



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND

AT KISII

MISCELLANEOUS CIVIL APPLICATION NO. E011 OF 2021

JOSEPH LEKODI TELEU.....PLAINTIFF/APPLICANT

VERSUS

JONATHAN PAAPAI.....1ST DEFENDANT/RESPONDENT

GRACE NAIGURAI.....2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. By a Chamber Summons dated 11th September, 2021 the Applicant sought a stay of execution of the Taxing Master's ruling rendered on 15th May, 2020 as well as enlargement of time within which to file a reference against the said ruling. The ruling in question was rendered by the Taxing Master in KISII ELC NO. 175 OF 2015 wherein the Respondents herein were awarded the sum of Kshs. 451, 856/= as party to party costs.
2. In the grounds in support of his application, the Applicant claimed that the amount of costs taxed was excessive and unjustifiable. He claimed that the Taxing Master's decision was based on an error of principle and amounted to wrongful exercise of discretion. He pointed out that no receipts were produced in support of the expenditure on disbursements.
3. He lamented that the intended Reference would be rendered nugatory and the Applicant would suffer irreparable damage in case execution was allowed to proceed. He stated that the application had been filed without unreasonable delay.
4. In order to support his application, the Applicant further swore a Supporting Affidavit on 14th September, 2021 wherein he averred that he was neither served with the Notice of Taxation of costs nor the ruling and he later learned that the costs stated therein were excessive.
5. He deposed that he only learned of the Taxation ruling on 7th August, 2021 when he was served with a Notice to Show Cause why he should not be arrested and committed to civil jail in the execution of the Decree in ELC Case No 175 of 2015 which had been determined against him. He further averred that he visited his former Advocates M/S Sagwe & Company Advocates to interpret the Notice for him.
6. He deposed that the former Advocates advised him that they intended to seek a stay of execution pending an Appeal that they had preferred to the Court of Appeal. He lamented that despite their promise to fast track the stay application, the said advocates thereafter failed to pick his telephone calls. Being frustrated by the conduct of his former advocates, he was forced to engage the current Advocates, M/S Oenga & Company Advocates.
7. He averred that his former Advocates failed to divulge any information regarding the case due to their disinterest in the case. After taking over the matter, his current Advocate obtained the phone contacts of the officers at the registry and made efforts to peruse the file but his efforts were futile. The said Advocates then visited the Kisii ELC registry on 10th September, 2021 and had the opportunity to peruse the file.
8. It was his deposition that upon perusal of the file his Advocates advised him to forego the Appeal because the judgment was based on sound reasoning of the Judge and instead pursue a Reference against the ruling of the Taxing Master for reasonable costs. He stated that the Reference would have been preferred sooner had his former advocates been more co-operative.
9. The application was opposed by the Respondents vide a statement of Grounds of Opposition dated 5th November, 2021. In the said statement, the Respondents stated that the application was not based on any provision of the Advocates Act to warrant this court to grant the orders sought therein.

10. The Respondent stated that the application was omnibus since there was no Reference to the Taxation before the Taxing Master thus no leave could be granted to lodge a Reference. It was also the Respondents' argument that the application was dead on arrival since the same did not seek to set aside the ruling of the Taxing Master but was seeking to stay the execution of the same.

11. The Respondents further stated that the Applicant had not shown or established any evidence of substantial loss to warrant the grant of the stay order. The Respondents expressed their view that the Applicant did not disclose any peculiar circumstances to warrant the grant of the orders sought and thus the same was an abuse of the process of the court and devoid of merit.

12. The Application came up for hearing on 6th October, 2021 whereupon the Court directed that the same be canvassed by way of written submissions. The Applicant filed his submissions on 26th October, 2021 while the Respondents filed their submission on 8th November, 2021.

ISSUES FOR DETERMINATION

13. From my analysis of the application, the response thereto and submissions filed by both parties, I deduce the following as the main issues of determination:-

- a) Whether this court should enlarge time to enable the Applicant file a Reference against the ruling of the Taxing Master out of time.
- b) Whether the court should stay the execution of the Taxation ruling.

