



**Kenya Commercial Bank Limited v Okere (Environment and Land Appeal  
1 of 2017) [2022] KEELC 15054 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15054 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 1 OF 2017  
A OMBWAYO, J  
NOVEMBER 24, 2022**

**BETWEEN**

**KENYA COMMERCIAL BANK LIMITED ..... APPLICANT**

**AND**

**THOMAS RAILA OKERE ..... RESPONDENT**

**RULING**

1. Before me is an application dated March 15, 2022 filed by the appellant pursuant to order 45 rule 1 (1) (a) &(b), rule 2 (2) of the Civil Procedure Rules, sections 1A,1B,3 and 3A of the Civil Procedure Act seeking orders that:
  1. That this honourable court be pleased to certify this application as urgent and dispense with service of the same in the first instance.
  2. That this honourable court do issue a stay of execution of the ruling and order of the learned Taxing Master made on September 2, 2021, pending the hearing of this application inter parties.
  3. That this honourable court do issue a stay of execution of the ruling and order of the learned Taxing Master made on September 2, 2021, pending full determination of this application.
  4. That his honourable court be pleased to review, vary and/or set aside the ruling dated March 11, 2022 and, in its place, this honourable court to consider the appellant/applicant's submissions on the reference dated September 7, 2021.
  5. That the costs of this application be awarded to the appellant/applicant.
2. The application was based on grounds that the respondent's bill of costs dated September 9, 2022 was taxed by the learned taxing master on September 2, 2021 in the sum of Kshs 216,196.70/= and the



- appellant being dissatisfied with the ruling of the Taxing Master, filed a reference dated September 7, 2021.
3. This matter came p for hearing on 29<sup>th</sup> 2021 and the court directed parties to file submissions. The appellant inadvertently forgot to diarize the matter and to comply within the timelines given by the court until March 1, 2022 when counsel for the appellant came across the file and proceeded to file submissions together with a forwarding letter dated March 2, 2022.
  4. It was stated that the court delivered its ruling dated March 11, 2022 in which the court dismissed the appellant's reference on grounds that parties had failed to file their written submissions within the timelines set by the court. It was alleged that there is an error apparent on the face record as the appellant filed its submissions on March 1, 2022.
  5. The application was supported by the affidavit of Faustine Osewe which affidavit relied on the grounds set out in the application.
  6. The respondent filed a response to the application where it was stated that the respondent's bill of costs was taxed by the Taxing Master on September 2, 2021 in the sum of Kshs 216,196.70/= and the applicant being dissatisfied with the ruling of the Taxing Master, filed a reference.
  7. That the matter came up for hearing on September 29, 2021 and the court directed parties to file submissions. counsel for the appellant failed to file and serve submissions as per the timelines and the allegations that counsel for the appellant misdiarised the matter is an afterthought meant to delay the ends of justice.
  8. It was stated that this court delivered its ruling on March 11, 2022 in which the reference was dismissed. That the court can give a ruling with or without submissions and this court cannot review its ruling on grounds that the applicant had not filed its submissions as it is not a ground for review under section 80 of the [Civil Procedure Act](#) and order 45 of the [Civil Procedure Rules](#).
  9. It is the respondent's case that failure to file submissions on time is not an error apparent on record and that there can only be an error apparent on record if the applicant had filed their submissions within the set timelines and the court overlooked or failed to consider as issue either on law or fact raised in the submissions which is not the case in the instant application. That the respondent should not be denied an opportunity to enjoy the fruits of his success due to the negligence and/or indolence of the appellant and that the respondent should be granted an opportunity to execute the decree and recover costs incurred in conducting this matter.
  10. The respondent further stated that the application is a waste of time and should be dismissed with costs as he will be greatly prejudiced if this application is allowed.

### **Analysis and Determination**

11. Section 80 of the [Civil Procedure Act](#) provides as follows:

- “ 80. Any person who considers himself aggrieved-
- a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”



29. Order 45 rule 1 of the *Civil Procedure Rules*, 2010 provides that:

“(1) Any person considering himself aggrieved—

- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

12. Based on the above provisions of the law, the main grounds for review are discovery of new evidence or important matter, mistake or error apparent on the face of the record, or any other sufficient reason. the court also considers whether the application has been made without unreasonable delay.
13. In this instant application, the application for review was based on grounds that counsel for the appellant inadvertently forgot to diarize the matter and to comply within the timelines given by the court by failing to file submissions within the timelines issued. The court delivered its ruling where the appellant’s reference was dismissed on grounds that parties failed to file their written submissions and the said refence was unmerited.
14. I have considered the letter dated March 2, 2022 and do confirm that the appellant filed its submissions on March 2, 2022. The appellant in its supporting affidavit has stated that if the court considers the submissions, there is a likelihood that the court would reach a different conclusion. The respondent on the other hand has opposed the application by stating that the court can give a ruling with or without the submissions as it can draw its ruling from the issues raised on the application.
15. It will be unfair if this court considers the appellant’s submissions without giving the respondent an opportunity to file his submissions since the matter was canvassed by way of written submissions. This court therefore allows the application and orders as follows:
  1. That the ruling dated March 11, 2022 is hereby set aside.
  2. That the respondent to file and serve his written submissions within 14 days from the date of today.
  3. That parties to fix a mention date in the registry for purposes of confirming if the respondent has filed his written submissions.



4. That costs of this application be in the cause.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022**

**A.O OMBWAYO**

**JUDGE**

