



Brookshill Limited & another v County Government of Kwale & 3 others; Mwadzugwe & 2 others (Interested Parties) (Environment & Land Petition 25 of 2021) [2025] KEELC 3311 (KLR) (8 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3311 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 25 OF 2021**

LL NAIKUNI, J

APRIL 8, 2025

BETWEEN

BROOKSHILL LIMITED 1ST PETITIONER

ASHBROOK LIMITED 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF KWALE 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

AND

SULEIMAN ALI MWADZUGWE INTERESTED PARTY

SALIM HUSSEIN OMAR INTERESTED PARTY

HATIBU MJAKA MTENGO INTERESTED PARTY

RULING

I. Introduction

1. The Ruling by this Honourable Court pertains to a Notice of Motion application dated 24th October 2024 instituted by the both Brookshill Limited And Ashbrook Limited , 1st & 2nd Petitioners/ Applicants herein against the Respondents herein. The application was premised upon the provisions of Order 42 Rule 6, Order 49 Rule 7; and Order 51 Rule 1 of the Civil Procedure Rules, 2010; Sections 1A,1B and 3A of the Civil Procedure Act, Cap. 21.



2. Upon service, the application was opposed through filing of by a Replying Affidavit dated 7th November 2024 sworn by M/s. Farida .K. Jadi, the Learned Counsel representing the Respondents. The Honourable Court shall be dealing with it in depth at a later stage of the Ruling herein
3. From the very onset, the Interested Parties did not participate in the instant application.

II. Petitioners/Applicants case

4. The Petitioners/Applicants sought for the following orders:-
 - a. Spent.
 - b. That pending hearing and determination of this application or further orders of this court, there be a stay of execution of the Certificates of Costs dated 25th September 2024 for the sum of Kshs 2,149,437/- in favour of the 1st respondent and Kshs 1,118,250/- in favour of the interested party.
 - c. That pending the hearing and determination of the intended reference, there be a stay of execution on the certificate of costs dated 25th September 2024
 - d. That the costs of this application be provided for.
5. The application is based on grounds, the testimonial facts and the averments made out under the 14 Paragraphed Supporting Affidavit of Alfred Andiwo, an Advocate of the High Court of Kenya having the conduct of this matter on behalf of the 1st & 2nd Petitioners/Applicants. He averred as follows that:-
 - a. On 25th September 2024, the Taxing Master delivered a ruling on the 1st Respondents and Interested Parties' Bill of Costs dated 5th February 2024 and 4th October 2023 respectively in the sum of Kenya Shillings Two Million One Fourty Nine Thousand Four Thirty Seven Hundred (Kshs. 2,149,437/-) in favour of the 1st Respondent and a sum of Kenya Shillings One Million One Eighteen Thousand Two Fifty Hundred (Kshs. 1,118,250/-) in favour of the Interested Parties.
 - b. Upon the delivery of the ruling, the Petitioners/Applicants made several attempts to obtain a copy of the ruling through the CTS and at the registry and but it could not be traced.
 - c. Accordingly, the Petitioners/Applicants wrote a letter dated 30th September 2024 to the Deputy Registrar requesting for a copy of the ruling.
 - d. The ruling on taxation was only availed to the Petitioners/Applicants on 9th October 2024 while the Certificate of Taxation was served upon the Petitioners/Applicants on 22nd October 2024.
 - e. The ruling on taxation never contained any reasons for the taxation especially for items listed in both Bills of Costs for getting up fees, perusals, drawings and attendances. As such the Petitioners/Applicants had been unable to ascertain the basis for the taxation of the said items.
 - f. On 8th October 2024, the Petitioners/Applicants filed with the Taxation Officer a Notice of Objection on the taxation, based on the oral ruling delivered on 25th September 2024 and requested for reasons thereof to facilitate filing of a Reference.
 - g. In the absence of the reasons for the taxation, the taxed amounts appeared excessive and gratuitous



- h. The 30 days stay that was granted by the Taxing Master was due to lapse on 25th October 2024 and the Petitioners/Applicants was apprehensive that the 1st Respondent and Interested Parties would proceed with execution of costs thereby rendering the intended Reference nugatory.
- i. The Petitioners/Applicants were reasonably apprehensive that once paid out the sums assessed would be beyond their reach for recovery.
- j. The Petitioners/Applicants stood and to suffer substantial and irreparable loss unless the stay of execution of the Certificate of Costs issued on 25th September 2024 was granted pending the hearing and determination of the intended Reference.
- k. It was in the interest of justice that a stay of execution of the said Certificate of Costs be granted to allow the Petitioners/Applicants file and canvass their Reference.
- l. This application was filed without unreasonable delay.

