



**Lempesai v Rioba & 2 others (Environment and Land Miscellaneous Application  
E020 of 2023) [2024] KEELC 512 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 512 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E020 OF 2023  
LC KOMINGOI, J  
FEBRUARY 1, 2024**

**BETWEEN**

**NTUYOTO MARASUA LEMPESAI ..... APPLICANT**

**AND**

**CHARLES OTEKI RIOBA ..... 1<sup>ST</sup> RESPONDENT**

**DIANA NYABATE MAGETO ADVOCATE ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, KAJIADO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This is the Notice of Motion application dated 29<sup>th</sup> June 2023. It seeks Orders:
  - i. Spent.
  - ii. That this Honourable Court, be pleased to grant stay of execution of the Ruling and orders of Honourable J. Kamau issued on 3<sup>rd</sup> May 2023 and Notice to Show Cause dated 11<sup>th</sup> May 2023 pending the hearing and determination of this application.
  - iii. That this Hon. Court be pleased be pleased to grant and hereby grants an Order to stay, vary and set aside its orders granting cost to the Defendants on 15<sup>th</sup> June 2022.
  - iv. That this Honourable Court be pleased to allow the Plaintiff to defend and submit on the quantum of costs.
  - v. That this Hon. Court be pleased to extend the time within which to file an appeal to the decision of the taxing officer.
  - vi. That the costs of this application are provided for.



2. The grounds are on the face of the application. It is also supported by the Affidavit sworn by the Applicant on 29<sup>th</sup> June 2023, in which he avers that he filed a suit on 1<sup>st</sup> July 2021 seeking cancellation of title number Kajiado/Mailua/4670 in the 1<sup>st</sup> Defendant's name to revert back to the Applicant's name for failing to pay balance of the purchase price. However, on 7<sup>th</sup> July 2021 they had a meeting with the 1<sup>st</sup> Defendant and his advocate and it was agreed that the Applicant would withdraw the suit, refund the purchase price paid to him and the 1<sup>st</sup> Defendant to transfer the property back to the Applicant.
3. Sometime in June 2022 he was called by the 2<sup>nd</sup> Defendant's counsel and asked to withdraw the suit against the 2<sup>nd</sup> Defendant. This is when he learnt that his advocates did not act on his instructions to withdraw it. Since he did not know how to go about this, counsel for the 1<sup>st</sup> Defendant drafted for him a Notice to Act in person and the Notice to withdraw the suit and was assisted to file the documents in court.
4. He was informed that the matter would be heard on 15<sup>th</sup> June 2022 and on that day he was physically present in court only to be informed that matters had been heard virtually. The notice to withdraw the suit was allowed with costs to the Defendant despite the notice to withdraw being clear that there would be no orders as to costs. This was done in his absence and he was not offered a fair hearing. He thus sought for setting aside of the said orders.
5. The 2<sup>nd</sup> Defendant filed grounds of opposition and sought dismissal of the application on the grounds that it was an abuse of the court process because the Applicant had voluntarily withdrawn the suit and failed attend court without justifiable reasons. She added that the delay to file the application was inordinate and the applicant had not appealed against the decision of the taxing master.
6. This application was canvassed by way of written submissions.

### **The Applicant's Submissions**

7. Counsel submitted that since the Applicant acted for himself at the lower court, Order 9 Rule 9 of the *Civil Procedure Rules* was inapplicable to him citing *James Ndonyu Njogu vs Muriuki Macharia* (2020) eKLR. It was his submission that this court had jurisdiction under Order 45 Rule 1 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act* to review and set aside orders dated 15<sup>th</sup> June 2022 as prayed in the application while citing the case of *Zablon Mokuva vs Solomon M. Choti & others* (2016) eKLR.
8. Counsel also sought extension of time to file a reference pointing out that the Applicant did not participate in the taxation as was held in *County Government of Tana River vs Miller & Company Advocates* (2021) eKLR.

### **The 2<sup>nd</sup> Respondent's submissions**

9. Counsel submitted that the lower court orders for costs was procedural as per Section 27 of the *Civil Procedure Act* since the Applicant voluntarily withdrew the suit citing *Samson K.A. Tim vs D.M. Machege* (2019) eKLR. The prayer for court to extend time to appeal was also premature and unsubstantiated since there was no copy of the reference to aid court in determining whether it had chances of success.

### **Analysis and determination**

10. I have considered the Notice of Motion, the rival submissions and the authorities cited. The issues for determination are:



- i. Whether Applicant is entitled to the orders sought.
  - ii. Who should bear the costs of this application?
11. The Applicant seeks to set aside the lower court's orders for costs on the grounds that the suit was withdrawn with no orders to costs and that when the said orders were granted he was not only absent at the virtual court but did not have legal representation. The Respondent contested the application on the ground that it was filed inordinately late.
  12. I will first address the issue of time. I take note that the ruling in the Party to Party Bill of Cost ruling is dated 3<sup>rd</sup> May 2023 and the instant application was filed on 29<sup>th</sup> June 2023. This is a period of less than two months. I also take note that the Applicant filed a notice to act in person on 3<sup>rd</sup> June 2022. Therefore, I construe that at the time the ruling was delivered, the Applicant was acting in person. I would therefore, not consider the period taken to file this application as inordinately late and there is no evidence of prejudice occasioned against the Respondent. In arriving at this decision, I am guided by the principles set out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where it was held;
 

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.

...

the principles for extension of time, we derive 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.”
  13. The Applicant has also sought stay of the Notice to Show Cause dated 11<sup>th</sup> May 2023, which was issued a week after the ruling. This court has not been informed whether the Applicant was present at the delivery of ruling or whether he was aware of the orders prior to issuance of the Notice to Show Cause. There is similarly no evidence of service of the decree to the Applicant. There are glaring gaps in information provided by the parties, however in the spirit of Article 50 of the Constitution on the



right to a fair hearing and the fact that the Applicant stated that he did not have legal representation, the court shall exercise leniency and vacate the Notice to Show Cause dated 11<sup>th</sup> May 2023.

14. Further, the Applicant seeks this court to stay, set aside and vary the trial court's orders dated 3<sup>rd</sup> May 2023. Paragraph 11 of the [Advocates Remuneration Order](#) 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.”

15. Having stated that, the Applicant may not have been present in the virtual hearing when the bill was taxed, I find that it is in the interest of Justice that he is given an opportunity to contest the said bill. The relationship between the Applicant and the 1<sup>st</sup> Respondent is that of a vendor and a purchaser. I therefore extend the time within which to file a reference to this court.

16. In conclusion, I find merit in this application and the same is allowed in the following terms;

- a. That there be a stay of execution of the Ruling and orders of Honourable J. Kamau issued on 3<sup>rd</sup> May 2023 and the Notice to show cause dated 11<sup>th</sup> May 2023 pending the hearing of the reference.
- b. That the Order of 15<sup>th</sup> June 2022 granting costs to the 1<sup>st</sup> Respondent is hereby set aside.
- c. That the Applicant is hereby granted 45 days to file a reference against the decision of taxing officer dated 3<sup>rd</sup> May 2023.
- d. That costs of this application do abide the outcome of the reference.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 1<sup>ST</sup> DAY OF FEBRUARY 2024.**

**L. KOMINGOI**

**JUDGE.**

In the presence of:

Ms. Kirisiet for the Applicant.



N/A for the Respondents.

Court Assistant – Mutisya.

