



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

MISCELLANEOUS APPLICATION NO. E 001 OF 2020

NKAMA GROUP RANCH & 5 OTHERS.....1ST APPLICANT

KEREMPU OLE KAATA.....2ND APPLICANT

WILLIAM NOONKILETI OLE KAYIAA.....3RD APPLICANT

TURERE OLE KAATA.....4TH APPLICANT

VERSUS

JEREMIAH OLE RISA.....RESPONDENT

RULING

The applications before court for determination is the Applicants' Chamber Summons dated the 10th May, 2021 and Notice of Motion dated 11th May, 2021. In the Application dated 10th May, 2021, they seek the following orders:

1. Spent
2. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue an order for stay of execution of the Certificate of Costs dated 26th April, 2021 arising from the Judgement in Kajiado ELC No. 667 of 2017 and the Ruling of the Deputy Registrar dated 29th March, 2021.
3. That this Honourable Court be pleased to enlarge time within which the Applicants ought to have filed and served the Application and Reference herein from the Ruling of the Deputy Registrar delivered on 29th March, 2021 and grant leave to deem this Application as properly filed and properly on record within the enlarged time.
4. That this Honourable Court be pleased to set aside the decision of the Ruling of the Deputy Registrar dated 29th May, 2021 and re assess and tax afresh the Respondent's Party and Party Bill of Costs dated 21st September, 2020.
5. That costs of this application be provided for.

While in the Application dated 11th May, 2021, they seek for orders of temporary stay of execution of the Certificate of Costs dated the 26th April, 2021 arising from the Judgement in Kajiado ELC No. 667 of 2017 and Ruling of the Deputy Registrar dated 29th March, 2021 pending the determination of the said application.

The two applications are premised on the grounds on the face of it and the supporting affidavits of WILLIAM NOONKILETI OLE KAYIAA where he explains that judgement was entered in favour of the Respondent on 29th May, 2020 wherein he was awarded costs. He confirms they have lodged a Civil Appeal No. E 0416 of 2020 and that on 29th September, 2020, the Respondent filed a Party and Party Bill of Costs against the Applicants. He avers that they filed their written submissions on 22nd March, 2021 and the Deputy Registrar taxed the Bill of Costs in the sum of Kshs. 4, 926, 285 which decision they are aggrieved with and seek to file a Reference against the said taxation for re assessment. He reiterates that the Deputy Registrar made serious errors of principle in taxing the said Bill of Costs and thereby arrived at the wrong decision. Further, that the decision of the Deputy Registrar was irregular and ought to be set aside and the Bill of Costs taxed afresh. He states that the delay of forty (40) days in filing and serving the Reference herein was occasioned by an oversight and inadvertent mistake of the Counsel. Further, that the delay was occasioned by the fact that Counsel's numerous follow ups to confirm what decision had been handed down by the Deputy Registrar's Ruling of 29th March, 2021 was thwarted with the closure of the Kajiado Registry and apparent misplacement of the file in circumstances which the Counsel was unable to obtain as well as review the Ruling of the Deputy Registrar until 6th May, 2021 when the Auctioneers descended on the Applicants. He reiterates that unless leave is granted their right to fair hearing will be

curtailed. Further, the Respondent's Agent, Moran Auctioneers proceeded to the 2nd, 3rd and 4th Applicants and proclaimed their movable assets in execution of the Certificate of Taxation issued pursuant to the Ruling delivered on 29th March, 2021. He contends that unless an order for stay of execution sought is granted before 12th May, 2021, the Respondent's agent, Moran Auctioneers will proceed to execute the Certificate of Costs on 12th May, 2021 rendering outcome of the Application and Reference filed herein nugatory.

