



REPUBLIC OF KENYA



KENYA LAW
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Mwangi v Asati Anyona & Company, Advocates (Environment and Land Miscellaneous Application 11 of 2023) [2024] KEELC 300 (KLR) (22 January 2024) (Ruling)

Neutral citation: [2024] KEELC 300 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 11 OF 2023**

EM WASHE, J

JANUARY 22, 2024

IN THE MATTER OF REFERENCE APPLICATION

AND

IN THE MATTER OF ADVOCATE/CLIENT BILL OF COSTS

AND

**IN THE MATTER OF THE DEPUTY REGISTRAR DECISION IN
THE RULING DELIVERED ON THE 24TH DAY OF AUGUST 2023**

AND

IN THE MATTER OF: ADVOCATES (REMUNERATION)(AMENDMENT) ORDER, 2014

AND

IN THE MATTER OF THE ADVOCATE ACR

BETWEEN

IGNATIUS CHEGE MWANGI APPLICANT

AND

ASATI ANYONA & COMPANY, ADVOCATES RESPONDENT

RULING

1. The Applicant herein filed a notice of motion application dated September 20, 2023 (hereinafter referred to as “the present application”) seeking for the following orders; -
 - a. That this application be certified urgent and heard *ex-parte* in the first instance.



- b. That this honourable court be pleased to issue a stay orders staying the execution of the taxation ruling delivered on the August 24, 2023 and all other consequential orders pending the hearing and determination of the intended reference .
 - c. That this honourable court be pleased to enlarge time out of the stipulated fourteen (14) days for the Applicant to file a reference (a draft reference is annexed hereto) against the decision of the taxing officer delivered on the August 24, 2023 .
 - d. That the draft reference annexed herein and dated September 14, 2023 be deemed by this honourable court as duly filed by the Applicant upon payment of the requisite court fees.
 - e. That the costs of this application be in the cause.
2. The prayers in the present application are premised on various grounds contained in the body of the said application as well as the supporting affidavit sworn on the September 20, 2023 which can be summarised as follows; -
- a. The Applicant is aggrieved with the determination of the taxing officer dated August 24, 2023 on the advocate/client bill of costs dated July 27, 2023 amounting to KShs 2,175,817.80/-.
 - b. Consequently thereof, the Applicant wrote to the taxing officer requesting for the grounds and/or reasons on the August 31, 2023 as required under Order 11 of the Advocates Remuneration Order.
 - c. On the same day the Applicant requested for the said grounds and/or reasons, the same were supplied to him by the Deputy Registrar.
 - d. Unfortunately, the Applicant was not able to prepare and file the relevant reference against the said ruling by the taxing officer dated August 24, 2023 within the prescribed time of fourteen (14) days under Rule 11 of the Advocates Remuneration Act.
 - e. The Applicant is however desirous of appealing against the ruling dated on August 24, 2023 by the taxing officer and therefore seeks for enlargement of time to do so.
 - f. Further to that, the Applicant is seeking for a stay of the said ruling dated August 24, 2023 by the taxing officer as well as the consequential proceedings thereof pending the hearing and determination on the intended reference .
 - g. The Applicant submits that if an order of stay of execution is not issue against the ruling dated August 24, 2023 and all consequential proceedings thereof, then the intended reference will be rendered nugatory which will be prejudicial.
 - h. The Applicant undertook to comply with any condition that will be set by this honourable court as a pre-condition granting an order of stay thereof.
3. The present application was served upon the Respondent who opposed the same by filing a replying affidavit dated October 12, 2023.
4. In the replying affidavit, the Respondent outlined the following grounds for opposing the present application ; -
- a. The ruling dated August 24, 2023 was read in the presence the Applicant on the material day.



