



REPUBLIC OF KENYA



Mbogo v Samuel Karimi Guantai t/a Guantai & Associates & another (Miscellaneous Application 003B of 2021) [2024] KEHC 1400 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION 003B OF 2021
LM NJUGUNA, J
FEBRUARY 14, 2024**

BETWEEN

NELLIUS NGAI MBOGO APPLICANT

AND

**SAMUEL KARIMI GUANTAI T/A GUANTAI & ASSOCIATES ... 1ST
RESPONDENT**

GIANT AUCTIONEERS 2ND RESPONDENT

RULING

1. The applicant has filed a notice of motion dated 26th October 2023, being supported by the grounds set out on the face of the application as well as the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 - a. Spent;
 - b. That the court be pleased to stay execution of the Taxing Master's ruling dated 26th June 2023 pending the intended appeal;
 - c. That the time for filing the intended appeal be extended from 04th August and the instant appeal be deemed as duly filed within the required time;
 - d. That the ruling of the Taxing officer delivered on 26th June 2023 in the matter of the Advocate's bill of costs dated 06th September 2021 between the parties herein be set aside;
 - e. That the appeal be allowed and stay of execution by Giant Auctioneers be granted pending the intended appeal; and
 - f. That the costs of this application be provided for.



2. In the application, it was the applicant's argument that he was not served with a proper notice for the ruling, and notice for proclamation. That at the time, he was recuperating from the mental illness and had instructed the firm of Rutere & Company Advocates to file an objection and reference within time on his behalf but the said counsel did not do so. That the failure to file the objection and reference in good time are not intentional as the instructed advocate failed to communicate that he had not complied, even though he had paid the said advocate legal fees amounting to Kshs. 60,000/= . That the applicant was committed to civil jail in another matter arising from the present one. That if the application is not granted, the applicant will suffer for the mistakes of the advocate and will be condemned unheard.
3. The 1st respondent filed a replying affidavit dated 23rd November 2023 opposing the application. He stated that the application is bad in law and it has been brought in total disregard of Rule 11 of the Advocates Remuneration Order, which dictates the procedure for appeals against a taxing master's decision. That the applicant knew when the ruling was delivered she had 14 days within which to appeal but she neglected to do so within good time. That the 1st respondent moved to execute through the 2nd respondent one month after the ruling and after the applicant's window for appeal had closed. He urged the court to dismiss the application.
4. In this application, the court directed the parties to file their written submissions and only the applicant complied.
5. In her submissions, the applicant relied on Article 159(2)(d) of *the Constitution*, Sections 4(1) and 22 of the *Limitation of Actions Act*, Sections 44(2) and 45 of the *Advocates Act* and Rule 11 of the Advocates Remuneration Order. It was her argument that the court must not be restricted to the provisions of Rule 11 of the Advocates Remuneration Order as it focuses on form rather than content of proceedings. For this argument, she relied on the cases of Alfred Ochieng Opiyo t/a Ochieng Opiyo & Co. Advocates v Export Hydro Pump & Services (Africa) Limited [2018] eKLR and Vishisht Talwar v. Anthony Thuo Kanai T/A A. Thuo Kanai Advocates [2014] eKLR which cited the case of Machira & Co. Advocates v Arthur K. Magugu & another [2019] eKLR.
6. She urged the court to apply its discretion on the matter as stated in Article 159(2)(d) of *the Constitution*. That the applicant is still recuperating from a mental illness and that her predicament should be accommodated by the court. That this court had issued an order on 15th March 2023 that the Taxing Master should give reasons for her decision in the ruling dated 26th June 2023 but the same was not done.
7. The 1st respondent submitted that this court issued an order that the bill of costs be taxed by a different taxing master. Consequently, the same was taxed at Kshs. 153,615/= and the applicant did not file a reference against this finding by the taxing master. That the applicant cannot depose that she was not served with the impugned ruling yet she was in court when the same was delivered and that she also filed a response to the bill of costs. That she has come to this court of equity with unclean hands and she lied by stating that she had instructed her advocate to file a reference.
8. It was his argument that the court should not grant the orders sought as to do so would deny him justice considering he litigated the case. He relied on the cases of Matthews Sankok Shompa v. Kenya Commercial Bank Limited & Others Civil Appeal No. 529 of 2004, Savings and Loans Limited v. Susan Wanjiru Muritu Nairobi HCCC no. 397 of 2002 and Duale Mary Ann Gurre v. Amina Mohamed Mahamood & Another (2014) eKLR. That a decision of the Taxing Master can be contested through a reference as specified under Rule 11 of the Advocates Remuneration Order on grounds stated in the case of First American Bank of Kenya v. Shah & Others (2002) EALR 64 at 69.



