. He argued that the applicant had been aware of the taxation for 5 years and could not come to the court after the 1<sup>st</sup> respondent had begun the process of execution. He argued that the applicant has already made part payment in line with a consent entered between the parties which have not been set aside. Counsel contends that the application is not merited regardless of whether the appeal itself is merited.

11. From the parties' submissions and deposition, the only issue arising is whether the applicant should be granted leave to appeal out of time.

12. The applicant contends that his appeal against the ruling and certificate of costs issued by the trial court has high chances of success as the court exceeded its authority in taxing the bill of costs. He relied on the case of **Cyrus Bosire Ogega & 3 Ors vs Timothy Mokuia Nyarango & 2 Ors (Supra)** where the court held that the trial magistrate had no jurisdiction to tax a Bill of Costs and that the jurisdiction donated to the trial court under Schedule VII of the Advocates Remuneration Order 2006 is that of assessing and not taxing costs.

13. Generally, the court's discretion to extend time is unfettered but must be exercised judiciously. Extension of time is also an equitable remedy and thus subject to the rules of equity. (See **Thuita Mwangi v Kenya Airways Ltd CA NRB Civil App No. Nai 162 of 2002 [2003]Eklr** and **Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others, Application No. 16 of 2014 [2014] eKLR**)

14. The factors to be taken into account by the court in deciding whether to grant an application for extension of time were discussed in the case of **Thuita Mwangi v Kenya Airways Ltd CA NRB Civil Application No Nai 162 of 2002 [2003] eKLR** where the Court of Appeal held;

*“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 -vs- 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 the 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 reason for the 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.”*

15. Further, in the more recent decision of **County Executive of Kisumu v County Government of Kisumu & 8 others Civil Application No. 3 of 2016 [2017] eKLR** the Supreme Court summarized the principles it had discussed in the case of **Nicholas Kiptoo Korir Arap Salat v**

**Independent Electoral & Boundaries Commission & 7 others (supra)** as follows:

*“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.”*

16. In this case, after assessing the costs payable to the 1<sup>st</sup> respondent on 3<sup>rd</sup> December 2014, the trial court informed the applicant of his right to appeal within 30 days. The applicant did not file his appeal within the stipulated time. He explains that his delay in filing the appeal was caused by financial constraints and his inability to comprehend the procedure which he only got to know after his arrest in 2018. The applicant complains that the 1<sup>st</sup> respondent extracted a certificate of costs on 19<sup>th</sup> November, 2018 and had him arrested and committed to civil jail on 10<sup>th</sup> January, 2019 for failing to pay the amount taxed.

17. To secure his release from civil jail, a consent dated 14<sup>th</sup> January 2019 was entered into between the applicant and the 1<sup>st</sup> respondent's counsel on the following terms;

- 1) The judgment debtor do pay Kenya Shillings Five Hundred Thousand (Kshs 500,000/= ) forthwith, to the Decree Holder's advocates, receipt whereof is hereby acknowledged ;*
- 2) The judgment debtor be released from civil jail at Kisii G.K. Prison forthwith;*
- 3) The judgment debtor do pay Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) to the decree holder's advocates on or before 30<sup>th</sup> January, 2019;*
- 4) The balance thereof be paid in monthly installments of Kshs. 100,000/= starting the 28<sup>th</sup> day of February 2019 and thereafter on each last day of the month until payment in full.*

18. The net effect of the present application by the applicant is to set aside the consent entered into by the parties yet a court will not interfere with a consent judgment where no grounds have been advanced for such interference. This was the decision of the Court of Appeal in the case of **Gateway Insurance Company Ltd v Aries Auto Sprays Civil Appeal No. 317 of 2004 [2011] eKLR** where it held;

*There is no claim of fraud or collusion. The consent was entered into freely, and it is unambiguous. There is nothing to show that there could have been a mistake or misapprehension. As Windham, J. said, in the introduction to the passage quoted above from Hirani's case, "a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties".*

19. The applicant has not challenged the terms of the consent which was adopted as the order of the court on 14<sup>th</sup> January 2019. He also concedes that the consent order has been partially complied with as he admits payment of Kshs. 1,050,000/= to the 1<sup>st</sup> respondent's counsel. Granting the application would therefore be prejudicial to the 1<sup>st</sup> respondent.

20. Further, the reasons given by the applicant for failing to file his appeal within the stipulated time do not impress this court as sufficient grounds to grant leave to file an appeal out of time. The impugned decision of the court to assess costs was made on 3<sup>rd</sup> December 2014 nearly 5 years before the instant application was made. Before making its decision, the applicant had been given sufficient opportunity to seek legal counsel and respond to the 1<sup>st</sup> respondent's bill of costs dated 26<sup>th</sup> February 2014.

21. The applicant was then committed to civil jail on 10<sup>th</sup> January, 2019 in execution of the certificate of costs. After his release from jail on 14<sup>th</sup> January, 2019 and inexplicable 5 months lapsed before the applicant filed his application for leave. These facts do not put the applicant in good light. He comes across as an indolent party who is only jolted from slumber when an action is threatened against him. One of the vital maxims of equity is that it will aid the vigilant and not the indolent.

22. It is therefore my finding that the applicant has not given satisfactory reason on why the court should exercise its discretion to extend time to file appeal out of time. I therefore dismiss the application with no orders as to costs.

**Dated, signed and delivered at Kisii this 27<sup>th</sup> day of September 2019.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Miss Kerubo h/b Mr. Nyambati For the Applicant**

**Mr. Bunde For the Respondent**

**Ms Rael. Court clerk**