



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC LAND MISC CASE NO. E036 OF 2024

BARUTHI BUNDI.....
.....APPLICANT

VERSUS

ELIUD C. WAMBU
T/A CHADOR
AUCTIONEERS.....RESPONDENT

RULING

- 1) This application, was filed by Baruthi Bundi (the Applicant) on 04/04/2025, 15 days post-Ruling which was dated 2/03/2025 through **KN Law LLP**, and it seeks urgent intervention from the Environment and Land Court at Thika to stop the execution of a multi-million-shilling Taxation Ruling.
- 2) In their specificity, the Applicant seeks the following prayers from Court:
 1. Spent.
 2. *This Honourable Court be pleased to grant the firm of **M/S KN Law LLP** leave to come on record for the Applicant in place of **M/S Karanja Kang'iri & Co. Advocates** pursuant to the Consent Notice of Change*

of Advocates dated 02 April 2025 annexed to this application.

- 3. Pending hearing and determination of this application inter partes, there be a stay of execution of the Taxation Ruling delivered by Honourable James Wanyanga dated 20 March 2025.*
 - 4. This Honourable Court be pleased to enlarge or extend time for lodging an appeal against the Taxation Ruling delivered by Honourable James Wanyanga dated 20 March 2025.*
 - 5. This Honourable Court be pleased to admit the instant appeal against the Taxation Ruling delivered by Honourable James Wanyanga dated 20 March 2025 as duly filed and served.*
 - 6. The Taxation Ruling delivered by Honourable James Wanyanga dated 20 March 2025 in favour of the Respondent be set aside or varied accordingly.*
 - 7. In the alternative, the Respondent's Bill of Costs dated 01 July 2024 be remitted back to a different Taxing Officer to be taxed afresh.*
 - 8. The costs of this appeal be awarded to the Applicant and be borne by the Respondent.*
- 3) The matter is labeled extremely urgent because according to the Applicant there is imminent auction since the Respondent has already obtained Warrants of Attachment

and Sale and instructed **Mamalo Auctioneers** to proceed with execution.

- 4) The Applicant contends that if the execution proceeds, the Appeal will become nugatory as the money/assets will already be gone. The Applicant also claims the warrants were obtained irregularly because they were never served with a formal Decree.
- 5) From the Applicant's point of view, the Taxation Ruling was erroneous since there are binding service agreement dated 26/08/2022 that set specific costs. The Applicant argues that the Taxing Officer ignored this contract and used a different schedule of costs.
- 6) At the same time, that despite the Taxing Officer allegedly admitting that eviction and demolition costs are not in the Auctioneers Act Schedule, yet he proceeded to tax them anyway.
- 7) The Applicant attributed the delay in filing the Appeal to the mistake of the previous Advocates failing to notify the Applicant of the Ruling until 25/03/2025, and then failing to file the actual Appeal as instructed. Further the Applicant argues the Court wrongly relied on a valuation by PJ Crafts Limited, a third party without the Applicant's consent.
- 8) In response the Respondents filed a Replying Affidavit sworn on 24/04/2025 by **Eliud C. Wambu** in which he characterizes the Applicant's request as a sham and a tactical move to delay the payment of a lawful debt.

- 9) The Respondent rebuts the lack of awareness claim and points out that the Ruling dated 20/03/2025 was set by mutual agreement. He argues that both the Applicant and his Advocates were aware of the date but chose not to attend the virtual delivery. That upon delivery of the said Ruling it was immediately available on the Court's Case Tracking System (CTS), meaning the Applicant could have accessed it regardless of connectivity issues or Advocate silence.
- 10) The Respondent also claims that the Applicant was served with the Certificate of Costs on 25/03/2025 but refused to sign it and therefore this contradicts the Applicant's claim of being in the dark.
- 11) The Respondent further argues that there is no proof such as correspondence or logs that show that the previous Advocates actually failed in their duty or experienced technical hitches. This being the case the challenge to the issue of the mistake of the Counsel argument is not augmented with any proof.
- 12) Further, he asserts that even if the Advocates were silent, the Applicant had a personal duty to follow up on a multi-million-shilling Ruling. According to the Respondent, the Applicant has woken from slumber only after the auctioneers arrived meaning the Applicant was indolent.
- 13) The Respondent has also raised the issue of procedural legitimacy of execution and averred that the grace period

provided from him to the Applicant was 7-day notice to pay after the Ruling. Only that after this period lapsed, he then extracted the Warrants of Attachment which are dated 3/04/2025. He therefore maintains that the execution is not an unlawful or premature process but a standard follow-through on a Court-certified debt.

