



**Embu County Government v Olaka (Miscellaneous Application
46 of 2022) [2023] KEHC 2228 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION 46 OF 2022
LM NJUGUNA, J
MARCH 15, 2023**

BETWEEN

EMBU COUNTY GOVERNMENT APPLICANT

AND

VICTOR ONYANGO OLAKA RESPONDENT

RULING

1. The matter for determination before the court is an application dated the October 24, 2022 wherein the applicant sought for orders as enumerated on the face of the application.
2. The application is premised on the grounds on its face and it's supported by the affidavit of Alex Mbeka, an advocate of the High Court of Kenya, who is on record for the applicant.
3. In response to the application, the respondent via a replying affidavit dated November 2, 2022 depones that the allegations by the applicant herein are only meant to deny him the fruits of his judgment. That after the determination by the trial court, the applicant herein appealed the finding of the trial court via Embu HCCA No 49 of 2021 and the same was dismissed. That the applicant's advocates have all through the conduct of this matter listed their email address as mbekalaw@gmail.com and alex.mbeka@gmail.com. That surprisingly, in the hearing notice that was served, the applicant's advocates indicated that their email address is info@mbekaadvocates.com and alex.mbeka@gmail.com. It was contended that the change of the said email address was never communicated to the respondent's advocates. That at the time of the filing of the bill of costs, his advocates on record and the taxing officer were not aware of the applicant's advocates new email address. It was therefore prayed that the application herein be dismissed for the reason that the applicant was the author of its misery.
4. The application is hinged on the fact that the applicant was neither served with the respondent's bill of costs dated June 27, 2022 in the primary suit Embu CMCC No E045 of 2021 nor a taxation notice and/or ruling notice of the said bill of costs. That it learnt of the same when it was served with High



- Court judicial review application No 007 of 2022 wherein the respondent sought for an order of *mandamus* to compel the applicant to settle the decretal amount and assessed costs of Kes 251,662 which costs, the applicant is challenging.
5. The court directed that the application be canvassed by way of written submissions and the parties herein complied with the said directions.
 6. The applicant submitted in relation to the following issues to wit; whether the applicant should be granted leave to file reference out of time; whether the court should refer the matter back to a different taxing master for a fresh re-assessment of the respondent's bill of costs dated June 27, 2022 or alternatively set aside the decision of the taxing master and reassess the costs payable to the respondent and on costs of the application.
 7. On whether the applicant should be granted leave to file reference out of time, it was submitted that this court has wide discretionary powers under the *Civil Procedure Act* and rules more specifically under sections 1(A), 1(B), 3(A) on overriding objective, the inherent jurisdiction and on account of sufficient cause to exercise jurisdiction in matters of this nature for the interest of justice to prevail. Reliance was placed on the cases of *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* (2013) eKLR and *Henry Mukora Mwangi v Charles Gichana Mwangi* civil application No Nai 26 of 2004. The applicant contended that as stated in the above cases, the length of the delay and reasons for non compliance are important factors to influence the exercise of discretion of the court. That the applicant only learnt about the assessed costs and the certificate of costs in Embu CMCC No 45/2021 when it was served with pleadings in Embu High Court judicial review application No E007 of 2022 Republic v Embu County Government & 3 others Ex parte Victor Onyango Olaka, on October 6, 2022 wherein the respondent sought for orders of *mandamus* to compel the applicant to settle the decretal amount, notwithstanding that the disputed costs were obtained by the respondent in a process that the applicant was never aware of. It was contended that if the respondent served the said taxation notice via mail as alleged, he has not annexed any form of proof to substantiate his allegations. That the consequence of the respondent's failure to serve the applicant with the bill of costs dated June 27, 2022 and a taxation notice, was to deny the applicant a right to be heard.
 8. On whether the court should refer the matter to a different taxing master for a fresh assessment, it was submitted that the taxing master erred in law and in principle by proceeding to assess the respondent's bill of costs dated June 27, 2022 without ascertaining if the bill of costs and a taxation notice were duly served upon the applicant. Reliance was placed on the cases of *Premchand Raichand Limited & another v Quarry Services of East Africa Limited and another* [1972] EA and *Arthur v Nyeri Electricity Undertaking* [1961] EA 492. It was reiterated that the applicant herein was neither served with the bill of costs nor a taxation notice to enable it participate in the assessment of costs. The applicant contested items 8, 9,10,11,12 and 13 on the respondent's bill of costs citing reasons amongst others and further placed reliance on the case of *Pyramid Motors Limited v Langata Gardens Limited* (2015) eKLR in contesting the fact that it was never heard. That the taxing master erred in awarding the respondent VAT yet the subject bill of costs is a party and party bill of costs and not an advocate – client bill of costs which would attract an award on VAT.
 9. On costs, it was submitted that given that the application herein is merited, the applicant should be awarded costs of the application.
 10. The respondent submitted that the applicant's counsel was dully served with the respondent's bill of costs and that the same advocate has been on record all through save that the email address that has been used mbekalaw@gmail was allegedly changed. That paragraph 72 of the ARO provides for notice of taxation to be given by the taxing officer. It was contended that the applicants are the authors of



