



Maina v Kamanja (Civil Appeal 57 of 2017) [2023] KEHC 17721 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL 57 OF 2017
CM KARIUKI, J
MAY 18, 2023**

BETWEEN

JOHN MUNENE MAINA APPELLANT

AND

PETER MURAGE KAMANJA RESPONDENT

RULING

1. By a Motion on Notice dated 20th December 2022, the Applicant herein sought the following orders: -
 - i. Spent.
 - ii. Spent.
 - iii. That pending the hearing and determination of this Application, there be a stay of execution of the Notice of Show Cause dated 3/10/2022 and the warrants of arrest issued on 15/11/2022 the warrants to include committal of the Applicant to civil jail and all other consequential order thereto.
 - iv. That the honorable Court be pleased to extend the time to the Applicant within which to lodge a notice to the taxing officer of his objection to the items of taxation in Nyahururu High Court Civil Appeal No. 57 of 2017 John Maina Munene v Peter Murage Kamanja.
 - v. That the costs of the Application be provided for.
 - vi. The Application is supported by the annexed affidavit of John Munene Maina and the grounds on the face of the Application as follows:-
 - vi. That the Applicant lodged the instant appeal against the Respondent and the same was dismissed with costs.
 - viii. That the Respondent taxed his costs vide a bill of costs dated 12/6/2021 and the Applicant responded to the same through submissions filed in Court on 12/6/2021.



- ix. That the ruling was delivered on 13/5/2022 but the Applicant was not aware of the same and only became aware that a ruling was delivered upon his arrest on 30/11/2022 when the Respondent's counsel sought to have him committed to civil jail.
 - x. That the Applicant being aware of the existence of the ruling, he would have objected to the decision of the taxing master being aggrieved by amounts taxed but the time within which to file an objection has since lapsed.
 - xi. That the taxing officer has given no reasons as to how he arrived to his decision of taxing the Respondent's bill of costs dated 12/6/2021 as drawn which amounts have been grossly exaggerated and the Applicant objected to all the items drawn to their entirety.
 - xii. That the Applicant is not a person of means and risks to be committed to civil jail unless the orders sought are granted.
 - xiii. . That it is only just and fair that the orders sought to be allowed as prayed.
2. On the other hand, the Respondent filed a replying affidavit dated 16/1/2023 where the Respondent deponed that the Applicant did not give a plausible reason for the delay in filing a reference against the ruling dated 13.5.2022 and that the said Application is incompetent, bad in law, untenable under the circumstances and an abuse of the court process as it does not meet the threshold of invoking the discretion of the Court and sought for the Application to be dismissed with costs.
 3. Parties were directed to dispose of the Application by way of written submissions.
 4. Applicant's Submissions
 5. The Applicant submitted that the costs of the suit are not meant to punish nor oppress a losing party in litigation but rather for compensation for the trouble a winning party has gone through during litigation. That a party has lost in the field of justice and then ends up being slapped with hefty fees from the winning party does not in itself balance the scales of justice but only results in rubbing salt into an already existing and now rotting wound.
 6. It was asserted that the Applicant approached his Court seeking damages for malicious prosecution and salary arrears vide Nyahururu Civil Suit No.34 of 2013. Aggrieved by the lower court case decision, he lodged the instant appeal where the same was dismissed with costs to the Respondent. The costs were assessed at kshs. 166,950/- by the Respondent vide the Respondent's Bill of Costs dated 12/6/2022. The Applicant in his response vide the submissions dated 23/7/2021, sought for the amounts assessed to be taxed off to the tune of kshs. 109,935/- subject to the provision of receipts under disbursements.
 7. It was contended that despite the Applicant raising an objection to the amounts drawn by the Respondent, the taxing officer upheld the Respondent's Bill of Costs stating that the same was drawn to scale without giving any reasons as to why he found that the same was drawn to scale.
 8. The Applicant averred that neither he nor his counsel on record were aware of the existence of the taxing officer's ruling. That counsel was not in Court on 13/5/2022 as indicated in the said ruling. That the Applicant only became aware of the existence of the ruling when he was arrested on 30/11/2022 and arraigned in Court. Upon arguing for his release, he and his advocates learned of the existence of the ruling, decree, notice to show cause and even warrants of arrest had been issued.
 9. It was argued that had the Respondent been forthcoming, they ought to have notified the Applicant through his counsel on record vide a demand letter to alert them of the existence of the cost certificate



instead of moving for his arrest. That the circumstances surrounding the instant case were beyond the Applicant's control, thus why an objection was not raised within the stipulated time.

