

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 200 OF 2014

MWANIKI GAKUYA MBUTHI.....1ST PLAINTIFF

JAMES MUNENE GAKUYA.....2ND PLAINTIFF

VERSUS

PRISCILLA WANJIKU GAKUYA.....DEFENDANT

RULING

Summary of facts

By a plaint dated 23rd June 2014, the Plaintiffs herein sued the Defendant seeking a declaration for orders to compel the Defendant to register the Plaintiffs jointly with herself as the joint owners of MUTIRA/KAGUYU/2122, being the Suit Property in the matter, or in the alternative, for the defendant to share out half of the Suit Property to the Plaintiffs. In the Plaint, supported by the verifying affidavits of both Plaintiffs as well as in their statements, the Plaintiffs trace the origin of the dispute to the demise of their father, one Mwangi Gatimu, who they claim to also be a husband to the defendant and their step mother. They aver that their father had two wives, the first being Wamutira Gakuya, the Plaintiffs' mother, and the Defendant as the second wife. That upon his demise on 5th August 2012, the Defendant was left as the sole surviving spouse. That they filed Succession Cause No. 216 of 1996 in which the Court divided the deceased's land according to the two houses. That, aggrieved by the Courts decision, the Defendant herein lodged an Appeal, being Embu Appeal No. 30/99. The Appellate Court set aside the decision of the trial court, and ordered instead that the three parcels left behind by the deceased be distributed as follows:

To be transmitted to Mwaniki Gakuyu and Munene Gakuyu in equal shares (the PlaintiffsThe herein)
Parcel L.R. MUTIRA/KAGUYU/2120

To be transmitted to Priscilla Wanjiku Gakuyu (the Defendant herein)
Parcel L.R. MUTIRA/KAGUYU/2122

To be transmitted to Johnson Mwangi Gakuyu
Parcel L.R. MUTIRA/KAGUYU/2121

Plaintiff's case seeks a declaration that the Suit Property transmitted to the Defendant is held by the Defendant in trust for the two houses, and as such prays for orders to either compel the Suit Property to be registered in joint ownership with the Defendant or in the alternative, for the Defendant to transfer half of the property to the Plaintiffs.

The Defendant entered appearance on 14th July 2014 and filed her defence on even date. The Defendant admits that she is the step mother of the Plaintiffs having been married by their father, one Reuben Gakuya Mbuthi and not Mwangi Gatimu, as averred by the Plaintiffs. She admits that upon the demise of Reuben Gakuya Mbuthi on 9th September 1995, the Plaintiffs filed a Succession Cause No. 216 of 1996 in which the Court divided the deceased's land according to the two houses. That, aggrieved by the Courts decision, the Defendant lodged an Appeal, being Embu Appeal No.30/99. The Appellate Court set aside the decision of the trial court, and ordered instead that the three parcels left behind by the deceased be distributed as set out above. That the Plaintiffs were discontent with the decision and they thus filed an Appeal to the Nyeri Court of Appeal case number 443 of 2001, seeking extension of time to appeal against the High Court's decision. That leave was granted on 19th May 2001 but that the Plaintiffs have never filed the Appeal. On those facts, the Defendant raised a Preliminary Objection that the court lacked jurisdiction to entertain the present suit, being barred by the doctrine of res judicata.

On 07th August 2014 the Defendant passed away and letters of administration of her estate were issued to one David Mwangi Gakuya on 29th February 2016. On 04th October 2016, the Plaintiffs filed an application requesting for the Defendant's personal representative to be substituted into the Suit in place of the Defendant. The application was allowed on 21st March 2017.

On 20th July 2018, the Preliminary Objection raised by the deceased Defendant, being that the court lacked jurisdiction to entertain the suit as the matter was res judicata was allowed and the suit struck out with costs to the Defendant. On 15th August 2018, the substituted

Defendant filed his bill of costs and caused a notice of taxation of costs and a copy of the bill of costs to be served on the Plaintiffs on 24th August 2018 by one James Mbau Ndung'u, licenced process server (S/No. CPS00290).