ANALYSIS AND DETERMINATION

Whether this court should grant the Applicant extension of time to enable him file a reference against the ruling of the Taxing Master out of time.

14. Paragraph 11 of the Advocates Remuneration Order (ARO) stipulates as follows on the filing of reference objecting to the decision of the Taxing Master:-

- 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 which he objects.*
- 2) *The Taxing Officer shall forthwith record and forward to the objector the reasons or 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 subparagraph (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 expired.* (Emphasis supplied).

15. The discretion of this court to enlarge time is elaborately discussed in the case of the **County Executive of Kisumu v County Government of Kisumu and 8 Others [2017] eKLR** where the Supreme Court of Kenya held thus:

*“[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.*”

16. In this instant application the Applicant has made an attempt to explain the reason for the delay in meeting the requirements set out in Paragraph 11 (1) and (2) of the Remuneration Order outlined hereinabove. He denied that he was served with the application for Taxation. However, in paragraph 7 of his Affidavit, he reveals that he was being represented by a firm of Advocates. It cannot be true that he was not served given that he was being represented by the advocates who according to his averments did not deny that they were served.

17. The Applicant seems to place the blame on his former Advocates for his failure to file his application to challenge the ruling of the Taxing Master. He laments that the Advocate was disinterested in pursuing the matter on his behalf because he was not picking his telephone calls. However, it is clear that the Applicant only got interested in the case on 7th August, 2021 after a Notice to Show Cause was served upon him and that is the only document he has filed in support of his application. There is nothing to convince me that the Applicant after giving instructions to his advocate made any follow up as he seems to have gone to slumber only to be awakened by the execution order.

18. The Ruling of the Taxing Master having been made on 15th May, 2020 following the procedure set out in Paragraph 11 of the Remuneration order outlined above, he ought to have indicated which items of the Bill of Costs he objected to before the expiry of the 14 days. The Applicant has not made any attempt to explain why he had to wait until he was served with Notice to Show Cause before taking any action.

19. It seems he had it in his mind that it was his former Advocate’s role after a judgement had been entered against him to find ways in which he was going to avoid liability. No wonder he only visited his chambers to seek an interpretation of the Notice to Show Cause served upon him on 7th August 2021.

20. The Applicant ought to know that having been sued by the Respondent, it was his obligation to ensure that the suit filed against him was expeditiously prosecuted in court by making all necessary follow ups. He was not supposed to sit pretty and wait until an execution order is served upon him for him to rush to his Advocate’s chambers for an interpretation of the same. In the case of **Savings & Loan Limited –Vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCC NO.397 OF 2002**, the court stated thus: -

*“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, **it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case.** The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff’s determination to execute the decree issued in its favor, is an indictment of the Defendant. **She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favor of such a litigant.**” [own emphasis]*

21. Likewise, in **Duale Mary Ann Gurre –Vs – Amina Mohamed Mahamood & Another [2014] eKLR, Hon Justice Mutungi** held as follows: -

*” An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. **In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client.** If the Advocate commits a negligent act the client has an independent cause of action against the Advocate.”*

22. From the above-mentioned authorities, it is clear that a litigant has a duty to follow up on his case after he has instructed an advocate. In the instant application the delay of a year and three months is inordinate. I also find that the explanation given by the Applicant regarding the delay is not satisfactory and thus I find no reason to enlarge time for him to file a Reference against the ruling of the Taxing Master.

Whether this court should stay the execution of the taxation ruling.

23. Having found no reason to enlarge time for filing the Reference, it follows that execution cannot be stayed.

CONCLUSION

24. In the final result, it is my finding that the Applicant’s application for enlargement of time is unmerited and the same is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 10TH DAY OF FEBRUARY, 2022.

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J.M ONYANGO

JUDGE