



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.18 OF 2013 (OS)

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT CHAPTER 281 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: LR PORTION NO.20119-CR26151

LR PORTION NO. 2031-CR33295

LR PORTION NO.24845-CR33298

LR PORTION NO.24846-CR 33297

AND

IN THE MATTER OF: REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

**IN THE MATTER OF: PLOT NOS, NGOMENI/SQUATTERS SETTLEMENT
SCHEME/1882, 892, 811, 893, 813, 986, 1025, 987,1025,
987,988, 787, 1887, 1888 AND 1373**

AND

IN THE MATTER OF: THE SURVEY ACT CAPS 299 LAWS OF KENYA

BETWEEN

NGOMENI SWIMMERS LTD.....PLAINTIFF/APPLICANT

=VERSUS=

- 1. THE COMMISSIONER OF LANDS**
- 2. THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT**
- 3. THE DIRECTOR OF SURVEY**

4. THE DISTRICT LAND REGISTRAR (KILIFI)

5. THE REGISTRAR OF TITLES (MOMBASA)

6. THE HONOURABLE ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS

AND

1. ST. PATRICK'S HILL SCHOOL LTD

2. NDURYA MSANZU NDURYA

3. MORRIS SULUBU HARE

4. KADII TEZI TSUMA

5. SAMSON NGOWA

6. SWALEH AHMED SAID

7. NICHOLAS KABANDO MWANGI

8. FENYASAN CONSTRUCTION LIMITED

9. KARISA FUNDI BULUSHI

10. KAHINDI KAINGU GONDA

11. TABU TUVA KHONDE

12. THE ESTATE OF SAFARI KIMERI THUVA

13. THE ESTATE OF CHARO MWABAYU NDURYA

14. THE ESTATE OF KATANA

KENGA MWANYIRO.....INTERESTED PARTIES/RESPONDENTS

R U L I N G

Introduction

1. Before me is the Application dated 24th November, 2014 filed by the Applicant pursuant to the provisions of Rule 11(2) of the Advocates Remuneration Order. The Application is seeking for the following orders:-

(a) THAT the Honourable court be pleased to order a stay of execution of the decree in this instant suit pending the interpartes hearing of the intended reference.

(b) THAT, the Honourable Court be pleased to grant leave to the Applicant herein to file a reference out of time.

(c) THAT the decision of the Taxing Officer delivered on 8th April, 2014 in as far as the

same relates to taxation of item 1 of the Party and Party Bill of costs filed on 14th February 2014, the quantum of the award and the reasoning with respect to the said award be set aside.

(d) THAT the Honourable Court be pleased to refer the matter to another Taxing Officer for re-taxation of item 1 of the Bill of Costs herein and with proper directions thereof.

(e) THAT the costs of this application be born by Respondents herein.

The Applicant's case:

2. The Application is premised on nine grounds and the Supporting Affidavit of the Applicant's Director.
3. According to the grounds and the Supporting Affidavit of the Applicant's Director, the Taxing Officer erred in principle by relying on the repealed law, that is the Advocates Remuneration Order 2006; that in taxing item 1 of the Bill of Costs, the Taxing Officer failed to appreciate the provisions of the Advocates Remuneration Order 2009 and that the Taxing Officer erred by failing to consider that from inception of the suit, the crux of the matter herein was a boundary issue that was to be resolved by the relevant authorities and was not touching on the issue of ownership or the beneficial rights of the parties herein.

The Interested Parties' case:

4. Morris Sulubu Hare the 3rd Interested Party, swore a Replying Affidavit on behalf of the 2nd, 4th, 5th, 6th, 7th, 8th, 9th, 11th and 12th Interested Parties.
5. In the Replying Affidavit, the 3rd Interested Party deponed that the Application is misplaced by virtue of the Court of Appeal decision in Nairobi Civil Appeal NO. 298 of 1996 in which it was held that a stay of execution cannot be granted in respect of a decretal sum for payment of costs.
6. It is the Interested Parties' case that the Applicant has not even attempted to state why it did not file its reference within time and that the Applicant is buying time principally to delay and evade payment of the taxed costs.
7. The 1st Interested Party filed a Replying Affidavit and the Grounds of Opposition.
8. It is the 1st Interested Party's case that the Application is misconceived, scandalous, frivolous, vexatious and an abuse of the court's process; that there is no plausible explanation discernible from the Application for the inordinate delay on the part of the Applicant to challenge the decision of the Taxing Officer delivered on 8th April 2014 and that the Application is delaying tactic by the Applicant so as to avoid paying the costs awarded to the Interested Party.