- 14) The Respondent emphasizes that the Taxing Master explicitly mentioned the timelines for Appeal at the start of the Ruling. He argues that allowing an extension now would set a bad precedent for Court discipline.
- 15) He points out a logical flaw in the application where the Applicant is asking for a stay to prepare an appeal, while simultaneously asking the Court to decide the Appeal now (by setting aside the Ruling). He even avers that the Applicant wants to eat the cake and still have it.
- 16) According to the Respondent, if the Court is inclined to grant a stay of execution, the Respondent beseeches the Court to make it conditional. He demands that the Applicant deposit the full KES 9,653,000 into a joint account or with the Court as security, ensuring the money is available if the Appeal fails.
- 17) When the parties appeared in Court on 30/07/2025 the Court issued directions on filing of submissions.

Applicant's Submissions.

- 18) The Applicant filed their submissions dated 13/06/2025. The Applicant's submissions outline two primary issues for

the Court's determination; which are enlargement of time and validity of the Taxation Ruling.

- 19) Whether the Court should exercise its discretion to allow the Appeal to be filed out of time the Applicant argues the delay was short that is **9 days** from actual notice, explained by Counsel's error, and that the Appeal has high prospects of success.
- 20) On validity of the Taxation Ruling, the Applicant avers that the Ruling should be set aside or remitted for fresh Taxation. The Applicant claims the Taxing Officer ignored a written contract dated 26/08/2022, that fixed the fees. Secondly that the taxed items he admitted were not in the Fourth Schedule of the Auctioneers Rules and lastly that the Taxing Officer relied on a Valuation Report (PJ Crafts Ltd) that was never served on the Applicant, violating natural justice.
- 21) The Applicant has relied on Constitution of Kenya, 2010 Articles 48 on access to justice, 50 on fair hearing and 159 Judicial Authority. He also referred to the Civil Procedure Act at Sections 1A, 1B on objective of the Act, 3, 3A on inherent powers, and 95 on enlargement of time for filing an Appeal. The Applicant also referred to the Auctioneers Rules, Rule 55 which establishes that fees are governed by the Fourth Schedule unless a contract exists. That Rule 55(5) sets the 7-day limit for filing a Memorandum of Appeal.
- 22) For case law the Applicant in his submissions referred to **Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999]**

2EA 331 which established factors for enlargement of time such as delay period, reasons, prejudice among others; **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR**, which reaffirmed the **Leo Sila Mutiso (supra)** principles; **KCB Ltd v Jonathan Ndolo Mulwa [2021]eKLR**, where the Court stated that Courts may excuse short delays caused by Counsel in the interest of justice.

23) The case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2001] (Civil Appeal 95 of 1999) [2001] KECA 362 (KLR) (8 June 2001) (Judgment)** where the Court held that parties are bound by their contracts; Courts cannot rewrite them; **CS Ministry of Health v Aura & 13 Others [2024] (Civil Application E583 of 2023) [2024] KECA 2 (KLR) (19 January 2024) (Ruling)** in which the Court defined an arguable appeal as one raising a bona fide point, even if success is not guaranteed.

24) The Applicant also relied on the case of **Edward Kamau v Hannah Mukui Gichuki [2015] KEHC 7571 (KLR)** and averred that the right of appeal is a constitutional cornerstone of the rule of law and the final case relied upon by the Applicant is the case of **Letshego Kenya Limited v Moiruri t/a Moco Auctioneers [2023] [2023] KEHC 18069 (KLR)** where

the Court confirmed that a contract overrides the Auctioneers Rules' fee schedule.

Respondent's Submissions

- 25) In their submissions dated 4/07/2025, the Respondent frames the case around what he has termed as three main issues which rotate around the three failures by the Applicant.
- 26) The first issue which is a failure according to the Respondent is that the Ruling dated 20/03/2025 was fixed by consent. Therefore, the Applicant's claim of unawareness is legally untenable. They argue that blaming an Advocate is a casual shift of responsibility that does not meet the legal threshold for an extension of time.
- 27) The second issue is the one he terms as failure to meet Stay of Execution Test. That under Order 42 Rule 6(2), a stay requires proof of substantial loss. The Respondent argues that having to pay a lawful debt in form of taxed costs is not a loss but a legal obligation. That in fact the Applicant failed to offer any security for costs, which is a mandatory show of good faith.
- 28) And the third issue is the finality of Taxation. According to the Respondent, Taxing Officer's discretion is sacrosanct. Unless the Applicant can prove a gross error of principle or a manifestly excessive award, the Court has no business interfering with the specialized findings of the Taxing Master.