- b. Upon the pronouncement of the ruling dated August 24, 2023, the Applicant was furnished with the grounds and/or reasons for the determination within the prescribed time on the August 31, 2023.
 - c. So far, the Applicant has not given any sufficient reason as to why the substantive reference was not filed within the prescribed time of fourteen (14) days thereafter.
 - d. Further to that, the Respondent stated that the Applicant was granted a stay of execution of the said ruling dated August 24, 2023 for a period of 45 days which has since lapsed.
 - e. The Applicant herein has made the present application after an inordinate delay and has not provided any security towards a precondition for granting the purported stay of execution he wishes to be granted.
 - f. Lastly, the Respondent pointed out that the Applicant had not attached the relevant intended reference and therefore the present applicant is fatally defective and should be dismissed forthwith.
5. The Applicant upon being served with the replying affidavit dated October 12, 2023 filed a further affidavit dated October 31, 2023 wherein he reiterated the grounds in support of the present Applicant and sought to have the orders therein to be granted.
 6. The Applicant and the Respondent then proceeded to file their respective submissions on the December 5, 2023 and November 29, 2023 respectively.
 7. Indeed, this honourable court has perused the present application , the replying affidavit thereof, the further affidavit as well as the submissions by the parties and the issues for determination are as follows; -
 - Issue no. 1- Has the applicant provided sufficient reason for the enlargement of time to file a reference ?
 - Issue no. 2- Does the applicant have sufficient grounds to warrant the issuance of an order of stay pending the hearing and determination of the intended reference ?
 - Issue no. 3- Is the applicant entitled to the orders sought in the present application?
 - Issue no.4- who bears the costs of the present application?
 8. The issues having been duly outlined hereinabove, the same will now be discussed hereinbelow.

Issue No 1- Has the Applicant Provided Sufficient Reason for the Enlargement of Time to File a Reference?

9. The first issue for determination is whether or not this honourable court should enlarge the time for the Applicant to prepare and file their intended reference.
10. It is not in dispute that the Applicant was supplied with the reasons and/or grounds relied upon by the taxing officer in the determination of the bill costs dated July 28, 2023 on the August 31, 2023.
11. Paragraph 11 of the *Advocates (Remuneration) Order* which provides 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 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.
12. Consequently therefore, the Applicant was required to prepare and file the relevant reference to this honourable court within fourteen (14) days from the August 31, 2023.
13. The Applicant did not comply with this provision of the *Advocates (Remuneration)(Amendment) Act*, Cap 16 which was expiring on the September 16, 2023.
14. Unfortunately, the Applicant has not provided any reasons as to why there was non-compliance on his side to warrant this honourable court exercise its discretion to enlarge time.
15. Be as it may, a reference against a determination of a taxing officer in relation to a bill of costs is in fact an appeal against the said determination.
16. While the provisions of Order 11 of the Advocates (Remuneration) Amendment Act, Cap 16 may provide a specific period of instituting a reference, Rule 11 (4) of the same Advocates (Remuneration) (Amendment) Act, Cap 16 also allows for the enlargement of the said period.
17. In the case of *nyakundi & company advocates –vs- kenyatta national hospital board* [2005] eKLR the court held that: -
- “Under Rule 11 (2) of the Advocates (Remuneration) Order quoted above, a definite time frame for filing a reference is given. It is fourteen (14) days from the receipt of the reasons. If an objector is delayed in making his/her reference he/she may apply for enlargement of time to make the reference under Rule 11(4) of the same Order.”
18. Although the Applicant has not given any reasons as to why there was a delay in filing the intended reference within the fourteen (14) days provided in law, this honourable court is alive to the provisions of article 50 of the Kenyan *Constitution*,2010 which guarantees the right to a fair hearing.
19. The intended reference by the Applicant is a method of appeal provided in law which promotes the fair hearing of disputes by parties.
20. As such, this honourable court despite the lapse of the prescribed time under Order 11 of the *Advocates (Remuneration)(Amendment) Act*, Cap 16 will not hinder the Applicant’s right of appeal purposes of giving a fair hearing to the Applicant.
21. In essence therefore, the Applicant’s prayer for enlargement of time to file the intended reference is merited.

Issue No. 2 – Does the Applicant have Sufficient Grounds to Warrant the Issuance of an Order of Stay Pending the Hearing and Determination of the intended refeRence ?

22. The second issue for determination is whether the Applicant is entitled to an order of stay of execution pending the hearing and determination on his intended reference .
23. Order 42 Rule 6(1) of the *Civil Procedure Rules*,2010 grants our Kenyan court s jurisdiction and/or discretion to grant a prayer of stay of execution pending the hearing of an appeal process.