The two applications are opposed by the Respondent who filed a replying affidavit where he deposes that by a judgement handed down on 29th May, 2020 in ELC Case No. 667 of 2017 he was granted costs against the 1st, 2nd, 3rd and 4th Applicants. He confirms filing a Party and Party Bill of Costs dated the 21st September, 2020 wherein the Deputy Registrar taxed the same at Kshs. 4, 296, 285. He contends that the Ruling of the Taxing Officer was delivered in the presence of all parties and the Applicants were expected to file a Notice of Objection within 14 days of the delivery of the said Ruling. He insists the Applicants have failed to file the Notice of Objection within the prescribed time and the explanation given for the failure to do so is not reasonable. He avers that the Kajiado Court Registry has placed mechanisms to ensure continued running of operations, key among them being the use of technology for service delivery. Further, the Applicants have not disclosed or tabled any evidence to prove that they indeed reached out to the Kajiado Court Registry to obtain Ruling of the Deputy Registrar. Further, they have not disclosed or tabled any notice of closure of Kajiado Court Registry. He reiterates that the Applicants have not given valid and clear reasons, upon which discretion of the court can be favourably exercised. He explains that the Applicants have deliberately failed to inform this court that they previously filed an application in Civil Appeal No. E 416 of 2020 seeking order of stay of execution of orders made in the Judgement handed down on 29th May, 2020 in Kajiado ELC Case No. 667 of 2017 and any other consequential proceedings or orders arising thereon in ELC Misc Application No. E 001 of 2020 pending the hearing and determination of the said application and Appeal. Further, that the instant application is the same and exact one that the Applicants filed in the Court of Appeal in Civil Appeal No. E 416 of 2020, since the Applicants seek to stay execution of any consequential order arising from the Judgement in ELC Misc Application No. E001 of 2020 which in this case is the Certificate of Costs. He insists the Applicants have not demonstrated the substantial loss they stand to suffer nor furnished court with any evidence that the Respondent would not be in a position to indemnify them if the intended Reference is allowed. Further, that prayer No. 3 seeking to set aside the Ruling of the Deputy Registrar as prayed in the present application cannot issue but can only be canvassed in a substantive reference. He reiterates that the Applicants have not met the threshold set for granting a stay of execution but should the Court allow their application, they should be directed to pay his costs of defending the instant application; deposit within fourteen (14) days of the Ruling, the entire sum of Kshs 4, 296, 285 which was taxed by the Deputy Registrar, failure of which the order of stay of execution lapses.

The Applicants filed a further affidavit sworn by WILLIAM NOONKILETI OLE KAYIAA where they reiterated their claim and deny that the Ruling of the Deputy Registrar dated 29th March, 2021 was delivered in their presence. He explains that they failed to file their Reference within time in ELC No. 667 of 2017 as the Respondent issued notices in ELC Misc No. E 001 of 2020 and hence the mistake or error cannot be attributed to them. He contends that they severally followed up on this matter through email and telephone calls.

The two applications were canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Applicants' Chamber Summons dated the 10th May, 2021 and Notice of Motion dated 11th May, 2021 including the respective supporting affidavits as well as the rivalling submissions, the following are the issues for determination:

- Whether the Court should enlarge time within which the Applicants ought to have filed and served the Application and Reference herein from the Ruling of the Deputy Registrar delivered on 29th March, 2021.
- Whether the Court should grant a stay of execution of the Certificate of Costs dated 26th April, 2021

The Applicants in their written submissions reiterated their claim and invoked the unfettered discretion of the court to grant the orders sought. To buttress their averments, they relied on the following decision: **G4S Security Limited & Another V Joseph Kinyua Ngore (2018) eKLR which relied on the Supreme Case of Fahim Yasin Twaha V Timamy Issa Abdalla & 2 Others (2015) eKLR**

The Respondent in his submissions contends that the Applicants have not demonstrated the substantial loss they stand to suffer. Further, that the Applicants have not given a proper explanation for their failure to file a reference within time. To support his arguments, he had relied on various decisions including: **G N Muema (sic) Mt View Maternity & Nursing Home V Miriam Maalim Bishar & Another (2018) eKLR; James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR; Stanley Kangether Kinyanjui Vs Tony Ketter & Others (2013) eKLR; Jaber Mohsen Ali & Another Vs Priscillah Boit & Another (2014) eKLR; Focin Motorcycle Co. Limited V Anne Wambui Wangui & Another (2018) eKLR; Sound Entertainment Limited V Antony Burungu & Co. Advocates (2014) eKLR; Stanley Kahoro Mwangi & Another Vs Kanyamwi Trading Company Limited (2015) eKLR; Fahim Yasin Twaha V Timamy Issa Abdalla & 2 Others (2015) eKLR; Evans Thiga Gaturu Advocate V Kenya Commercial Bank Limited (2012) eKLR and Prabhulal Tejpal Haria & Another V Pravindshandra Meghji Dodhia & 2 Others (2021) eKLR.**

As to whether the Court should enlarge time within which the Applicants ought to have filed and served the Application and Reference herein from the Ruling of the Deputy Registrar delivered on 29th March, 2021.