their misfortune because they have all through the conduct of this matter listed their email address as mbekalaw@gmail. That surprisingly, the hearing notice served on the respondent's advocates was listed as info@mbekaadvocates.com and alex.mbeka@gmail.com and as a result, the said notice of change of advocates was never served upon the applicant. It was the respondent's case that at the time of filing the bill of costs, the respondent's advocates on record and the taxing master were not aware of the applicant's advocates new email address at info@mbekaadvocates.com.

11. I have considered the application herein, the response by the respondent and the written submissions by both parties and I find that the main issue for determination is whether the application is merited.
12. It is trite that the court enjoys wide discretionary powers under the *Civil Procedure Act* and rules more specifically as stipulated in section 1 (A), 1(B), 3(A). It is noted that paragraph 11 (1) (2) of the *Advocates Remuneration Order, 2014* does not speak to the relevant factors that the court should consider when exercising its discretion on whether or not to extend time. Guidance must therefore be sought from case law. In *Paul Wanjobi Mathenge v Duncan Gichane Mathenge*[2013], the Court of Appeal while referring to other authorities observed;-

“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 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. In *Henry Mukora Mwangi v Charles Gichina Mwangi* – civil application No Nai 26 of 2004, this court held; -

It has been stated time and again that in an application under rule 4 of the rules the learned single judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi v Kenya Airways Ltd* [2003] KLR 486 in which this court stated;-over the years, the court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – civil application No Nai 255 of 1997(unreported), the court expressed itself thus; -

It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general 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 reasons for 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.”

13. In opposing the prayers herein, the respondent contended that the applicants are the authors of their misfortune because they have all through the conduct of this matter given their email address as mbekalaw@gmail. That the said notice of change of advocates was neither served upon the respondent nor the court. It was the respondent's case that at the time of filing the bill of costs, the respondent's advocates on record and the taxing master were not aware of the applicant's advocates new email address at info@mbekaadvocates.com.
14. This court has independently perused the record herein and finds that the applicant prior to filing this application, has been using mbekalaw@gmail.co as their email address and therefore their email



addresses stated as info@mbekaadvocates.com and alex.mbeka@gmail.com were only used for the first time in a letter dated October 12, 2022 seeking for reasons for the decision in the certificate of costs before the tax master. In the same breadth, I also noted from the record and as correctly submitted by the applicant that, the respondent did not annex any form of proof that he indeed served the taxation notice via the email address known as mbekalaw@gmail.com or via any other email address. On the same, the respondent did not file an affidavit of service or any email printout showing that the bill of costs was indeed sent to the applicant herein. [See *Sifuna & Sifuna advocates v Patrick Simiyu Kbaemba* [2021] eKLR; order 5 rule 22 B on electronic Service]. From the material before the court, I find that the applicant was not served with the notice of taxation.

15. The applicant has also sought for stay of execution. The court in *RWW v EKW* [2019] held that; -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”

16. For the reasons stated above, I find that the application dated the October 24, 2022 has merits and the same is allowed in terms of prayers (2), (3) and (4). Each party to bear its own costs of the application.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....Applicants

.....Respondents