III. The Respondents' case

- 6. The Respondents opposed the application through filing a 13 Paragraphed Replying Affidavit sworn by their Counsel one M/s. Farida .K. Jadi and dated 7th November, 2024. She averred as follows that:-
 - a. The application was an afterthought and an abuse of the court process thus aimed at delaying the first Respondent from enjoying the fruits of the ruling after taxation
 - b. The ruling was delivered on 25th September 2024 at around mid - day and the court did upload a copy of the same on the CTS and hence available for everyone to see. Thus the allegation by the Petitioners/Applicants that they were not able to access the ruling
 - c. The deponent averred that on 9th October 2024 an email was sent to the Petitioners/Applicants asking them to settle the costs as awarded and upon receipt of the mail, they wrote back requesting for a copy of the ruling which was sent to them on the same day.
 - d. To date no reference had been filed to challenge the ruling on costs dated 25th September 2024. Thus, it was time barred pursuant to the provisions of Rule 11[2] of the Advocates Remuneration Order (ARO).
 - e. A clear basis had not been laid for the intended reference against the taxation. The Taxing Master outlined the reasons for the decision on three items instruction fees, getting up fees and court attendances.
 - f. Thus the application was opposed by the Respondents based on the grounds above.

IV. Submissions

- 7. On 18th February 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 24th October, 2024 to be disposed of by way of written submissions.
- 8. Pursuant to that, and at the time of penning down this Ruling, the Honourable Court was only able to access the Submissions by the Petitioners/Applicants and the 1st Respondents from the Judiciary CTS Portal. The 2nd, 3rd & 4th Respondents never participated. Subsequently, the Honourable Court reserved a Ruling on its own merit for 8th April 2025 accordingly.



A. The Written Submissions by the Petitioners/Applicants

9. The Petitioners/Applicants through the Law firm of Messrs. Hamilton Harrison & Mathews Advocates filed their written submissions dated 4th February, 2025. Mr. Andiwo Advocate commenced by stating that their application mainly sought for stay of execution of the Certificate of Costs issued by the Taxing Master on 25th September, 2024 pending the hearing and determination of the Intended Reference against the said Ruling. The Learned Counsel provided the Court all the details leading to the necessitating the filing of the application herein.
10. The Learned Counsel averred that the main issue for determination was identified as whether a stay of execution of the Certificate of Costs issued on 25th September 2024 should be issued pending the hearing of the intended reference.
11. The Petitioners/Applicants submitted that it would be in the interest of justice that a stay of execution was issued. If this never happened, the Petitioners/Applicants stood to suffer substantial and irreparable loss. The Learned Counsel asserted that they argued so as the 1st Respondent had already commenced execution proceedings against the Petitioners/Applicants herein.
12. To buttress on this point, the Petitioners/Applicants placed reliance on the provisions of Paragraph 11[1] and [2] of the ARO and the cases of:- “Oreng T/A Oreng J & Associates – Versus – Nthiga (Miscellaneous Civil Application No. E67 & E68 of 2019” ; & “Magdalena Alphonse Cheposowor – Versus - Chepsuko Lonyareng & 5 Others [2021] eKLR” whereby the Court issued a stay of execution of a Bill of Costs pending the giving of reasons on the decision of the Taxing master. The Court ordered that:-

“The execution of the bill of costs dated 13th April, 2021 is hereby stayed pending the giving of reasons on the decision of Taxing Master and the 14 days window of giving reasons or such longer period as the Taxing master may give upon issuance of the reasons”.
13. According to the Learned Counsel, in the instant matter the Petitioners/Applicant had requested the Taxing Master to supply them with reasons for the ruling to enable them to file a Reference but it was not availed to them. Further, that the Deputy Registrar never availed the reasons for the decision made making it impossible for the Petitioners/Applicants to file a reference as required by the law.
14. The Learned Counsel argued that the only reason why they had failed to file the reference was because the Taxing Master had not provided reasons for the ruling. The Petitioners/Applicant prayed that the orders sought were granted as prayed.