On 10th December 2018, the bill of costs was taxed at One Hundred and Fourty Four Shillings, Two Hundred and Seventy (Ksh. 144,270). On 24th January 2019, the Defendant filed a Notice to Show Cause, to be heard on 5th March 2019, as to why the Plaintiffs would not be committed to civil jail. The same was served to the Plaintiff Judgement debtors on 8th February 2019 by one James Mbau Ndung'u, licenced process server (S/No. CPS00290).

On 27th June 2019, the Plaintiff Judgement debtors filed a Notice of Motion supported by the affidavit of the 1st Plaintiff requesting the Court for the following orders:

- a. That the court review the bill taxed because the same was never served on the Plaintiff Judgement Debtors;
- b. That the bill of costs was made in the name of the deceased Defendant
- c. That the court stays execution of the taxed bill of costs pending the hearing and determination of the application;
- d. That the cost of the application be provided for.

On 22nd July 2019, the legal representative of the deceased Defendant filed his replying affidavit in opposition of the Notice of Motion filed by the Plaintiffs. He avers that the Plaintiffs have failed to follow down the set procedure for objecting against a certificate of costs. He further averred that the Plaintiffs were served with a copy of the Defendant's bill of costs and notice of taxation on 24th August 2018.

Submissions

The Plaintiff/Judgement Debtors filed their submissions to the Notice of Motion application on 12th November 2020, objecting to the amount taxed in the ruling delivered on 10th December 2018. They submit that the bill of costs has been taxed above the value of the subject matter and therefore pray for a review of the taxed costs from Ksh. 144,270 to Ksh. 90,000.

The Defendant Judgement Creditor filed his submissions on 01st December 2020. He states that the procedure for setting aside a decree is well established in law under *Order 45 of the Civil Procedure Rules*. He cites the case of *Raphael Kipsoi Arap Korir Vs Muskie Limited & 4 Others [2020] e K.L.R* in support. He further submits that *Section 11 of the Advocates Remuneration Order* provides the procedure of objecting to the decision of a taxing officer. He further submits that indeed the Plaintiffs were served with a copy of the bill of costs and notice of taxation and that the Court on 21st March 2017 did substitute him for the deceased Defendant. He notes that the plaintiffs have not met the threshold for stay of proceedings as outlined under *Order 42 Rule 6 of the Civil Procedure Rules*. He prays that the Plaintiffs' application be dismissed with costs and that they be committed to civil jail.

Issues for determination

- a. Whether the Court can review the taxed bill of costs?**
- b. Whether the bill of costs was served on the Plaintiffs?**
- c. Whether a stay of execution of the taxed bill of costs should be granted?**
- d. To whom costs of this application ought to be awarded.**

Legal analysis and Decision

The procedure for objecting to the decision of a taxing master is set out under ***Rule 11 of the Advocates (Remuneration) Order 2009*** 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) 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.

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. "

The decision of the taxing master having been delivered on 10th December 2018, the Plaintiff Judgement Debtors were required by law to set out their objection by way of a notice in writing, within 14 days to the taxing master, highlighting the items of taxation upon which their objection lay.

It is the Plaintiff Judgement Debtor's case that they were never served with the taxed bill of costs and were therefore not in a position to object. While notice is taken of the fact that the ruling of 10th December 2018 was delivered in the absence of the parties to the Suit, it is also noted that the Defendant Judgement Creditor had served a copy of their bill of costs and notice of taxation of costs on 24th August 2018 to the Plaintiffs, and service was effected by one James Mbau Ndung'u, licenced process server (S/No. CPS00290). Shortly thereafter, on 24th January 2019, the Defendant filed a Notice to Show Cause, to be heard on 5th March 2019, as to why the Plaintiffs would not be committed to civil jail. The same was served to the Plaintiff Judgement debtors on 8th February 2019 by one James Mbau Ndung'u, licenced process server (S/No. CPS00290).