10. Reliance was placed on Paragraph 11 of the [Advocates Remuneration Order, Fatim Yasin Twaha v Timamy Lusa Abdalla & 2 Others](#) [2015] eKLR, [George Kagima Kariuki & 2 Others v George M. Gichimu & 2 Others](#) [2014] eKLR, [Stanley Kahoro Mwangi & 2 Others v Kanyamwi Trading Company Limited](#) [2015] eKLR, [Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 Others](#) [2021] eKLR.
11. Having explained the delay, the Applicant submitted that he is deserving of an opportunity to raise an objection to the decision of the taxing officer. Furthermore, a reading of the ruling has yet to explain why the taxing officer arrived at his decision.
12. Respondent's Submissions
13. The Respondent stated that the main ground of the Application, as stated by the Applicant, is that he was not aware of the ruling delivered on 13th May 2022; however, the Applicant is misleading the Court as it is evident on the last page of the ruling that the Coram of that date shows that Wanjiru Muriitthi was present on behalf of the Applicant. That the presence of the advocate for the Applicant in Court is deemed to be noticed to the Applicant of the ruling delivered on 13th May 2022.
14. Reliance was placed on [Joseph Lekodi Teleu v Jonathan Paapai & Another](#) [2022] eKLR, [Duale Mary Ann Gurre v Amina Mohamed Mahamoud & Another](#) [2014] eKLR, Rule 11(1) & (2) [Advocates Remuneration Order](#)
15. The Respondent averred that the decision of the taxing officer was delivered on 13th May 2022, and the Applicant filed the current Application on 20th December 2022. This is after seven months which is way past the prescribed period of 14 days. In the circumstance, it is clear that the current Application is an afterthought with the aim of delaying the Respondent from enjoying the fruits of the judgment.
16. Reliance was placed on [George Kagima Kariuki & 2 Others v George M. Gichimu & 2 Others](#) [2014] eKLR, [Stanley Kahoro Mwangi & 2 Others v Kanyamwi Trading Company Limited](#) [2015] eKLR, [County Executive of Kisumu v County Government of Kisumu & 8 Others](#) [2017] eKLR
17. It was contended that the Applicant must give a plausible reason for the delay in filing a reference against the ruling of 13th May 2022. That the intended reference does not have any chance of success as the taxing master's decision contains clear reasons for the taxation of the Bill of Costs, and as such, it will be an abuse of the court process to allow the current Application.
18. The Respondent stated that taking into account the time when the appeal was dismissed and the Applicant condemned to pay costs, the Applicant has yet to show any attempt to settle the said cost. Thus the current Application has been brought in bad faith.
19. Lastly, the Respondent submitted that the taxing master made an informed decision under the circumstances and that the current Application is purely an afterthought, misconceived, lacks any legal and factual basis and it has been filed with the sole aim of continuing to clog the Court with finalized matters.
20. Analysis and Determination
21. Having considered the Application for stay and extension of time, the grounds thereof, supporting affidavit and annexures, the replying affidavit and written submissions together with case law cited by both the Applicant and Respondent, the main issue for determination is whether the Applicant has demonstrated that the orders for stay of execution and extension of time are merited.



22. The main ground the Applicant submitted for the delay in filing reference is that he was unaware that the taxing master had delivered a ruling on the same. The Applicant asserted that even though the record indicates that his advocate was in Court, the same needs to be more accurate as neither he nor his advocate on record attended Court on 13/5/2022 when the ruling was delivered. Further, the Applicant asserted that he only became aware of the existence of the ruling when he was arrested on 30/11/2022 and arraigned in Court. Upon arguing for his release, he and his advocates learned of the existence of the ruling, decree, notice to show cause and even warrants of arrest had been issued.
23. On the other hand, the Respondent argued that the Applicant's contention that he was unaware that the ruling was delivered is in a bid to mislead the Court, as it is evident on the last page of the ruling that the Coram of that date shows that Wanjiru Muriitthi was present on behalf of the Applicant. That the presence of the advocate for the Applicant in Court is deemed to be noticed to the Applicant of the ruling delivered on 13th May 2022.
24. The procedure of filing a reference to oppose a taxed bill of costs is set out in Paragraphs 11 (1) and (2) of the *Advocates Remuneration Order*. It 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. 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.”
25. In considering an application for an extension of time, the Court enjoys wide discretionary powers under the *Civil Procedure Act* and Rules, more specifically as stipulated in Section 79 (G) And Section 1 (A), 1(B), 3(A) of the *Civil Procedure Act* 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.
26. Additionally, the principles that guide courts in allowing or declining a motion seeking leave to file an appeal out of time was settled by the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the Court set out the principles as follows: -

“We derive the following as the underlying principles that a Court should consider in the exercise of such discretion:-

- i. 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;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
- iii. Whether the Court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether the Respondents will suffer any prejudice if the extension is granted;
- vi. Whether the Application has been brought without undue delay; and



vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.