B. The Written Submissions by the 1st Respondents.

15. The 1st Respondent while opposing the application filed their written submissions dated 18th February, 2025 through the Law firm of Mrima Madzayo & Jadi Company Advocates. M/s. Jadi Advocate submitted that the applications as filed by the Petitioners/Applicants lacked in merit. It was unsubstantiated and an abuse of the court process. That the application was further aimed at delaying the enforcement of the ruling on taxation and no reason had been advanced for the said stay.
16. As far as the Learned Counsel was concerned, there was only a single issue for the determination by this Court. This was whether the Petitioners/Applicants had met the legal threshold for the grant of a stay of execution of taxed costs pending the Intended Reference. The Counsel submitted that the power for court to grant stay orders was governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010. That the Petitioners/Applicants had failed to demonstrate that they would



suffer irreparable harm or substantial loss should the stay not be granted as was illustrated in the case of:- “Kenya Shell Limited – Versus - Benjamin Karuga Kibiru & Another [1986] eKLR” where it was held:-

“.....in an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted.....granting the stay would be denying a successful litigant of the fruits of his Judgement”

17. Further that the Petitioners/Applicants had not provided a clear basis for their objection to the taxation. That while they alleged the same was excessive, they had not particularised any specific item or demonstrated how the awarded amounts were unjustifiable. That the Petitioners/Applicants ought to establish the specific grounds for their objection. They submitted that the taxed amounts were fair and reasonable. To buttress on this point they referred Court to the case of: “Premchand Raichand Limited & Another – Versus – Quarry Services of East Africa Limited & Others (1972) EA 162”. Which was on all fours to this issue.
18. According to the Learned Counsel, there was a delay in filing the application. It was not filed expeditiously. Yet, there had been no explanation for the delay.
19. Additionally, and by referring to the case of: “Machira T/A Machira & Company Advocates – Versus East African Standard No. 2) of (2020) eKLR” the Learned Counsel contended that granting the stay would impede the 1st Respondent’s ability to recover its lawful costs. From this decision the Court declined to grant the orders as it was a ploy to frustrate the Applicants from enjoying the fruits the Judgement without sufficient justification. That the Petitioners/Applicants had not provided any security of costs.
20. In conclusion, the 1st Respondent prayed that the Petitioners/Applicants to be dismissed with costs.

V. Analysis & Determination

21. I have keenly considered the application as filed by the Petitioners/Applicants herein, the Replying Affidavit, the written submissions, the plethora of cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the law.
22. In order to arrive at an informed, fair and just decision on the matter, the Honorable Court has framed the following three (3) issues for determination:-
 - a. What are the fundamental legal principles to be considered for granting stay of execution pending the filing of Reference.
 - b. Whether the Notice of Motion application dated 24th October, 2024 by the Petitioners/Applicants for stay of execution of the ruling dated 25th September 2024 had any merit whatsoever.
 - c. Who bears the costs of the application?

ISSUE No. a). What are the fundamental legal principles to be considered for granting stay of execution pending the filing of Reference.

23. Under this sub – heading the Honourable Court shall critically examine whether the Applicants should be considered for granting of stay of execution pending the filing of the Intended Reference. As has already been rightfully submitted by the Learned Counsels herein, the principles for grant of stay



of execution orders are clearly outlined under the provision Order 42 Rule 6 (2) of the Civil procedure Rules, 2010 which provides that before a court could issue a stay order the applicant must prove that:-

- a. That the Applicant is likely to suffer substantial loss in the event the order is not granted.
- b. That the application has been filed without inordinate delay.
- c. That security for due performance of the decree has been finished.

24. The grant for an Order of Stay of Execution is discretionary in nature. The Court of Appeal while setting down Jurisprudence on this issue at the early stages, in the case of:- “Butt – Versus - Rent Restriction Tribunal [1982] KLR 417” gave guidance on how such discretion should be exercised as follows:-

1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

25. The first ground to be established is whether substantial loss may result to the Applicant unless stay of execution is granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of ”Mukuma – Versus - Abuoga (1988) KLR 645” where their Lordships stated that:-

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

26. Substantial loss was explained in the case of: “James Wangalwa & Another – Versus - Agnes Naliaka Cheseto [2012] eKLR, that: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”



ISSUE No. b). Whether the Notice of Motion application dated 24th October, 2024 by the Petitioners/ Applicants for stay of execution of the ruling dated 25th September 2024 had any merit whatsoever.