9. Further reliance was placed on the cases of *Microsoft Corporation v. Mitsumi Computer Garage Ltd & Another* (2001) eKLR, *Nicholas Kiptoo Arap Kiptoo Salat v. IEBC & 6 Others* (2013) eKLR and *Machira & Co. Advocates v Arthur K. Magugu & another* [2019] eKLR (supra). He argued that the applicant has failed to prove that failure to grant the application will result in substantial loss. That the delay in filing the reference has not been sufficiently explained and the applicant has not offered any security for payment of the costs. He urged the court to dismiss the application with costs and relied on the case of *Cecilia Karuru Ngayu v. Barclays Bank of Kenya & Another* (2016) eKLR.
10. The issues for determination are as follows:
- a. whether the application meets the threshold for issuance of orders for stay of execution and
 - b. whether the court should extend the time for filing a reference.
11. In considering whether or not to grant stay of execution, the court is expected to look at the circumstances and test them against the provisions of the law before applying its discretion on the matter. On this prayer, I am guided by Order 42 Rule 6(2) of the *Civil Procedure Act* which provides:
- (2) 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.
12. Stay of execution is granted at the discretion of the court considering the factors set out in the above cited provision. The applicant stated that she will suffer substantial loss if stay is not granted. The application was filed 4 months following delivery of the impugned ruling. It was her case that after the ruling was delivered, she instructed the firm of Rutere & Company Advocates to file a reference but the said counsel did not act, regardless of the fact that she allegedly paid legal fees. She also stated that since early 2023, she has been recuperating from a mental illness.
13. The applicant did not produce any documents through the supporting affidavit to support these allegations and in a bid to demonstrate that the delay can be justified and that the mistakes of counsel should not be visited on her. In the case of *Rajesh Rughani v. Fifty Investments Limited & Another* (2016) eKLR the court stated that it is paramount that the litigant did not participate in causing the delay. The applicant’s allegation that she instructed counsel does not persuade this court that the delay was occasioned by sufficient cause. In the case of *Edith Gichungu Koine Vs Stephen Njagi Thoithi* (2014) eKLR the court held thus:
- “Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
- In my view, there is a delay in filing this application and in the circumstances, the applicant should have seized time promptly since it is evident that she knew about the ruling on time.
14. The applicant has also failed to demonstrate the substantial loss that she is bound to suffer if the orders are not granted. In the case of *Shell Ltd vs Kibiru and Another* [1986] KLR 410 Platt JA the court held that proof of substantial loss is an important factor to consider before keeping a decree-holder from enjoying the fruits of his judgment. In the case of *James Wangalwa & Another v Agnes Naliaka*



Cheseto [2012] eKLR, the court held that execution of a decree, for instance through auction, is not substantial loss that the applicant is bound to suffer.

15. This court also has to consider the availability of security for performance. This is a safeguard to ensure that the court process is not abused. The security envisioned must be binding on the applicant as provided under Order 46 Rule(2)(b). In the case of Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR the court observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

16. As to whether this court should extend time for the applicant to file a reference, Rule11(4) of the Advocates Remuneration Order provides that the Judge may extend time. It states:

(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.

17. On the basis of the above cited provision, I shall apply my discretion under Article 159 of *the Constitution* and consider extending the time. Further, in consideration of both prayers for stay of execution and leave to appeal out of time, Article 48 of *the Constitution* of Kenya 2010 guarantees every person right of access to justice. Further, Article 50(1) of *the Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. I am therefore inclined to grant the orders only on the strength of *the Constitution*.

18. I am reminded of the role of the court in administration of justice as stated in the case of Kamuti v Kariuki (Miscellaneous Civil Cause E001 of 2023) (2023) observed that:

“The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out unless for a good reason.”

19. In the end, having considered the arguments of both parties, and relevant laws, the following orders shall issue:

- a. The applicant to file and serve a reference within 14 days of this ruling. Once filed, the same should be prosecuted within 90 days;
- b. The applicant to deposit the full taxed costs in court within 7 days of this ruling;
- c. Execution of the ruling of the Taxing officer delivered on 26th June 2023 hereby stayed pending hearing and determination of the reference; and
- d. The applicant to pay throw-away costs of Kshs. 10,000/= to the 1st respondent.



20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the 1st Respondent

.....for the 2nd Respondent

