



Gichohi v Uhuru Highway Development LTF & 2 others (Civil Case 292 of 2008) [2024] KEHC 3334 (KLR) (Civ) (8 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3334 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 292 OF 2008

AN ONGERI, J

APRIL 8, 2024

BETWEEN

HEZEKIAH W. GICHOHI PLAINTIFF

AND

UHURU HIGHWAY DEVELOPMENT LTF 1ST DEFENDANT

CENTRAL BANK OF KENYA 2ND DEFENDANT

**LIBYAN ARAB AFRICAN INVESTMENT CO. LTD T/A GRAND REGENCY
HOTEL 3RD DEFENDANT**

RULING

1. The application coming for consideration in this ruling is the one dated 27/10/2023 brought under the following provisions of law under 42 Rule 6 of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act* seeking the following orders;
 - i. That this application be certified as urgent for hearing ex parte in the first instance.
 - ii. That pending further orders, this honourable court be pleased to stay execution of the defendant's' costs taxed herein on 18th October 2011 including the 2 defendant's notice to show cause herein dated 17th October, 2023.
 - iii. That this honourable court be pleased to stay execution of the defendant's' costs taxed herein on 18th October, 2011 pending the hearing and determination of the Court of Appeal at Nairobi Civil Appeal no. E452 of 2020. Hezekiah W. Gichohi v Uhuru Highway Development Limited & 2 others (Appeal on taxation reference)
 - iv. That costs of this application be provided for.



2. The application is based on the following grounds;
 - i. On 28/10/11, the taxing officer delivered a ruling in which the defendant's party and party bills of costs herein dated 26/08/10 and 03/06/10, respectively were taxed and allowed in the sum of kshs.5,039,356, ksh.5,044,990 and kshs.5,055,012 respectively, all totaling to a sum of ksh.15,129,358.
 - ii. On 22nd June, 2017, the applicants lodged a taxation reference (amended) which Sought, inter alia orders to wit;
 - a. That this Honourable Court be pleased to deem the reasons of taxation of the Taxing Officer's decision made on 28/10/11 as contained in the -typed ruling dated 28/10/11.
 - b. That this court be pleased to enlarge the time for filing the reference against the decision of the Taxing Officer on the defendants' bill of costs herein made on 28/10/11 and to deem this reference as properly and duly filed.
 - c. That this Honourable Court be pleased to vary or set aside the decision of the Taxing Officer on the defendants' bills of costs herein dated 26/08/10, 17/02/10 and 03/06/10, respectively, contained, in her typed ruling dated 28/10/11.
 - iii. On 10th April, 2019. the said application was dismissed and the applicant was granted leave to appeal against the said order/dismissal to the Court of Appeal.
 - iv. On 20th November, 2020, the applicant lodged the appeal against the said decision on taxation reference; being Court of Appeal at Nairobi Civil Appeal No. E452 of 2000; Hezekiah W. Gichohi v Uhuru Highway Development Limited & 2 Others
 - v. Directions have already been given on the said appeal, parties have filed their written submissions and are only waiting allocation of a date to highlight the submissions
 - vi. (t) The 2nd defendant has just commenced the execution process of the taxed costs and hence this application has been made without delay.
 - vii. The amount of costs in issue a colossal sum of over Ksh. 15 million and hence the plaintiff will suffer substantial loss in the event the stay is not granted and the execution continues.
 - viii. The intended appeal which is on the quantum of costs is arguable and the same will be rendered nugatory unless stay is granted.
 - ix. The plaintiff/Applicant has already provided sufficient security of Kshs5,000,000/- which he deposited in court and which by consent of the parties, the same released to the three defendants herein equally. In the case of Safe Rentals V African Safaris (2010) eKLR, the court allowed security comprising only a part of the decretal sum; like in this case.
 - x. Article 47 and 50 of the Constitution guarantee the applicant right to access justice and to a fair trial; this includes the right to articulate the above issues before the court of appeal.
3. The application is supported by the affidavit of Hezekiah W. Gichohi in which he deposed that this application for stay relates to the ruling of the Taxing Officer made On 28th October, 2011 concerning taxation of the defendants' party and party bills of costs dated herein 26/08/10, 17/02/10 and 03/06/10, respectively.
4. That through the said ruling, the said ruling, the Taxing Officer taxed and allowed the said bills of costs as follows:



- (a) First Defendant Kshs. 5, 029, 356
 - (b) Second Defendant Kshs. 5, 044, 990
 - (c) Third Defendant Kshs, 5, 055, 012
- Total Kshs. 15, 129, 358
5. That upon the delivery of the ruling, the applicant was dissatisfied with the decision of the Taxing Officer and instructed his advocates to object to the taxation, which they did, and also requested for reasons of taxation pursuant to paragraph 11(1) of the Advocates Remuneration Order.
 6. That after several abortive applications, the applicant finally filed a proper taxation reference on 22nd June, 2017, (amended) in which he sought, inter alia orders to wit;
 - a) That this Honourable Court be pleased to deem the reasons of taxation of the Taxing Officer's decision made on 28/10/11 as contained in the typed ruling dated 28/10/11,
 - b) That this Court be pleased to enlarge the time for filing the reference against the decision of the Taxing Officer on the defendants' bill of costs herein made on 28/10/11 and to deem this reference as properly and duly filed.
 - c) That this Honourable Court be pleased to vary or set aside the decision of the Taxing Officer on the defendants' bills of costs herein dated 26/08/10, 17/02/10 and 03/06/10, respectively, contained, in her typed ruling dated 28/10/11.
 7. That on 10th April, 2019, the said application was dismissed and the applicant was granted leave to appeal against the said order/dismissal to the Court of Appeal.
 8. That on 16th April, 2019, the applicant lodged a notice of appeal against the said decision.
 9. That on 20th November, 2020, the applicant lodged the appeal against the said decision on taxation reference; being Court of Appeal at Nairobi Civil Appeal No. E452 of 2000: Hezekiah W. Gichohi v Uhuru Highway Development Limited & 2 others.
 10. That directions have already been given on the said appeal, parties have filed their written submissions and are only awaiting allocation of a date to highlight the submissions.
 11. That the 2nd defendant/respondent through the firm of Oraro & Company Advocates has just commenced the execution process and hence this application has been made without delays.
 12. That the amount of costs in issue is a colossal sum of over Kshs. 1 5 million and hence the applicant will suffer substantial loss in the event the stay is NOT granted and the execution is allowed to proceed.
 13. That the intended appeal which is on the quantum of costs is arguable and the same will be rendered nugatory unless stay is granted.
 14. That the applicant has already provided sufficient security of Kshs.5,000,000/= which he deposited in court previously and was released to the respondents by consent.
 15. That Article 47 and 50 of the Constitution guarantees the applicant a right to access justice and to a fair trial; this includes the right to articulate his case before the court of appeal.
 16. That again, unless the threatened execution is stayed, there is a real risk that his intended appeal on taxation reference will be rendered nugatory; hence the prayer for stay of execution.



17. The 2nd respondents filed a replying affidavit by Chacha Odera dated 30/11/2023 in it he stated that the Order the Applicant appealed from relates to a Ruling dated 10/4/2019 regarding a Bill of Costs that was taxed in the sum of Ksh. 5,044,990 on 28/10/2011, over 12 years ago. Upon delivery of the Ruling on costs, the Plaintiff filed an Application for an order to enlarge time to file a reference. The High Court dismissed the said application and leave was granted for the Plaintiff to file an Appeal to the Court of Appeal arising from the High Court's refusal to enlarge time.
18. He deponed that the plaintiff filed a chamber summons dated 22/6/2017 seeking various orders including an order to stay execution for recovery of costs. The application was heard and dismissed on 10/4/2019.
19. Previously, the plaintiff had been given a conditional stay of execution which he was required to deposit Kshs. 5,000,000 as security for payment of Kshs 15,129,358 being the total sum awarded to the three defendants.
20. The Court in a subsequent Ruling, pursuant to a consent entered into by the Advocates on record, ordered the said sum to be released to the 1st Defendant's counsel and the same be divided amongst all the Defendants in part payment of the costs awarded to them,
21. Further, that the Plaintiff refused to furnish the original deposit receipt of payment into Court thereby compelling the 1st Defendant to make an application for the release of the funds without the original deposit receipt.
22. He averred further that as of now, the 2nd Defendant is yet to receive any part of that deposit which was made into Court. that this application comes late in the day and was only triggered by the 2nd Defendant applying for a Notice for the Plaintiff to Show Cause why execution should not take place.
23. The parties filed written submissions as follows; the applicant submitted that they are seeking stay of execution of defendants' costs herein taxed at a combined figure of Kshs. 15, 129, 358 on 18/10/2022 pending the intended appeal arising from the decision of this court dismissing his application dated 22/6/2017 (amended), which was, in the main, a taxation reference and which was dismissed on 10/4/2019 with the applicant being granted leave to appeal.
24. That the appeal has since been filed in the Court of Appeal Nairobi Civil Appeal No. E452 of 2020. Directions for hearing of the appeal have been given and parties have filed submissions. The parties are waiting for the hearing date from the Court of Appeal.
25. The applicant submitted that there is a real threat of execution as the 2nd Defendant has already commenced execution and a notice to show cause issued. The application has been brought without delay as the process of execution commenced on 17/10/2023 when the notice to show cause was issued by the court.
26. The applicant submitted further that he has demonstrated substantial loss. He argued that the grounds presented in the appeal raise serious issues for determination. The applicant also seeks reduction on quantum of costs and has overwhelming chances of success. The execution of the costs against the applicant will therefore defeat and render nugatory the intended appeal.
27. The applicant indicated that he has already provided security of Kshs. 5,000,000 for the taxed costs. The said amount had been previously deposited in court but by the order of the court the parties consented that the amount be released to the firm of Wetangula Adam & Makoha for the three defendants to share equally.