27. In terms of applying the above legal principles to the instant case, the Petitioners/Applicants case is that the Certificate of Costs once executed will cause substantial loss to them. It is stated that they were not made aware of the ruling of the court. However, argument vigorously disputed by the 1st Respondent who states that the ruling was made available on the court CTS system and that further a copy of the ruling was sent to the Petitioners/Applicants via email.
28. The court has interrogated the submissions by both parties herein. From the evidence on record it is true that a Certificate of Costs has already been issued with an impending execution on the Petitioners/Applicants. The aspect of possibly suffering substantial loss after execution is therefore self-evident. I also note that the application was filed a month after the impugned ruling which I cannot term as inordinate delay. The issue of security for costs has not been raised by either parties. I am of the opinion that the threshold for stay of execution has been met.
29. However, the circumstances of this case are somehow different. The Petitioners/Applicants seek for stay of the Certificate of Costs pending filing of a Reference over the decision of the Taxing Master. This means that the court will interfere with the discretion of the Taxing Master not by setting aside the same or considering whether there was an error but by staying its execution. In doing so, I am set to interrogate the circumstances under which the court can fetter with the taxing master's discretion.
30. The circumstances under which a court can interfere with the discretion of the Taxing Master was aptly stated in the case of:- "First American Bank of Kenya – Versus - Shah and Others [2002] E.A.L.R 64 AT 69", where the court held as follows:-
- "First, I find that on the authorities, this court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle".
31. Similarly, in the case of:- "Republic – Versus Ministry of Agriculture & 20 Others Ex-Parte Muchiri W' Njuguna [2006] eKLR, Ojwang J. (Retired) stated as follows:-
- "The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle."
32. In the South African Case of "Visser – Versus - Gubb 1981 (3) SA 753 (C) 754H – 755C". The court stated as follows:
- "The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering



matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

33. The provision of Rule 11 of the ARO makes provision for the procedure an aggrieved party must adopt. It provides:
- (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.
34. The procedure contemplated above is:
- a. The aggrieved party issues a notice within 14 days on the items objected
 - b. The Taxing Officer shall forthwith give reasons for his decision
 - c. Upon receipt of the reason, the objector shall within 14 days’ file an application to the High Court setting out grounds for objection
 - d. If dissatisfied with the High Court, the objector shall with leave of court appeal to the Court of Appeal.
35. The court has taken note of the Notice of Objection by the Petitioners/Applicants herein. It was dated 8th October 2024. I further note that no response has been availed to the Petitioners/Applicants by the taxing master as provided above. Bearing that in mind, it is clear that the taxing master has not complied with the mandatory provisions above to enable the Petitioners/Applicants to further pursue the award of costs by filing of a reference.
36. It will be proper for the Petitioners/Applicants to be given an avenue to challenge the decision of the taxing master. Any execution that might ensue before the filing of the reference will definitely amount to loss on the part of the Petitioners/Applicants. In that case, it will further deny them the opportunity to fully ventilate the issues raised. For these reasons, therefore, the application must succeed.



ISSUE No. c). Who will bear the Costs of the application

37. It is now well established that the issue of Costs is at the discretion of Court. Costs mean the award that is granted to a party at the conclusion of a legal action or proceedings. The Proviso of Section 27 (1) of the Civil Procedure Act, Cap. 21 provides that costs usually follow the events unless special circumstances present themselves. By evet it means the results or outcome of the legal action.
38. In the instant Application, and in the given circumstances, the Court finds that the 1st Respondent cannot in anyway be faulted for the failure of the taxing master to avail a response to the objection.

VI. Conclusion & Disposition

39. Ultimately, having caused an indepth analysis to the framed issues herein, the Honourable Court based on the principles of Preponderance of Probabilities and the balance of convenience, it proceeds to make the following orders. These are:-
- a. That the Notice of Motion application dated 24th October, 2024 be and is hereby allowed.
 - b. That an order is hereby issued directing the Deputy Registrar- Kwale ELC Court to furnish the Petitioners/Applicants with reasons for the ruling dated 25th September 2024 within 14 days from the date of this ruling.
 - c. That the execution of the Certificate of Costs dated 7th October 2024 is hereby stayed pending the giving of reasons on the decision of the Taxing Master and the 14 day's window of the giving of those reasons or such longer period as the taxing master may give upon issuance of her reasons.
 - d. That the matter to be mentioned on 16th May, 2025 before the Taxing Master – the Deputy Registrar – Kwale for providing the appropriate direction accordingly.
 - e. That each party to bear its own costs.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 8TH DAY OF APRIL 2025

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**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT AT KWALE.**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. Mr. Andiwo Advocate for the Petitioners.
- c. M/s. Jadi Advocate for the 1st Respondent.
- d. No appearance for the 2nd, 3rd & 4th Respondents; 1st, 2nd & 3rd Interested Parties.