- 29) The statutory framework that the Respondent relied on is Order 50 Rule 6 of the Civil Procedure Rules, regarding the Court's discretion to enlarge time, emphasizing it must be exercised judicially, not as a matter of course.
- 30) Order 42 Rule 6(2) which outline the cumulative three-point test for a stay of execution being proof of substantial loss, no unreasonable delay and provision of security.
- 31) He also referred to the Principle of Equity aids the vigilant, which is a common law maxim and he argued that the Applicant's lack of interest in the case until the auctioneers arrived defeats their right to relief.
- 32) At the same time, he relied on the cases of **Habo Agencies v. Wilfred Odhiambo [2016] KECA 477 (KLR)** and he stated that litigants cannot simply blame their Advocates; they have a personal duty to follow up on their cases. Thus, he dismissed the Applicant's excuse that they were not notified by their former Lawyer.
- 33) He also referred to the case of **Edith Gichungu Koine v. Stephen Njagi Thoithi [2014] eKLR** where the Court stated that discretion to enlarge time must be guided by the reason for delay and prejudice to the Respondent. Therefore, it is his submission that the Respondent is prejudiced by being denied the fruits of their Judgment.
- 34) The Respondent also relied on the case of **Kenya Shell Ltd v. Benjamin Karuga Kibiru [1986]** where the Court stated that substantial loss must be proved with evidence;

mere allegations of loss are insufficient for a stay. From this case he argued that the Applicant has not shown why paying the costs would cause irreparable harm.

35) Additionally another case that he relied on was the case of **Focin Motorcycle Co. Ltd v. Ann Wambui Wangui [2018] KEHC 8358 (KLR)** where it was decided by the Court that proposing security is a mark of good faith in stay applications. That since the Applicant has not proposed the security the application is in bad faith since the Applicant failed to offer any security to the Court. The other case referred to is the case of **KTK Advocates v. Nairobi County Government [2024] KEELC 5467 (KLR)** according to the Court, Courts should not interfere with Taxation unless the fee is manifestly excessive. And it was the Respondent's submission that the Taxing Officer's Ruling was legally sufficient and final.

36) The Respondent concluded his submissions by urging the Court to dismiss the Applicant's application.

Legal Analysis and Disposal

37) From my perusal of the application, pleadings and submissions I find that the issues I would want to consider are:

- i. Whether application for the enlargement of time is merited;***
- ii. Whether the Taxing Master was right in the approach taken;***

- iii. Whether application for stay is merited;**
 - iv. What reliefs should the Court issue;**
 - v. Who bears the costs of this application?**
- 38) Odunga J. (as he then was) in **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR** held:

“Therefore, an Applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in Daphne Parry vs. Murray Alexander Carson [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the Court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as

time-barred, even at the risk of injustice and hardship to the appellant.”

39) Section 79G of the Civil Procedure Act provides as follows:

“Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”

Section 95 provides as:

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

40) The Supreme Court in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** enumerated the

principles to consider before granting extension of time as follows:

“... it is clear that the discretion to extend time is indeed unfettered... we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- 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.”

- 41) The instant application presents a scenario where there is competing interests of Constitutional rights to access justice being advanced by the Applicant against the interests of sanctity of Court timelines and the finality of litigation being advanced by the Respondent.
- 42) With regard to extension of time, the Applicant blames the 15-day delay on former Counsel’s silence and subsequent failure to file the Appeal.
- 43) Now, the issue of mistake of Counsel is a recognized ground for relief, but it is not a blank check. As established in **Habo Agencies Limited v. Wilfred Odhiambo Musingo [2015] eKLR**, a party must show they were not complicit in the delay. The Applicant admits to missing the 7-day window under Rule 55(5) of the Auctioneers Rules but blames former Counsel.
- 44) While **Habo Agencies (supra)** puts a burden on the client. However, a mistake of an Advocate should not necessarily be visited upon a litigant if the litigant acted promptly upon discovery. A 15-day delay in my opinion is non-inordinate. The Respondent’s evidence that the Ruling date was fixed by consent and available on the Case Tracking System (CTS) creates a presumption of constructive notice. Under **Nicholas Kiptoo Arap Korir Salat v. IEBC**

[supra], the Supreme Court held that an extension of time is not a right but an equitable remedy granted to the diligent.