24. In the case of *Butt-versus- Rent Restriction Tribunal* (1979) eKLR, the court stated as follows; -
- “ a. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 - c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 - e. The court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
25. The main ingredients in considering an application for stay of execution pending appeal can be categorised into three.
26. The first ingredient is whether the Applicant stands to suffer substantial loss if the said orders of stay are not issued.
27. In the present application , the Applicant was condemned to pay a sum of KShs 2,166,291/= pursuant to the ruling of the taxing officer pronounced on 2August 4, 2023.
28. The Applicant submits that this taxed figure is erroneous, excessive, punitive and unlawful hence the intended reference before this honourable court .
29. The Applicant is of the view that if the Respondent is allowed to execute for the said amount of KShs,2166,291/- before the hearing and determination of the Intended reference , then he will suffer substantial loss and in fact the intended reference will be rendered nugatory.
30. Indeed, in the honourable court view, a sum of kenya shillings two million (KShs 2,000,000/-) is a substantial amount to any litigant in court .
31. The recovery of this amount from the Applicant will indeed occasion him substantial loss by any normal standard.
32. Further to that, once the Respondent procures this amount from the applicant, then the intended reference will be of no use as the disputed figure will have been realised.
33. In essence therefore, the Respondent’s realisation of the taxed amount will render the intended reference to be nugatory.



34. The second ingredient for consideration is whether the present application was brought without undue delay.
35. The Respondent has alleged that the present application was filed outside time and after an inordinate delay.
36. However, this honourable court is of a contrary opinion because the period of filing the reference was to lapse on the September 16, 2023.
37. The Applicant after the lapse of the fourteen (14) days period filed the present application on the September 22, 2023 which is just about a week late.
38. The period of one week between the date of when the prescribed time lapsed and the date of filing the present application is not inordinate.
39. Consequently, this honourable court is of the view that the present application has been filed without any delay.
40. The last ingredient is that of security of costs as a pre-condition for the granting of an order of stay of execution.
41. The Applicant has committed to abide by any terms and conditions that this honourable court shall grant as a pre-condition of granting the stay of execution.
42. The Respondents have submitted that the Applicant has not offered any security for costs to warrant the granting of the said orders of stay.
43. Be as it may, this honourable court does not have any doubt that the Applicant is a man of means capable to meeting the terms and conditions recommended as security for costs.
44. Consequently therefore, the Applicant has again satisfied this honourable court of his ability to comply with this particular ingredient.

Issue No. 3- Is the Applicant Entitled to the Orders Sought in the present application ?

45. The third issue for determination is whether or not the Applicant is entitled to the orders sought in the present application .
46. The honourable court has discussed the issues for determination hereinabove and arrived at the conclusion that indeed the Applicant is entitled both prayers discussed in issues no.1 and 2 hereinabove.
47. In essence therefore, this honourable court is perused that the Applicant is entitled to the prayers sought in the present application .

Issue No.4- Who Bears the Costs of the Present Application ?

48. The last issue for determination is who should bear the cost of the present application .
49. It is a settled rule that costs follow the outcome of the proceedings unless otherwise ordered.
50. In the present application , the intention was to enable the Applicant exercise his right of appeal in the pursuit of justice.
51. Costs of the present application will therefore abide the outcome of the intended reference .



Conclusion

52. In conclusion, this honourable court hereby makes the following orders in determination of the notice of motion application dated 20th of September 2023; -
- A. The application dated 20th of september 2023 is merited.
 - B. The applicant is granted leave of 14 days from the date of this ruling to prepare, file and serve the intended reference against the ruling of the taxing officer pronounced on the 2August 4, 2023.
 - C. An order of stay of execution of the ruling by the taxing officer pronounced on the August 24, 2023 together with all other consequential proceedings tthereof be and is hereby issued pending the hearing and determination of the intended reference herein.
 - D. The applicant shall deposit a sum of kenya shillings two hundred & fifty thousand (kshs 250,000/-) in the court as security for costs pending the hearing and determination of the intended reference within fourteen (14) days from the date of this ruling .
 - E. In the event of a default in order no.b and/or d hereinabove, the order of stay of execution issued in order c will stand automatically lapsed and/or discharged.
 - F. Costs will abide the outcome of the intended reference .

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC court ON 22ND OF JANUARY 2024.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

court Assistant: Mr. Ngeno

Advocates For The Applicant: Mr. Anyona

Advocates For The 1st Respondent: Mr. Chege (N/A)