27. Additionally, in *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, the Court of Appeal, while referring to other authorities, observed that:-

“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 the delay; third (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.”

28. Accordingly, the Court is tasked with establishing whether the Applicant met the principles outlined in the *Nicholas Kiptoo Arap Korir Salat* case.

29. I have perused the Court’s record, and contrary to the Applicant’s assertion, the record indicates that Hon. Kiplagat indicated that Wanjiru Muriithi, counsel for the Applicant, the Respondent then, was present on 13/5/2022 when the ruling was delivered. I am, therefore, not convinced that the Applicant was unaware that the ruling had been delivered. However, I will give the Applicant the benefit of the doubt. In light of the overriding objectives, I will exercise this Court’s unfettered discretionary power in favour of the Applicant.

30. The Applicant asserted that he intends to file a reference against the taxing officer’s ruling stating that the taxing officer upheld the Respondent’s Bill of Costs stating that the same was drawn to scale without giving any reasons as to why he found that the same was drawn to scale.

31. The ultimate goal of the justice system is to hear and determine disputes fully. Article 48 of the *Constitution* guarantees every person access to justice. Additionally, Article 50(1) of the *Constitution* provides that every person has the right to have any dispute that the Application of law can resolve decided in a fair and public hearing before a court or, if appropriate, another independent and impartial



tribunal or body. In the interest of the overriding objective, the Applicant should be given a chance to ventilate their grievances through their intended reference without being locked out.

32. In *Kenya Commercial Bank Limited v Kenya Planters Co-operative Union* Civil Application No. Nai. 85 of 2010, the Court held that:

“Where there is a conflict between the statute (overriding objective principle) and subsidiary legislation (rules of the Court), the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfill them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case.”

33. Accordingly, this Court considers both parties’ interests in balancing the interests of the Applicant, whose reference would be rendered nugatory if the appeal succeeds, and that of a respondent from being barred from enjoying the fruits of judgment. If this Court were to deny the Applicant the order for stay of execution, it would place them in a more prejudicial position than the Respondent. It is my finding that while it is unfortunate that the Respondent has had to wait for long to enjoy the fruits of their judgment, in considering the overriding objective of civil proceedings litigation, i.e., the just, expeditious, proportionate, and affordable resolution of disputes before the Court, the Applicant is granted leave to file the reference out of time against the taxing officer’s ruling dated 13/5/2022.

34. Having granted the leave to file reference out of time, I will also grant the stay of execution orders as prayed. Not granting the aforementioned orders would amount to shutting the party out of the process of a fair trial, which includes exhaustion of all remedies available to him or her within the law.

35. I am also guided by the case of *Governors Baloon Safari Limited vs Skyship Company Limited & Another* (2020) eKLR the Court held that:

“.....having found that the 2nd defendant is entitled to orders for extension of time within which to file reference, it logically follows that the execution for costs that are the subject of the Objection and Reference should be stayed pending the outcome of the Reference.”

36. Lastly, I have taken into account the Applicant’s conduct and take this opportunity to warn him and his counsel. It goes without saying that litigation has to come to an end and the Applicant will not be allowed by this Court to hinder the Respondent from enjoying the fruits of judgment in his favour without legal justification.

37. For the foregoing reasons, the Application dated 17/6/2021 is allowed in the following terms:-

- i. Leave is granted to the Applicant to file reference out of time against the ruling of the taxing master delivered on 13/5/2022
- ii. The Applicant is to file and serve his reference within fourteen (14) days hereof.
- iii. Pending the hearing and determination of this Application, there be a stay of execution of the Notice of Show Cause dated 3/10/2022 and the warrants of arrest issued on 15/11/2022 the warrants to include committal of the Applicant to civil jail and all other consequential orders thereto.
- iv. In default of complying with order number two (ii), the orders staying execution shall lapse and the Respondent shall be at liberty to execute.
- v. Costs of this Application to the Respondent.



DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 18TH DAY OF MAY 2023.

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CHARLES KARIUKI

JUDGE