In the current scenario, the Applicants has lodged an application to enlarge time after 41 days. It was the Applicants' contention that they were not present when the Taxing Master delivered his Ruling on 29th March, 2021. They explain that they failed to file their Reference within time in ELC No. 667 of 2017 as the Respondent issued notices in ELC Misc No. E 001 of 2020 and hence the mistake or error cannot be attributed to them. They have annexed several emails from their Advocate to the Court following up on the Ruling by the Deputy Registrar. I note the emails are dated 31st March, 2021; 6th April, 2021 and 19th April, 2021. From the contents of the said emails, it is evident the Applicants advocates were indeed following up on the Ruling. The Applicants proceeded to highlight the discrepancies in respect to the Taxing Master's decision which I opine can only be dealt with in the substantive reference and not at this juncture.

Clause 11 of the Advocates Remuneration Order stipulates that: ‘

‘(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.’

The above cited legal provisions give the Court the discretion to enlarge time to file a reference. In the case of **Peter Julius Njoroge V Fidelity Commercial Bank Limited & Another (2018) eKLR**, the Court found a delay of 45 days not inordinate and allowed an application for enlargement of time. In the instant case, I note that the Applicants’ Counsel have explained they were not present when the Ruling was delivered. I note they sought to know the outcome of the said Ruling before the period of lodging an Objection had lapsed but did not get a response from Court. To my mind this is a good reason enough for failing to lodge an objection within 14 days of the Ruling. Based on the facts as presented while associating myself with the above quoted case as well as the legal provisions cited above, I will excuse the delay as it was not inordinate and proceed to enlarge time within which the Applicants ought to have filed and served the Application and Reference herein from the Ruling of the Deputy Registrar delivered on 29th March, 2021. I direct the Applicants to lodge an objection as well as a Reference within 14days from the date hereof.

As to whether the Court should grant a stay of execution of the Certificate of Costs dated 26th April, 2021.

The Applicants have sought for stay of execution of the Certificate of Costs dated the 26th April, 2021 pending the determination of the Application which has been opposed by the Respondents. I note the Applicants have also filed a similar application in the Court of Appeal where they seek a stay of execution and have not informed court of the outcome of the said application. Be that as it may, I will proceed to deal with this issue.

I will first proceed to highlight various legal provisions governing stay pending appeal.

Order 42 Rule 6(2) of the Civil Procedure Rules provides that:’ **No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.’**

Further, Rule 5 (b) of the Appellate Jurisdiction Act (Court of Appeal Rules) provides that’ in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.’

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal while dealing with an issue of stay of execution pending appeal held that it is a discretionary power of a Court to grant the same so that an appeal may not be rendered nugatory and Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

While in James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR the Court of Appeal held that: ‘ **an Applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party.**

In the current scenario, the Applicants claim they will suffer substantial loss as the Agent of the Respondent has proclaimed their goods in execution of the Certificate of Costs. I note this court delivered judgement in favour of the Respondent against the 1st to 4th Applicants. Further, the 2nd, 3rd and 4th Applicants are officials of the 1st Applicant which is a Group Ranch. In the Applicant’ averments, they claim they will suffer substantial loss but have not demonstrated what loss the 1st Applicant which is a Group Ranch stands to suffer. They have further not offered any security for costs. Further, I note they had already filed an application seeking stay of execution in the Court of Appeal in Civil Appeal (Application) No. E 416 of 2020 and have not informed this court of the outcome.

It is my considered view that since the Applicants have already lodged an Appeal in the Court of Appeal, the instant application for stay should have been filed in the Court of Appeal. Based on the facts as presented while relying on Rule 5 (b) of the Appellate Jurisdiction Act cited above and associating myself with the decisions quoted, I find that the Applicants have failed to meet the **threshold set for granting stay of execution pending appeal and will decline to grant the said orders.**

In the circumstances, I find the Notice of Motion dated 11th May, 2021 unmerited and will disallow it with costs to the Respondent. As for Chamber Summons dated the 10th May, 2021, it partially succeeds in terms of allowing the Applicants file a Reference out of time but the

rest of the prayers fail. The Orders of Stay of Execution on costs earlier granted be and are hereby vacated.

I will award the Respondent the costs of these two applications.

Dated signed and delivered in Virtually at Kajiado this 26th day of July, 2021

CHRISTINE OCHIENG

JUDGE