28. The 2nd respondent submitted that the decree herein relates to taxed costs and the 2nd respondent is a reputable institution capable of repaying the money back to the applicant if the instant appeal succeeds. That further the inability of repayment by the 2nd respondent has not been deponed by the applicant and therefore the 2nd respondent's repayment ability is not in doubt not has it been substantiated.
29. On delay the 2nd respondent submitted that Justice Mbogholi Msagha's Ruling was delivered on 10/4/2019, the subject of the Appeal being referred to by the Applicant. The Applicant's Application has been filed four and a half years after on 27/10/2023, 10 days after the 2nd Respondent restarted its attempts in recovering its costs.
30. Finally, on security the 2nd respondent submitted that this Court had previously ordered that the Applicant deposits security of Kshs. 5,000,000, which in spite of a consent entered into by all the parties including the Plaintiff, the Plaintiff refused to release the deposit receipt, thereby compelling the 1st Defendant/ Respondent to make an application to this Court. To this date, the 2nd Respondent has never received any part of that money and there is no evidence before this Court that any part of the Kshs. 5,000,000 has been received by the 2nd Respondent. In the circumstances, no security has been offered.
31. The sole question for determination in the application 27/10/2023 is whether stay execution of the defendant's costs taxed herein on 18th October, 2011 should be granted pending the hearing and determination of the Court of Appeal of Nairobi Civil Appeal no. E452 of 2020. Hezekiah W. Gichohi v Uhuru Highway Development Limited & 2 others (Appeal on taxation reference)
32. I find that there is no dispute that the High Court dismissed an amended Chamber Summons dated 22/6/2017 seeking stay of execution of the taxed costs alongside other orders including enlargement of time for filing the reference.
33. This application dated 27/10/2023 is seeking review of the Ruling of the Ruling delivered on 10/4/2019 in which the High court declined to grant stay of execution of the taxed bill of costs.
34. The High Court in the Ruling delivered on 10/4/2019 dismissed the application dated 22/6/2017 and leave was granted to the applicant to file an Appeal to the Court of Appeal arising from the High Court's refusal to enlarge time.
35. The applicant did not dispute that following a consent by the parties, the court ordered the release of Kshs. 5,000,000 deposited as security for the payment of the taxed costs to the 1st Defendant's counsel and the same was to be divided amongst all the Defendants in part payment of the costs awarded to them.
36. Further, the applicant did not dispute that he refused to furnish the original deposit receipt of payment into Court thereby compelling the 1st Defendant to make an application for the release of the funds without the original deposit receipt.
37. Even if the application had any merit, I find that there has been inordinate delay in bringing the said application and that the same was triggered by the execution process.
38. The application dated 27/10/2023 lacks in merit and it is res judicata since the applicant sought the same orders in the amended Chamber Summons dated 22/6/2017 and the court declined to grant the order for stay of execution alongside other prayers which were also declined.
39. The application dated 27/10/2023 is accordingly dismissed with costs to the respondents.



DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
8TH DAY OF APRIL, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd Defendant

