



**Maluti & 5 others v Nzyuko & another (Environment & Land Miscellaneous Case E001 of 2023) [2024] KEELC 13530 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13530 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E001 OF 2023  
TW MURIGI, J  
DECEMBER 4, 2024**

**BETWEEN**

**MICHAEL MALUTI ..... 1<sup>ST</sup> APPLICANT  
JOHN MATU MALUTI ..... 2<sup>ND</sup> APPLICANT  
BENEDICT MAWIO MALUTI ..... 3<sup>RD</sup> APPLICANT  
FIDELIS KIMOTE MALUTI ..... 4<sup>TH</sup> APPLICANT  
MUTISO MALUTI ..... 5<sup>TH</sup> APPLICANT  
JOSEPHAT WAMBUA MALUTI ..... 6<sup>TH</sup> APPLICANT**

**AND**

**JULIUS MBAU NZYUKO ..... 1<sup>ST</sup> RESPONDENT  
COUNTY LAND REGISTRAR, MAKUENI COUNTY GOVERNMENT .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. This ruling is in respect of the Chamber Summons dated 25<sup>th</sup> September, 2023 brought under Section 1A, 1B, 3A, 89 and 94 of the *Civil Procedure Act* in addition to Paragraph 11 (1), (4) and (5) of the Advocates Remuneration Order in which the Applicants seek the following orders: -
  - a. Spent.
  - b. That the Honourable Court enlarges the time within which to file a reference against the decision of the Taxing officer delivered on 13<sup>th</sup> March, 2023.
  - c. That there be a stay of execution of the Ruling of the Taxing Officer aforesaid and any other consequential proceedings pending hearing and determination of the application.



- d. That the Reference annexed hereto be deemed as duly filed upon payment of the requisite fees.
  - e. That costs of the application be in the cause.
2. The application is based on the grounds appearing on its face together with the supporting affidavit of Benedict Mawio Maluti sworn on his behalf and on behalf of the rest of the Applicants.

### **The Applicants Case**

3. The deponent averred that on 13<sup>th</sup> March, 2023, the Taxing Officer delivered a ruling in respect of a party and party bill of costs in Makueni ELC Case No. E069 of 2018. He further averred that they are strongly aggrieved by the said decision which they have set out to oppose through a Reference.
4. He further averred that they are apprehensive that the Respondents will execute the decision since they have been served with warrants of attachment and proclamation notices by Mambu Auctioneers. The deponent further averred that the Applicants were unable to file their reference within the stipulated timelines owing to the mistake of their previous Advocates who failed to inform them of the outcome of the taxation proceedings. He argued that they became aware of the decision after they were served with the proclamation and warrants of attachment.
5. The deponent contended that the application herein has been made without unreasonable delay and that it is in the interest of justice that it be allowed as prayed. He further contended that the mistakes of their previous Advocates should not be visited upon them.

### **The Respondent's Case**

6. The 1<sup>st</sup> Respondent filed a replying affidavit sworn on 27<sup>th</sup> October, 2023 in opposition to the application. He averred that the application is frivolous and an abuse of the court process. He further averred that the procedure for taxation was duly followed and that the Applicants were duly represented. He argued that the Applicants have not explained the delay to the court's satisfaction or satisfied the conditions necessary to warrant the grant of the orders sought.
7. He further contended that he will suffer prejudice if the application is granted. He deposed that the Applicants have been indolent and added that equity does not aid the indolent.
8. The 1<sup>st</sup> Respondent contended that in the event that the court is inclined to allow the application, the Applicant should be ordered to deposit the entire decretal sum of Kshs. 391,450/= into a joint interest-earning account in the names of both Advocates within seven days and that he should be awarded thrown away costs of Kshs. 50,000/=. Concluding his reply, the 1<sup>st</sup> Respondent urged the court to dismiss the application with costs.

### **Analysis and Determination**

9. Having considered the application, the respective affidavits and the rival submissions, the following issues fall for determination: -
  - i. Whether the Applicant has made a compelling case to warrant enlargement of time to file a reference.
  - ii. Whether the Applicant is entitled to stay of execution of the Taxing officer's ruling.
10. The Applicant is seeking for extension of time to file a reference against the ruling delivered on 13<sup>th</sup> March 2023.



