



REPUBLIC OF KENYA



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Njowamu Construction Company Limited & another v Kiarie (Environment & Land Case 382 of 2008) [2023] KEELC 17242 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 382 OF 2008**

OA ANGOTE, J

MAY 4, 2023

BETWEEN

NJOWAMU CONSTRUCTION COMPANY LIMITED 1ST PLAINTIFF

STEPHEN NJOROGE MUHINJA 2ND PLAINTIFF

AND

SAMUEL NGIGE KIARIE DEFENDANT

RULING

1. Before this court are two applications. The first application is a Notice of Motion filed by the Defendant dated 14th June 2022. It has sought for the following reliefs:
 - a. That this Honourable Court be pleased to issue orders of Eviction against the Plaintiffs from L.R. No. 76/784 situated within Thindigua in Kiambu County (hereinafter called “suit property”) to Patrick Mburu Ng’ang’a t/a Virmir Auctioneers.
 - b. That this Honourable Court be pleased to order the Officer Commanding Station (OCS) Kiambu Police Station to give security to the Auctioneer while executing the warrants.
 - c. That the Plaintiffs be ordered to pay the costs of the eviction exercise that may be incurred by the Defendant.
 - d. That the costs of this Application be borne by the Plaintiffs.
2. This application is supported by the Affidavit sworn by the Defendant who deposed that he is the registered owner of the suit property; that on 30th September 2014, the Court gave judgement against



- him in respect to the suit property and that he lodged an appeal on 5th April 2016 in Civil Appeal No. 61 of 2016 and judgement was delivered on 21st June 2019.
3. It was the deposition of the Defendant that the court allowed the Appeal and ordered that this Court's judgement be set aside in its entirety; that the Plaintiffs have refused to vacate the suit property causing prejudice to him and that he has approached Patrick Mburu Ng'ang'a t/a Virmir Auctioneers to undertake the eviction and police assistance is necessary.
 4. The 2nd Plaintiff opposed the application and deposed that that he is aware of the Court of Appeal Judgement dated 21st June 2019; that he has instructed his advocates to file a Notice of Appeal against the said decision dated 2nd July 2019 and that the Defendant is aware of the Plaintiff's intention to Appeal against the said judgement.
 5. The 2nd Plaintiff deposed that he filed an application for stay of execution of the said Judgement dated 4th May 2021 which is still pending before the Court of Appeal and that he has written several email reminders to the Deputy Registrar to set down the application for hearing.
 6. The second application was filed by the Plaintiffs. In the Chamber Summons application dated 28th June 2022, the Plaintiffs have sought FOR the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to extend time to file the Notice of Objection against the decision of the Taxing Master delivered on 26th January 2022.
 - c. That the Notice of Objection dated 27th June 2022 attached to this application be deemed as duly filed upon payment of requisite charges.
 - d. That this Honourable Court be pleased to enlarge the time within which to file a Reference against the decision of the Taxing Master delivered on 26th January 2022;
 - e. That this Honourable Court be pleased to issue an order of stay of execution arising out of the said Ruling of the court delivered on 26th January 2022 pending the hearing and determination of this application and the intended reference.
 - f. That the costs of this application be in the cause.
 7. The application is based on the grounds on the face of it and the Affidavit sworn by the 2nd Plaintiff, who deposed that the Taxing Master, through a ruling delivered on 26th January 2022, taxed the Defendant's Party and Party Bill of Costs at Kshs. 1,013,908 and that the said taxation proceeded ex parte without the knowledge and participation of the Plaintiffs or their advocates on record at the time.
 8. It was deposed that the Plaintiffs' advocates filed a Notice of Change of Advocates dated 14th June 2022 and that the Plaintiffs are aggrieved by the ruling as the amount awarded is excessive and contrary to the *Advocates Remuneration Order*.
 9. The 2nd Plaintiff deposed that the delay in filing a Notice of Objection as well as a reference in line with paragraph 11(1) and (2) of the *Advocates Remuneration Order* was inadvertent as the Plaintiffs had no knowledge that the proceedings were going on; that the intended reference is arguable and has



high chances of successes and that it is only fair that the Plaintiff be given an opportunity to effectively canvas his reference without any undue difficulties or technicalities.

