



Odongo Okal & Company Advocates v Mak'Ojuando (Miscellaneous Civil Cause E48 of 2023) [2023] KEHC 27488 (KLR) (20 March 2023) (Ruling)

Neutral citation: [2023] KEHC 27488 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL CAUSE E48 OF 2023
MS SHARIFF, J
MARCH 20, 2023**

BETWEEN

ODONGO OKAL & COMPANY ADVOCATES APPLICANT

AND

PAUL ODALO MAK'OJUANDO RESPONDENT

RULING

1. The Applicant/client moved this court by way of two chamber summons dated 28th September, 2023 and 3rd October 2023. In the first application the Applicant sought the following orders;
 1. Spent
 2. That the Honorable court be pleased to issue a stay of execution of the ruling and order of the Deputy Registrar given on 17th August 2023 pending the hearing and determination of the instant application.
 3. That this court be pleased to enlarge time for the Applicant to file this reference to the ruling and order made on 17th August 2023 and the certificate of costs by this court on 17th August 2023.
 4. That this Honorable Court be pleased to aside and/review the ruling and determination made by the Deputy Registrar of this Honorable Court on 17th August 2023.
 5. That this Honorable Court be pleased to tax the Bill of costs dated 17th April 2023 accordingly.
 6. That this Honorable Court be pleased to grant any other orders it deems fit.



2. In the second application the Applicant sought for the following orders;
 1. Spent.
 2. That This Honorable Court be pleased to enlarge time for the Applicant to file a notice of objection to the ruling and order made on 17th August 2023 and the certificate of costs issued by the Deputy Registrar on 17th August 2023.
 3. That the notice of objection to be deemed as duly and properly filed upon payment of the requisite court fees.
3. The two applications are supported by the affidavits of Plister Omondi sworn on 28th August 2023 and 3rd September 2023 respectively, gist of the said affidavits is that the Applicant is aggrieved by the taxation of cost as done by the Deputy Registrar who, it is averred, failed to consider the Applicant's/ client's response to the advocates bill of cost dated 17th April 2023. The deponent deposes that whereas she had the conduct of this brief she had been indisposed hence her failure to file a notice of objection and ultimately the reference within the limitation period.
4. The two applications have been resisted by the advocates/ Respondent vide two affidavits of Gideon Odongo sworn on 2nd October 2023 and 16th October 2023 respectively. The advocates oppose the application on grounds that no notice of objection was ever filed against the ruling of the deputy registrar and that the second application a duplicate of the first one. It is posited that the delay in filing the notice of objection and reference has not been sufficiently explained and that these applications are solely aimed at delaying the advocates' notice of motion dated 14th September 2023 that seeks the conversion of the certificates of costs made on 17th August 2023 as a judgment of this court.
5. On 9th October 2023 the two Applicant's applications were consolidated and parties were directed to file written submissions. Both parties duly complied.

Analysis and Determination

6. This court has analyzed the applications, the supporting affidavits, the replying affidavits, the response to the replying affidavit and the rival submissions of parties and the issues that emerge for determination are as follows;
 - a. Has the Applicant made out a case for the enlargement of time to file the notice of objection and the reference.
 - b. Whether this court ought to set aside and or review the ruling delivered by the Deputy registrar on 17th August 2023.
 - c. Whether this court should proceed to tax the bill of costs dated 17th April 2023.
7. Paragraph 11 of the advocates Remuneration Order provides as follows;
 - “ 11. Objection to the decision on taxation and appeal to the Court of Appeal.
 1. Should any party object to a 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.

8. The principles for enlargement of time were elucidated in the Supreme Court case of *County Executive of Kisumu v County Government of Kisumu & Others* (2017) eKLR thus;

- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases like election petitions, public interest should be a consideration for extending time.”

9. It is trite law that any exercise of judicial discretion ought to be judicious and not capricious. The Applicant's advocate herein has stated that she had been indisposed for a lengthy period from mid-month of August 2023 to late September 2023 and thereafter a minor sickler who is dependent on her also fell ill and was hospitalized. Treatment notes of the minor have been annexed to support this position. As a court I treat the word of the Applicant's advocate as one made by an officer of this court and a lady wherefore no suspicion crosses my mind. The Applicant ought not be blocked from accessing the seat of justice due to omissions and lapses of his advocate, more so where the advocate has herself come forth and offered an explanation for the delay in complying with the timelines. This court leans towards doing justices to parties than towards denying a party a hearing on merit. Any inconvenience occasioned to the Respondent can be assuaged by an award of costs.

10. It is noteworthy that the Applicant's first application was filed on 28th September 2023, after the one by the Respondent for conversion of the certificate of costs into a judgment and the Respondent /



advocate posits that the applications herein are actuated by malice and are aimed at frustrating and delaying the advocates enjoyment of the fruits of judgment. The advocate has not addressed the reasons proffered for the delay yet the same involves the health of the Applicant's counsel and her minor child. I am not persuaded that these applications were actuated by malice regard being had to the basis for the intended challenge of the certificate of costs; that the taxing officer disregarded the Applicant's response to the advocates' bill of costs and inter alia inflated the instructions fees to the prejudice of the Applicant.

11. The first application was made 28 days out of time and as I have already found, a reasonable explanation has been tendered and I am persuaded by the same.
12. On the balance I find that these applications are well merited and in the interest of justice I do hereby allow it and I proceed to make the following orders;
 - a. The Applicant is granted leave to file the notice of objection to the ruling of Hon. Barasah made on 17th August 2023 within 7 days from the date hereof and to file a reference to the said ruling within 14 days from the date hereof.
 - b. The Applicant/client is ordered to deposit a sum of Ksh.500,000 in a joint interest earning account of parties within 30 days from the date hereof.
 - c. The Applicant to pay the Respondent/ advocates costs of these applications assessed at Ksh.16,000.
 - d. Mention on 25.6.2024 to confirm compliance.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 20TH DAY OF MARCH 2023.

MWANAISHA S SHARIFF

JUDGE