11. Paragraph 11 of the Advocates Remuneration Order requires that a party aggrieved by the taxing officer's decision to apply to a judge by Chamber Summons setting out grounds for opposition within 14 days. If a party is still aggrieved by the decision of the judge, then they should appeal to the Court of Appeal.
12. The legal framework on extension of time is clearly stipulated under paragraph 11(4) of the Advocates Remuneration Order which provides that;
  - (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.”
13. The decision whether or not to extend time is discretionary. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR succinctly laid down the principles to guide courts in applications for extension of time as follows:-
  - i. 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;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
14. Similarly, in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* Civil Application No. Nai 251 of 1997 where this Court of Appeal held that:-

“It is now 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 to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”
15. The ruling of the Taxing officer was delivered on 13<sup>th</sup> March, 2023. The instant application was filed on 29<sup>th</sup> September, 2023.
16. The Applicants admitted having failed to comply with the provisions of Paragraph 11 (1) and (2) of the *Advocates (Remuneration) Order*.



17. The Applicants explained that the delay in complying with the provisions Paragraph 11(1) and (2) of the Advocates Remuneration Order was occasioned by failure on the part of their previous Advocate to inform them of the decision of the Taxing Officer. The Applicants averred that they became aware of the decision after they were served with warrants of attachment and proclamation notices dated 25<sup>th</sup> July, 2023 by Mambu Auctioneers.
18. They argued that the mistakes of their previous Advocate should not be visited upon them. In the case of *Belinda Murai & 9 others v Amos Wainaina* [1978] eKLR, Madan JJA (as he then was) appreciated that mistakes will inevitably occur during litigation and that a party should not be penalized at the expense of justice. The court held as follows:
- “A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The Court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”
19. Similarly in the case of *Gideon Mose Onchwati v Kenya Oil Co Ltd & Another* (2017) eKLR cited in the case of *Shah v Mbogo* the court held that :-
- “Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate is bound by the acts and omissions of the Advocates in the course of representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure on the part of the litigant, to give the Advocate due instructions”.
20. From the foregoing, I find that the mistakes of their Advocate should not be visited upon them. The Applicants have given a reasonable explanation for the delay in filing the reference on time. In the circumstances, I will allow the prayer for extension of time in the interest of justice.
21. The Applicants sought for a stay of execution pending the filing of the reference. They contended that they are apprehensive that the Plaintiff may proceed to execute if a stay of execution is not granted. In the case of *Labh Singh Harman Singh Ltd v Attorney General & 2 others* [2016] eKLR the court observed as follows: -
- “I am unable to agree with the submission by counsel for the respondent that the Court has no power to order stay in cases of taxation for costs as exists in the Civil Procedure Rules. It is clear to me that taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the *Civil Procedure Rules*. Indeed, Section 94 of the *Civil Procedure Act* provides as a general rule that execution of orders of the court should await the confirmation of the costs by taxation unless the Court grants leave for execution before taxation of costs.”
22. Having found that the Applicant is entitled to orders for extension of time, this court finds and holds that it will be in the interest of justice to stay execution of the taxation pending the hearing and determination of the reference.



23. In the end, I find that the application dated 25<sup>th</sup> September 2023 is merited and the same is hereby allowed in the following terms:-

1. The Applicant be and is hereby granted Fourteen (14) days leave to file and serve a Reference against the Ruling of the Taxing Officer delivered on 13<sup>th</sup> March, 2023.
2. An order for stay of execution of the Ruling of the Taxing Officer delivered on 13<sup>th</sup> March, 2023 is hereby granted pending the hearing and determination of the reference.
3. The Applicant shall pay to the Respondent thrown away costs assessed at Kshs. 30,000/= within Thirty (14) days from the date hereof.
4. In default of order (3), the order of stay of execution shall automatically lapse.

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**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 4<sup>TH</sup> DAY OF DECEMBER, 2024.**

**IN THE PRESENCE OF:**

Munyasya for the 1<sup>st</sup> Respondent

C/A Alfred

