



**Sare Developers Ltd v Airo & another (Environment and Land Appeal
13 of 2022) [2023] KEELC 21400 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21400 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 13 OF 2022
MN KULLOW, J
OCTOBER 23, 2023**

BETWEEN

SARE DEVELOPERS LTD APPELLANT

AND

CHARLES AIRO 1ST RESPONDENT

BARRACK OTIENO DACHE 2ND RESPONDENT

RULING

1. By Chamber Summons dated 25th May, 2023, the Applicant sought for the following orders: -
 - a. Spent.
 - b. That this Honourable Court be pleased to order an enlargement of time to enable the Applicant file a reference and/or do an objection, albeit out of time, to the ruling of the Deputy Registrar made on the 19th day of April, 2023 in taxing the Respondent's Bill of Costs dated 2nd December, 2022.
 - c. That costs of this Application be in the cause.
2. The application is premised on the 9 grounds on its face and on the Supporting Affidavit of one Samwel Odingo, an Advocate of the High Court having conduct of the matter on behalf of the Appellant, sworn on even date. He contends that the Respondents filed a Bill of Costs dated 2/12/2022, which was taxed on the 19th April, 2023 at Kshs. 2,077,517/=.
3. It is his claim that the Respondent's Bill of Costs was taxed in error because it was based on the Appeal which is still pending and yet to be finally determined whereas the same ought to have been with regards to the Application dated 17/07/2022 only.



4. He avers that the delay in filing the objection/reference to the ruling of the taxing master was unintended and the same was occasioned by the filing of the Application dated 24.04.2023; which was withdrawn by consent and the court directed that a reference/objection to the Registrar's Ruling be filed. He thus urged the court to allow the Application.
5. The application was opposed. The Respondents filed a Replying Affidavit sworn on 5th July, 2023 by the 1st Respondent, on his own behalf and on behalf of the 2nd Respondent. He dismissed the Application as being an abuse of the court process. It was his contention that the Applicant never filed any Objection to the Bill of Costs so assessed and therefore there is nothing to base the Reference on.
6. Further, it was his contention that this court is functus officio in so far as the said Ruling of the taxing master is concerned. That the inordinate delay of almost 60 days has not been sufficiently explained as required by law to warrant the grant of the orders sought. He thus urged the court to dismiss the Application with costs.
7. The Application was disposed of by way of written submissions. Both parties filed their rival submissions which I have read and considered.

Analysis and Determination

8. It is my considered opinion that the sole issue arising for determination is whether the Application is merited and the Applicant is entitled to the orders sought;
9. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman v Cumarasamy* [1964] 3 All ER 933.
10. The first principle to determine is the length of the delay and the reason for the delay if any. The present Application was filed on the 30th June, 2023 while the decision of the taxing master was rendered on 19th April, 2023. The Application was therefore filed within 2 months and 11 days. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. See *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.
11. Paragraph 11(1) and (4) of the *Advocates Remuneration Order* provides the timelines within which to file an Objection to the decision of a taxing officer and further accords the court the discretion to enlarge time to file an objection after the expiry of the 14 days. It 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.
 3.
 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.
12. The Applicant has attributed the delay in filing the Reference challenging the decision of the Taxing Master to the procedural technicalities. It is the Advocate's claim that he inadvertently filed a Notice



- of Motion Application, seeking to challenge the said decision of the taxing master, contrary to the provisions of the law but within the stipulated timelines of 14 days. The said Application was withdrawn by consent on the 23/5/2023 and the instant Application filed on the 25/5/2023. He therefore implored the court not to visit the mistakes of the counsel on an innocent litigant and cited the provisions of Article 159 (2) of the Constitution as read with the Oxygen Principles provided in the Civil Procedure Act.
13. The Respondent on the other hand dismissed the said averments and maintained that the explanation by the Applicants was not sufficient. He further stated that the said procedural mistake was not inadvertent but the same was made by the counsel in ignorance and is therefore inexcusable.
 14. Paragraph 11(4) of the Advocates Remuneration Order above, empowers the court to enlarge the time for filing an Objection to the decision of the taxing master, notwithstanding that the time fixed for filing the same has expired. I have considered the rival position by the parties on the explanation tendered for the delay. Article 159 (2)(d) of the Constitution provides that justice shall be done without undue regard to procedural technicalities.
 15. It is common ground that the Applicant's Advocate on Record, filed a Notice of Motion Application dated 24/4/2023, seeking to challenge the decision of the Deputy Registrar/ taxing master on the Respondent's Bill of Costs. This was not the appropriate procedure and the said Application was withdrawn by consent. The question that follows is whether this inadvertent mistake on the part of the advocate should be visited upon the innocent litigant or whether the said mistake is excusable.
 16. The Applicant has urged the court not to visit the mistakes of the advocate on the innocent litigant. By his own admission, counsel for the Applicant has acknowledged the procedural lapse on his part by filing a Notice of Motion Application instead of a Reference as procedurally required. He further demonstrated the effort made and the steps taken after the delivery of the decision by the taxing officer with the aim of challenging the said decision. Thus, in my considered view, the instant Application cannot be said to be a deliberate attempt to frustrate the Respondent as alleged.
 17. In Gideon Mose Onchwati v Kenya Oil Co. Ltd & Another [2017] eKLR the court cited with authority the case of Ongwom vs Owota, where the Court held that;

“ Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate, is bound by the acts and omissions of the advocates in the course of representation, in applying that principle, Courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure, on the part of the litigant, to give the advocate due instructions.”(emphasis added)
 18. In view of the forgoing, I find the explanation tendered by the Applicant's advocate is plausible and sufficient and I will proceed to grant the Applicant the benefit of doubt. The delay has genuinely been explained and this is a clear case where the mistakes of the Advocate should not be visited upon the litigant.
 19. The final element to be proved is the degree of prejudice to the Respondents if the Application is allowed. The degree of prejudice entails balancing the competing interests of the parties; the injustice to the applicant in denying him an extension to exercise his right of appeal, against the prejudice to the respondent in realizing the fruits of his judgment, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes on the other hand.



20. In the case of *Martha Wangari Karua v IEBC* Nyeri Civil Appeal No.1 of 2017 the Court of Appeal held as follows: -

“The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”

21. The amounts in question is Kshs. 2,077,517; which is a colossal amount and justice thus demands that the Applicant be accorded an opportunity to ventilate his claim before being condemned to pay such a huge sum of money.

22. The totality of the foregoing, I find that enlarging time and allowing the Applicant to have his day in court would not unduly prejudice the Respondent. I have also considered the amount in question and I therefore hold in favor of the Applicant.

23. In view of the above, I am inclined to exercise the discretion vested in this court in favour of the Applicant as no substantial prejudice will be occasioned on the Respondents.

24. Further, I have noted that the Applicants submitted on the issue of stay of execution. However, no such order was sought in his Application. It is common ground that parties are bound by their pleadings. This court will therefore not award an order for stay of execution since the same was not sought in the instant Application.

Conclusion

25. In the upshot, I accordingly find that the Application dated 25th May, 2023 is merited and I accordingly allow the same on the following terms: -

- a. Leave be and is hereby granted to the Applicant to file a Reference, to the ruling of the Deputy Registrar made on the 19th day of April, 2023 in taxing the Respondent’s Bill of Costs dated 2nd December, 2022, within 21 days from the date of this Ruling.
- b. Costs of the Application to abide the Intended Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON THE 23RD DAY OF OCTOBER, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

.....for the Applicant

.....for the Respondents

Court Assistant- Tom Maurice/ Victor