Submissions:

9. Counsel for the Applicant submitted that although the Applicant has requested from the Taxing Officer the reasons for her taxation for the purpose of filing a reference, the Taxing Officer has not responded to their letters.
10. Counsel submitted that the reasons for the delay in filing the reference is because of the failure by the Taxing Officer to respond to their letters.
11. The 1st Interested Party's advocate submitted that the Application is totally defective and incompetent.
12. Counsel submitted that the Applicant has not explained the delay in filing the reference; that the delay is inordinate, excessive, unreasonable, grossly negligent and inexcusable. Counsel relied on the cases of **Kwengu & Co. Advocates Vs Invesco Assurance Co. Ltd. Misc Civil Application No. 145 of 2011** and **Kamau Kinyanjui Advocates Vs Genge Gitau Munene, Misc Application NO. 629 of 2012.**

13. Counsel for the thirteen Interested Parties submitted that a stay of execution of costs can never be granted; that the period of delay in filing a reference is inordinate and that the delay has not been explained at all. Counsel relied on the cases of **KAPA Oil Refineries Ltd Vs James Odur & Another, Nairobi HCCC No. 463 of 2014.**

Analysis and findings:

14. The Application before me has been filed pursuant to the provisions of Rule 11(2) of the Advocates Remuneration Order.

15. The prayer for stay of execution of the taxed costs and for this court to tax the Bills of Costs or to refer the Bills of Costs for re-taxation by another Taxing Officer can only be considered if the court enlarges time within which to file a reference.

16. Rule 11(1) and (4) of the Advocates Remuneration Order provides as follows:-

“11(1) Should any party object to the decision of the Taxing Officer, he may within fourteen days after giving notice in writing to the Taxing Officer of the items of taxation to which he objects 11(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.

17. A party seeking to enlarge time within which to file a reference must explain to the satisfaction of the court the reasons for the delay. The explanation for the delay should be stated in the grounds of the Application or the Supporting Affidavit. In the case of **Kwengu & co. Advocates Vs Invesco Assurance Co. Ltd, Nairobi Misc, Civil Application No. 145 of 2011**, Odunga J held as follows:-

“As I understand it, this court has wide discretion to enlarge time under Rule 11(4) aforesaid, but such discretion cannot be exercised whimsically. The discretion, especially favorable discretion has to be based on reasonable grounds. In this case the applicant was under an obligation to reasonably explain away the inordinate delay of eleven months before filing this application to seek the enlargement of time....The Applicant also tended to devolve on the merits of the Taxing Officer's taxation process. In view of the the court, the merits or demerits of the taxation process are not before this court under this application which only seeks for enlargement of time and stay of execution”.

18. I associate myself with the sentiments of the Judge in the above matter.

19. I have gone through the entire Application and I have not come across any paragraph, either in the grounds or the Supporting Affidavit, explaining why the Applicant was unable to file a reference within 14 days from the date the Taxing Officer delivered her Ruling.

20. Although the Applicant's counsel stated from the bar that the delay in filing the reference was because he has been waiting to be furnished with the reasons of the Taxing Officer for her decision, counsel did not annex on his Application any letter that he has written addressed to the Taxing Officer or the Deputy Registrar requesting for reasons of the decision of the Taxing Officer. Indeed, I have gone out of my way to peruse the entire file and I have not come across such a letter by the Applicant or his advocate.

21. In any event, the applicable Remuneration Order in this matter is the one for the year 2006 and not 2009 considering that the 2009 Remuneration Order only amended schedule 1 and 2 of the 2006 Remuneration Order. The Taxing Officer could therefore only use the 2006 Remuneration Order to tax the Bill of Costs and not the one for the year 2009 as submitted by counsel. However, as I have already stated, that is an issue that cannot arise now considering that no reason, plausible or otherwise, has been given for filing of the Application for enlargement of time seven months after the taxation.

22. For those reasons, I dismiss the Application dated 24th November, 2014 with costs.

Dated and delivered in Malindi this 1st day of **April**, 2016.

O. A. Angote

Judge