



**Owuor v Okatch (Miscellaneous Application E003 of 2023)
[2023] KEELC 20950 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20950 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
MISCELLANEOUS APPLICATION E003 OF 2023
GMA ONGONDO, J
OCTOBER 24, 2023**

BETWEEN

ERICK OUMA OWUOR PLAINTIFF

AND

HENRY OKATCH DEFENDANT

RULING

1. This ruling is in respect of an application by way of chamber summons dated July 7, 2023 and filed on even date (the application herein) by Henry Okatch (applicant/defendant), through Kenja and Company Advocates.
2. The instant application was lodged under article 159 of *the Constitution* of Kenya, 2010, sections 1A, 1B and 3A of the *Civil Procedure Act*, chapter 21 Laws of Kenya 2010 and rule 11(4) of the *Advocates Remuneration Order* seeking the orders infra:
 - a. Spent
 - b. That this honourable court be pleased to grant leave to the law firm of Kenja and Company Advocates to come on record for the defendant/applicant.
 - c. Spent
 - d. That this honourable court be pleased to set aside consent dated 6th June 2023 for being contrary to the policy of the court and for being obtained fraudulently and without disclosure of sufficient material facts.
 - e. That this honourable court be pleased to file a reference against the ruling of the taxing master out of time.



- f. That this honourable court issues a stay of execution and/or sets aside certificate of costs dated 26th April 2021 for payment of Kshs.598,255/- pending hearing and determination of this application.
 - g. That the court be pleased to stay and/or set aside warrants of attachment dated 1st August 2022 and the proclamation dated 1st August 2022 issued by Kimu Auctioneers against the defendant/applicant's land being L.R. No. Kasgunga/Kamreri/5438 pending the hearing and determination of this application.
 - h. That the decision of the honourable taxing master delivered in so far as the same relates to the reasoning and determination pertaining the taxation of the bill of costs dated 7th April 2021 be set aside and/or removed and/or quashed and vacated by way of reference and all consequential orders be and are hereby set aside.
 - i. That in the alternative to prayer (h) above, the honourable court exercises its inherent jurisdiction and be pleased to re-tax the bill of costs dated 7th April 2021.
 - j. That in the alternative to prayers (h) and (i) above, the honourable court exercises its inherent jurisdiction and refer the bill of costs dated 7th April 2021 to another taxing officer for re-taxation or make directions to a fresh taxation.
 - k. That costs of this application be awarded to the defendant/applicant.
 - l. That any such order or further order be made as the honourable court shall deem just and expedient.
3. The application is anchored on the supporting affidavit sworn by the applicant's counsel, Ronnie Gali, on even date. Counsel avers that the plaintiff/respondent filed a bill of costs dated 7th April 2021 and the court issued a certificate of costs dated 26th April 2021 for Kshs. 598,255/-. That warrants for attachment and proclamation notices dated 1st August 2022 were issued over the applicant's property being L.R No. Kasgunga/Kamreri/5438 for the recovery of Kshs. 1,142,106.75/-.
 4. Also, counsel averred that thereafter, the applicant entered into consent dated 6th June 2023 whose terms were that part of his land measuring 1.24 Ha was to be transferred to the respondent's advocate, in satisfaction of the decree. That on the same day the applicant executed the consent, he also allegedly executed a notice to act in person which was drafted by the respondent's counsel. That the applicant is blind and his rights need to be protected.
 5. In a supplementary affidavit sworn by the applicant, Henry Okatch, on 8th August 2023, he asserted that it is unethical for the respondent's advocate to transfer a portion of the applicant's land to himself since he was not a party to the suit at the trial court. That the instant application is not res judicata Homa Bay ELC Appeal No. E006 of 2023. That the applicant stands to suffer irreparable loss and damage, unless the orders sought herein are granted.
 6. The respondent opposed the application by way of a replying affidavit sworn on 31st July 2023. The respondent deposed, inter alia, that the instant application constitutes an abuse of the court process. That it is the applicant and not his counsel who ought to have sworn the affidavit in support of the application to set aside the consent parties entered into.
 7. The respondent deposed that the genesis of this matter was in Mbita Law Court's Environment and Land Case No. 21 of 2018. That judgment was entered against the applicant who then preferred an appeal to this court vide Homa Bay ELC Appeal No. 1 of 2022, which appeal was dismissed with