10. The Defendant opposed the Chamber Summons and deposed that the Plaintiffs' current advocates, Mereka & Co. Advocates was duly served with the Party and Party Bill of Costs as per the Affidavit of Service filed on 8th December 2021 which they stamped with their receiving stamp.
11. The Defendant deposed that the Plaintiffs' current advocates failed to file a Notice of Change of Advocates until 14th June 2022, when they served his advocates with their email address and that the said Advocates wrote a letter dated 15th June 2022 requesting reasons why they were not served with the taxation notice or why it was not served on the Plaintiffs' Advocates, F.N. Njanja Advocates, who were on record in the suit.
12. Counsel for the Defendant submitted that there are no disputable facts with regard to ownership of the suit property; that as the Defendant is the true and absolute owner, he is entitled to enjoy his property rights and interests and that the Plaintiff does not reside on the suit property but has placed a caretaker on it. It was submitted that the Defendant requires vacant possession of the suit property and that the Plaintiff has refused to vacate the suit property causing prejudice to the Defendant.
13. Counsel for the Plaintiffs submitted that the procedure for eviction is stipulated under Section 152E of the [Land Laws \(Amendment\) Act](#); that should this court proceed to issue eviction orders, its application seeking certification of the matter as that of general public importance with high chances of success will be rendered nugatory and that the application fulfills the qualifications for certification of a matter raising public importance as set out in the Court of Appeal cases of [Airtel Networks Limited v Africa Management Communication Ltd](#) and [William Njibia Kimani v Francis Waweru Mbochi](#).

Analysis and Determination

14. Having considered the applications, pleadings, evidence and submissions of the parties, the following issues are before this court for determination:
 - a. Whether this court should grant the Defendant eviction orders as sought in its application dated 14th June 2022
 - b. Whether the court should grant an extension of time for the Plaintiff to file a Notice of Objection against the decision of the Taxing Master delivered on 26th January 2022.
15. The facts in this suit are that this suit was instituted vide a Plaint seeking specific performance of an agreement for sale dated 8th June 2007; that in the alternative, the sum of KShs 4.5 million which was paid to the Defendant under the sale agreement be refunded to the Plaintiff together with interest at court rates; general damages for breach of contract; KShs. 2,015,904 being the value for motor vehicle Reg. No. KAZ 745 B and general damages for loss of use of the motor vehicle.
16. Upon hearing the parties, the court on 30th September 2014 entered judgement for the Plaintiffs with respect to the prayer for specific performance of the sale agreement dated 8th June 2007.
17. Aggrieved by the decision of this court, the Defendant preferred an appeal to the Court of Appeal on grounds that the court erred in finding that the sale agreement was not terminated and that the Defendant was not entitled to vacant possession as he allowed the Plaintiffs to remain on the suit land after the completion date and continued receiving monthly rent thereafter.



18. In its judgement of 21st June 2019, the Court of Appeal found in favour of the Defendant and set aside the judgement of this court (Gacheru J.).
19. The Plaintiffs have argued that they should not be evicted from the suit property because the provisions of Section 152E of the [Land Act](#) has not been complied with and that they have a pending appeal before the Supreme Court which was awaiting certification.
20. Section 152E of the [Land Act](#) prescribes that the owner of a land may serve on a person in occupation of their land without a consent a notice of not less than three months before the date of the intended eviction. Although no notice has been served upon the Plaintiff, it instructive to note that section 152E is only applicable to a situation where there is no litigation over the suit property.
21. The Court of Appeal having dismissed the Plaintiffs' application for specific performance, it follows that the court has determined the issue of ownership of the suit property in favour of the Defendant. Consequently, and on the basis of the decision of the Court of Appeal, the issue of an eviction of notice being issued to the Plaintiffs does not arise. The Plaintiffs' ought too deliver vacant possession of the suit property to the Defendant without much a do.
22. Indeed, it does not matter that the Plaintiff has challenged the decision of the Court of Appeal in the Supreme Court. In the absence of an order of stay of execution of the Court of Appeal, it is the Defendant who is entitled to the suit property.
23. The second issue regards the Plaintiffs' application for extension of time to file a Notice of Objection against the Taxing Master's decision dated 26th January 2022.
24. Paragraph 11 of the [Advocates Remuneration Order](#) provides that:

“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.”
25. The court in [Vishisht Talwar v Antony Thuo Kanai T/A Thuo Kanai Advocates](#) [2014] eKLR adopted a passage in the case of [Machira & Co. Advocates v Arthur K. Magugu](#) where it put in perspective the certificate of costs by the Deputy Registrar and filing a reference in the following passage:-

“Rule 11 therefore provides for ventilation of grievances from such decision through references to a Judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open Court. Reviews, however, would require provisions akin to those in Section 80 of the [Civil Procedure Act](#) of discovery of new and important matters, errors on the fact of the record and so on. In our view of the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate's bill of costs through reference under Rule 11 to a Judge in chambers.”
26. The Plaintiff herein has sought leave to file a Notice of Objection to the ruling of the court dated 26th January 2022 out of time. The Notice of Objection is dated 27th June 2022. The same should have been filed within 14 days of the decision.



27. It is trite that extension of time is a remedy granted at the discretion of the court. In the case of *Salat v Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR, the Court stated as follows:

“Discretion to extend time is indeed unfettered but its incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there were extenuating circumstances that could enable the Court to exercise discretion in favour of the applicant. In doing so the following principles are applicable thus:

- (i). Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party.
- (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 ought to exercise 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, which ought to be explained to the satisfaction of the Court.
- (v). Whether there would be any prejudice suffered, the respondent if the extension was granted.
- (vi). Whether, the application had been brought without undue delay and
- (vii). Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”

28. Similarly, the Court of Appeal’s decision in *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR articulated the principle that discretion must be exercised judiciously as follows:

“The discretion under Rule 4 is unfettered but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in the previous decisions of this Court, including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.” (See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. 255 of 1997).”

29. In this instance, the Plaintiffs have claimed that they were never served with the Bill of Costs nor the notice of taxation. The Defendant has however averred that on 8th December 2021, it endeavored to serve the Bill of Costs dated 28th October 2021 upon the 1st Plaintiff’s designated office but was notified by the building management that the said office had been closed for a couple of months for failure to pay rent, and that they proceeded to serve the Plaintiffs’ advocate with the same.

30. While the Plaintiffs have denied that the Party and Party Bill of Costs was served upon them or their advocates, it is clear from the Affidavit of Service annexed on the Defendant’s Replying Affidavit and the stamped copy of the Bill of Costs, that the Plaintiffs’ Advocates, Mereka & Co. Advocates, was served with the Bill of Costs on 8th December 2021.



31. In the case of *Justus Mungumbu Omiti v Walter Enock Nyambati Osebe & 2 Others* [2010] eKLR the court held that there is a presumption as to service wherever the process server files an Affidavit of Service in which he swears that he has served. In the said case, the court held as follows:

“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 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.”

32. With respect to the Bill of Costs, the Plaintiffs have not discharged the presumption that they were duly served. On the other hand, no presumption has arisen with respect to service of any notice of taxation, as the Defendants have not proved that it was duly served on the Plaintiffs or their advocates.

33. This court is thus persuaded that the Plaintiffs’ failure to participate in taxation of the Bill of Costs and the consequent delay in filing the Notice of Objection could reasonably be attributed to the failure to serve a notice of taxation upon the Plaintiffs’ advocates. This court therefore finds that there was no undue delay in filing the application for the Notice of Objection. For these reasons, this court deems the Notice of Objection dated 27th June 2022 as duly filed.

34. The upshot of this analysis is that save for costs, the Defendant’s application dated 14th June 2022 and the Plaintiffs’ application dated 28th June 2022 are allowed as prayed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY OF MAY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Mereka for the Plaintiff/Applicant

Ms Muturi for Macharia for Defendant

Court Assistant - June