In **Justus Mungumbu Omiti Vs Walter Enock Nyambati Osebe & 2 Other [2010] e KLR**, the court stated:

"There is a qualified presumption in favour of the process server recognized in *MB Automobile v Kampala Bus Service [1966] EA 480* at p 484 as having been the view taken by the Indian courts in construing similar legislation. On *Chitale and Annaji Rao: The Code of Civil Procedure Vol. II p 1670*, the learned commentators say:

"3. Presumption as to service – There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning (sic) it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

Even if the Plaintiff Judgement Debtors were to be given some latitude, it is safe to say that by the very latest, they were aware of the existence of the ruling on 08th February 2019, when the notice to show cause was served. By this time however, the 14-day window of filing the notice of objection had already closed. However, **Rule 11 of the Advocates (Remuneration) Order 2009** allows for a judgement debtor to make an application to the High Court for the extension of time within which to lodge their objection. An extract of the relevant section is cited below:

"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."

Various court decisions have pointed out the existence of this relief for a judgement debtor who finds themselves time barred. See **Nairobi City County Vs Otieno Ogolla & Associates [2020] e KLR**:

"The provisions of Rule 11 of the Advocates Remuneration Order nevertheless grant this Court discretion to extend time for lodging a reference from the taxing master's decision, notwithstanding the expiry of the 14 days' period prescribed. In exercising such discretion, the court acts judiciously bearing in mind the facts placed before it and to meet the ends of justice...."

Thomas K'bahati t/a K'bahati & Co. Advocates Vs Janendra Raichand Shah [2018] e KLR:

"Paragraph 11 of the Advocates Remuneration Order is clear that the Court has discretion to extend time for lodging a reference notwithstanding the expiry of the 14 days' period prescribed for the reference from the Taxing Master's decision on costs. However, in exercising its discretion in this regard, the Court should consider whether there has been no inexcusable delay in presenting the application. The Respondent has submitted that there was inordinate delay of about 21/2 months and therefore the Court's discretion should not be exercised in the Applicant's favour."

In **Njagi Wanjeru & Company Advocates Vs Ben Momanyi t/a Momanyi & Associates, (2014) e KLR** by **Ougo J.**, who adopted the Court of Appeal's decision in **Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi CA Civil Application No. NAI 25 of 1997 (UR)** that:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether or not to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chance of the appeal succeeding if the application is not granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

From the foregoing, even where the relief to file out of time is availed to the judgement debtor, the same is at the court's discretion and ought to take into account the length of delay and the reason for the delay.

In the present case, the Plaintiff Judgement Debtor has not even made a prayer for leave to file their objection out of time. Secondly, they filed their grounds of objection on 09th December 2019, being a day short of one (1) year, since the bill of costs was taxed. The delay is clearly inexcusable. They have moved to the court directly requiring the court to review the decision of the taxing master, effectively bypassing the first stage of the process set out in law.

The supreme court in considering the importance of adhering to laid down procedure pronounced itself as follows in the case of *Moses Mwicigi & 14 Others Vs Independent Electoral and Boundaries Commission & 5 Others [2016] e KLR*

“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the constitution, which proclaims that, “...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”

It is apparent from the foregoing that the orders sought from the Court are pre-mature, the judgment debtor having failed to comply with the procedure set out for resolving objections emanating from a taxing master’s ruling. It is my view that this application is incompetent and that the same must fail. In the result therefore, the Notice of Motion dated 27th June 2019 is dismissed with costs to the defendant/judgment creditor.

READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 5TH DAY OF MARCH, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mwaniki Gakuya Mbithi – present
2. James Munene Gakuya – present
3. Defendant/Advocate – Represented by Johnson Mwangi
4. Kabuta, Court clerk – present.