- 45) A litigant should not lose a multi-million-shilling claim because an Advocate failed to check a computer system (CTS). The Administrative Error of Counsel is a recognized ground for enlargement of time where the intended Appeal is highly arguable.
- 46) In the case of **Belinda Murai & Others v. Amos Wainaina [1979] KECA** established that the Court has a duty to ensure that the blunders of an Advocate do not cause a total miscarriage of justice for the client.
- 47) The Court finds that while the 7-day limit under Rule 55(5) is strict, it must be balanced against Article 159(2)(d) of the Constitution, which mandates justice without undue regard to technicalities. The delay of 15 days is not inordinate as already stated. Although the Respondent argues the date was fixed by consent, the Applicant's prompt change of Counsel and filing of this application demonstrates a lack of indolence.
- 48) There is a *prima facie* case that the Taxing Master may have misdirected himself by ignoring a private contract and taxing items not found in the Auctioneers Act Schedule. To shut out the Applicant now would be to validate a potentially illegal award of nearly KES 10 million.
- 49) The Taxing Officer is a creature of Statute. The Applicant's strongest substantive point is the **Service**

Agreement dated 26/08/2022. Rule 55 of the Auctioneers Rules explicitly allows for fees to be governed by contract rather than the Fourth Schedule. If the Taxing Officer ignored a valid contract, he acted without jurisdiction. He erred in principle by ignoring the contract terms. Also, the Officer erred by taxing demolition/eviction costs which he himself admitted were not in the Schedule. *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169

- 50) Under the principle in **MacFoy v. United Africa Co. Ltd [1961] 3 All E.R. 1169** if an act is a nullity, it is void *ab initio*. The Applicant argues that the Taxing Officer acted outside his powers by ignoring a binding contract and taxing non-statutory items. If the Ruling is potentially a nullity, the Applicant should not be taxed via security for costs just to prove it is wrong.
- 51) In **Letshego Kenya Limited v. Moiruri t/a Moco Auctioneers [supra]**, the High Court held that where a contract exists, the Taxing Master cannot resort to the statutory schedule. A Taxing Officer cannot freelance outside the agreed contract or the statutory schedule.
- 52) On the issue of stay of execution, whereas the Respondent is entitled to the fruits of his Judgment, as stated in **Kenya Shell Ltd v. Kibiru (supra)** but the Applicant is entitled to ensure those fruits are legally harvested. It is my opinion that to allow execution on a Ruling that appears to be a jurisdictional nullity would cause substantial loss to the

Applicant. The Respondent demands KES 9.65 million as security.

53) The Applicant has raised a fundamental challenge to the jurisdiction of the Taxing Officer. Under Order 42 Rule 6(2), the Applicant must prove substantial loss. Paying a debt is not usually a loss. However, if the Respondent is allowed to auction the Applicant's property based on a Ruling that ignored a binding contract, the damage would be irreparable. The Respondent has not demonstrated their ability to refund KES 9.6 million should the Appeal succeed.

54) Further, the Respondent's demand for a full deposit of KES 9.6 million is punitive. If the Court forces the Applicant to tie up nearly 10 million shillings just to exercise a constitutional right of appeal, the Court is effectively selling justice and pushing away litigants from the seat of justice.

Disposal Orders:

a) Leave is hereby granted for M/S KN Law LLP to come on record.

b) The Application for enlargement of time is granted.

c) A Stay of Execution of the Taxation Ruling 20/03/2025 is hereby granted pending the hearing and determination of the Appeal.

d) The Applicant is directed to deposit a sum of KES 1,000,000 (10%) in joint bank account with both Counsel as the signatories within 30 days.

- e) In default of the deposit in Order 4 (above), the stay shall stand vacated and the Respondent (through Mamalo Auctioneers) shall be at liberty to proceed with execution.***
- f) The Taxation Ruling is set aside in its entirety.***
- g) The Court admits the instant appeal filed against the Taxation Ruling delivered by Honourable James Wanyanga dated 20/03/2025 as duly filed and served upon payment of the requisite fees.***
- h) The Respondent's Bill of Costs is remitted for fresh Taxation before a different Taxing Master, with a specific instruction to apply the rates agreed upon in the contract of 26/08/2022.***
- i) The Court grants the firm of M/S KN LAW LLP leave to come on record for the Applicant in place of M/S Karanja Kang'iri & Co. Advocates pursuant to the Consent Notice of Change of Advocates dated 02/04/2025 as annexed to this application.***
- j) The Respondent shall pay the Applicant the costs of this application.***

It is so ordered.

**DATED, SIGNED AND DELIVERED THROUGH VIDEOLINK AT
THIKA ON THIS 24TH DAY OF FEBRUARY 2026.**

MOGENI J
JUDGE

In the presence of:

..... for Applicant

..... for the Respondent

Melita..... Court Assistant

MOGENI J
JUDGE

ORIGINAL