- costs. That thereafter, the applicant challenged the bill of costs at the trial court but the application was dismissed. That being aggrieved with that ruling, the applicant again filed an appeal in this court, to wit, Homa Bay ELC Appeal No. E006 of 2023 but withdrew the same. That the applicant then entered into the disputed consent wherein he agreed to have a portion of his land subdivided and sold for the settlement of the decree.
8. The respondent averred that the applicant executed the notice to act in person so as to pave way for him to enter into a valid consent. That the applicant even allowed for the process of survey, subdivision and possible transfer of the disputed portion. That in any event, the instant application has been overtaken by events as the decree was executed on 27th July 2023. Thus, the respondent urged the court to dismiss the instant application with punitive costs.
 9. Similarly, the respondent's counsel, Samwel O. Nyauke, swore a replying affidavit on 17th August 2023 in response to the supplementary affidavit sworn by the applicant. Counsel deponed that this court lacks jurisdiction to set aside consent that was entered into at the trial court to dispose of the decree issued in that court. That the instruction between an advocate and his client are privileged, and if there is wrongdoing then this court is not the right forum to address the misconduct of an advocate. That the orders for stay sought in the instant application have also been overtaken by events since the decree has already been executed in terms of the consent order at the trial court.
 10. On 14th July 2023, the court ordered and directed that the application be heard by way of written submissions in the spirit of article 159 (2) (b) of *the Constitution* of Kenya, 2010 and order 51 rule 16 of the *Civil Procedure Rules*, 2010.
 11. Accordingly, the applicant's counsel filed submissions dated 21st August 2023, in support of the application and identified five issues for determination to wit: whether the plaintiff/respondent had an obligation to serve the bill of costs upon the defendant/applicant; whether the decision of the taxing master in so far as the same relates to the bill of costs dated 7th April 2021 should be set aside and/or quashed and consequently retaxed; whether the consent dated 6th June 2023 should be set aside; whether the court should enlarge time to enable the defendant/applicant file a reference out of time and who should bear the costs of the suit?
 12. Counsel submitted that the respondent's counsel did not obtain leave of court to file the further affidavit referenced in paragraph 9 hereinabove thus, the same ought to be expunged from the record. That the bill of costs dated 7th April 2021 was not served on the applicant, that the assessed amount was overly excessive and the same ought to be set aside. That the consent dated 6th June 2023 was brought about through collusion, fraud and illegality as the notice to act in person which gave it effect was prepared by the respondent's advocate, who is set to benefit by having a portion of the applicant's land transferred to him.
 13. Further, counsel urged this court to allow the applicant to file a reference out of time. That the delay in filing the same was occasioned by the applicant only finding out about the existence of the same on 5th August 2022. Thus, counsel submitted that the instant application be allowed with costs. Reliance was placed on various authorities including the case of *Otieno Ragot & Company Advocates -vs- Kenya Airports Authority* (2021) eKLR, in support of the submissions.
 14. Learned counsel for the respondent filed submissions dated 8th August 2023. Counsel submitted that the issues raised herein were raised in ELC Appeal No. E006 of 2023. That therefore, the instant application be dismissed with punitive costs.
 15. I have duly considered the application, the response thereto and the parties' respective submissions. So, the issues which arise for determination are thus:



- a. Whether the instant application is merited.
 - b. Who should bear the costs herein?
16. The applicant contends that the respondent failed to serve the bill of costs upon him in contravention of Order 21 rule 9A of the Civil Procedure Rules, 2010. That the amount taxed by the taxing master was disproportionate thus, the bill of costs dated 7th April 2021 should be set aside and/or quashed and consequently re-taxed. That this court do allow the applicant to file a reference out of time
17. In Donholm Rabisi Stores (firm) -vs- EA Portland Cement Ltd (2005) eKLR, Waweru J held:
- “...Taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates Remuneration Order...” (Emphasis added)
18. Rule 11 of the Advocates Remuneration Order, 2017 (1962) provides as follows:
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. (Emphasis added)
19. In Paul Wanjohi Mathenge -vs- Duncan Gichane Mathenge (2013) eKLR, which is cited by the applicant in his submissions, the Court of Appeal while referring to other authorities observed thus
- “...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 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...” (Emphasis added)



20. I note the issue of delay in bringing the instant application to court. Article 159 (2) (b) of the Constitution of Kenya, 2010 provides thus:
- “In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
- (b) justice shall not be delayed”
21. In the present case, the disputed bill of costs dated 7th March 2021 was duly taxed and a certificate of costs dated 26th April 2021 issued. Although the applicant contends that the matter proceeded ex parte as service was not effected on him, he, however, admits that he became aware of the bill of costs on 5th August 2022. This application was filed on 7th July 2023. Clearly, the delay is inordinate and no sufficient reason has been given to justify the same.
22. In the case of Utalii Transport Co. Ltd. & 3 Others -vs- NIC Bank Limited & Another (2014) eKLR, the court stated that:
- “Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court’s mind on the delay, caution is advised for Courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality” (Emphasis added).
23. In the circumstances, this court finds that the applicant’s prayer for leave to file a reference out of time is unmerited. Accordingly, this court cannot interfere with the terms of the bill of costs dated 7th April 2021.
24. On consent judgment, the decision in S M N vs Z M S & 3 Others [2017] eKLR is very instructive. The Court of Appeal stated as follows:
- “There is no dearth of authorities on the law governing the setting aside of consent judgments or orders, and we are grateful to counsel for citing some of them before us. Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties.” (Emphasis added)
25. In Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR, the Court of Appeal stated as follows:
- “A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”
26. Be that as it may, I note that the contested consent was filed at the trial court in satisfaction of the decree of that court. I further note that no appeal has been lodged in this court challenging the validity of



such consent. Initially, the applicant filed Homa Bay ELC Appeal No. E006 of 2023 challenging the decision of the trial court but withdrew the same by way of consent dated 31st May 2023.

27. In light of the foregoing, this court is not seized of jurisdiction to make a determination on whether the consent dated 6th June 2023 should be set aside. In the case of *Owners of Motor Vessel "Lillian S" -vs- Caltex Oil (K) Ltd* [1989] KLR 1, it was observed that:

“...Jurisdiction is everything. Without it a court has no power to take one more step, where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”

28. In the foregone, it is my considered view that the instant application instituted by way of chamber summons dated 7th July 2023 is devoid of merit. It is hereby dismissed.

29. As regards prayer (b) sought therein, the same has been overtaken by events since counsel has addressed the court on this application, which has been determined.

30. By dint of the proviso to section 27(1) of the *Civil Procedure Act*, chapter 21 Laws of Kenya, the costs herein shall be borne by the applicant.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 24TH DAY OF OCTOBER 2023.

G.M.A ONG'ONDO

JUDGE

Present

S. Nyauke, learned counsel for the respondent/ decree holder

K. Gali, learned counsel for the applicant

