



**Kemboy Law Advocates v Narok County Government (Miscellaneous Application E010 of 2023) [2024] KEELC 269 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 269 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
MISCELLANEOUS APPLICATION E010 OF 2023  
EM WASHE, J  
JANUARY 18, 2024  
IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA  
AND  
IN THE MATTER OF TAXATION OF COSTS BETWEEN THE ADVOCATE & CLIENT**

**BETWEEN**

**KEMBOY LAW ADVOCATES ..... ADVOCATE**

**AND**

**NAROK COUNTY GOVERNMENT ..... CLIENT**

**RULING**

1. The Client Narok County Government (hereinafter referred to as “the Applicant”) filed a Notice of Motion dated 11.09.2023 (hereinafter referred to as “the present application”) seeking the following orders; -
  - a. That this Application be certified as urgent and be heard ex-parte in the first instance.
  - b. That this Honourable Court be pleased to issue a stay of proceedings in execution of the taxation ruling issued on the 10<sup>th</sup> of August 2023 and all other consequential orders pending the hearing and determination of this application.
  - c. That this Honourable Court be pleased to issue a stay of proceedings in execution of the taxation ruling issued on the 10<sup>th</sup> of August 2023 and all other consequential orders pending the hearing and determination of the intended Reference.
  - d. 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 herein) against the decision of the Taxing Officer delivered on the 10<sup>th</sup> August 2023.



- e. That the draft Reference annexed herein and dated 11<sup>th</sup> September 2023 be deemed by this Honourable Court as duly filed by the Applicant upon payment of the requisite court fees.
  - f. That the costs of this Application be in the cause.
2. The grounds upon which the prayers above are premised are contained in the body of the present application as well as the supporting affidavit by John Maiyani Tuya sworn on the 15.09.2023 and can be summarised as follows; -
- a. The Applicant is aggrieved by the decision of the Taxing Officer pronounced on the 10.08.2023 relating to the Bill of Costs dated 25.01.2023 which awarded a sum of KShs 15,348,678/-) in favour of the Respondent.
  - b. The Applicant proceeded to request for the reasons and/or grounds relied upon by the Taxing Officer on the 16.08.2023 and the same were supplied on the 25.08.2023.
  - c. At the time the reasons and/or grounds by the Taxing Officer were availed to the Applicant, the stipulated period of Fourteen (14) days within which one is allowed to lodge a Reference had since lapsed.
  - d. The Applicant is therefore seeking for an enlargement of the period within which the Applicant can file its Reference.
  - e. Further to that, the Applicant is praying that the Taxation Ruling dated 10.08.2023 together with all consequential proceedings be stayed pending the hearing and determination of the intended Reference.
  - f. The Applicant is of the view that if the stay of execution orders is not issued, then the Respondent will proceed to execute the same and recover the disputed amount thereby causing substantial loss to the Applicant as well as render the intended Reference nugatory.
3. The present application was opposed by the Respondent through a Replying Affidavit sworn on the 17.10.2023 on the following grounds; -
- a. The prayer for enlargement of time was not merited as no valid reason was advanced by the Applicant as to why the Reference was not filed within the Fourteen (14) days after receiving the reasons and/or grounds of the Taxing Officer on the 25.08.2023.
  - b. Secondly, the Respondent stated that the failure by the Applicant to file the Reference by 08.19.2023 when the said Fourteen (14) Days lapsed, caused such a right to be extinguished and the same can not be allowed as sought by the Applicant.
  - c. The Respondent pointed out to the Honourable Court that the Applicant was in a habit of failing to adhere to timelines given by Judicial Officers and/or statute hence the failure to file the Reference within Fourteen (14) days as prescribed by law is intentional and deliberate.
  - d. As to the issue of an order of stay of execution pending the hearing and determination of the Ruling by the Taxing Officer dated 10.08.2023, the Respondent were of the view that there was no substantial loss which had been demonstrated by the Applicant to warrant an issuance of the same.
  - e. The Respondent pleaded that the present Application was an abuse of the court process which should not be entertained and therefore the present application should be dismissed.



4. The opposing parties then filed submissions with the Applicant filing theirs on the 08.11.2023 while the Respondent filed theirs on the 09.11.2023.

5. The Honourable Court has indeed perused the present application, the Replying 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?

6. 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?**

7. 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.

8. 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 25.01.2023 on the 25.08.2023.

9. 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.

10. Consequently therefore, the Applicant was required to prepare and file the relevant Reference to this Honourable Court within Fourteen (14) days from the 25.08.2023.

11. The Applicant did not comply with this provision of the *Advocates (Remuneration)(Amendment) Act*, Cap 16 which was expiring on the 08.09.2023.

12. 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.

13. 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.

14. 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.



15. In the case of *Nyakundi & Company Advocates v 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*.”

16. 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.

17. The intended Reference by the Applicant is a method of Appeal provided in law which promotes the fair hearing of disputes by parties.

18. 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 for purposes of giving a fair hearing to the Applicant.

19. 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?**

20. The second issue for determination is whether the Applicant is entitled to an Order of stay of execution pending the hearing and determination of the intended Reference.

21. Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010 grants our Kenyan Courts jurisdiction and/or discretion to grant a prayer of stay of execution pending the hearing of an appeal process.

22. In the case of *Butt v 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.”

23. The main ingredients in considering an application for stay of execution pending appeal can be categorised into three.
24. The first ingredient is whether the Applicant stands to suffer substantial loss if the said orders of stay are not issued.
25. In the present Application, the Applicant was condemned to pay a sum of Kshs 14,078,587.50/= pursuant to the Ruling of the Taxing officer pronounced on 10.08.2023.
26. The Applicant submits that this taxed figure is erroneous, excessive, punitive and unlawful hence the intended Reference before this Honourable Court.
27. The Applicant is of the view that if the Respondent is allowed to execute for the said amount of KShs 14,078,587.50/= 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.
28. Indeed, in the Honourable Court view, a sum of 14,078,587.50/= is a substantial amount to any litigant in Court.
29. The recovery of this amount from the Applicant will indeed occasion him substantial loss by any normal standard.
30. 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.
31. In essence therefore, the Respondent’s realisation of the taxed amount will render the intended Reference to be nugatory.
32. The second ingredient for consideration is whether the present application was brought without undue delay.
33. The Respondent has alleged that the present application was filed outside time and after an inordinate delay.
34. The present application was filed on the 14.09.2023 while the prescribed time had lapsed on the 08.09.2023.
35. The Applicant filed the present Application about Seven (7) days after the expiry of the prescribed time on the 08.09.2023.
36. The period of Seven (7) days between when the prescribed time lapsed and when the present Application was filed cannot be deemed to be inordinate.
37. This Honourable Court is of the view that the present application has been filed without any delay.
38. The last ingredient is that of security of costs as a pre-condition for the granting of an order of stay of execution.
39. 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.
40. This Honourable Court does not have any doubt that the Applicant is capable to meeting the terms and conditions recommended as security for costs.



41. Consequently therefore, the Applicant has again satisfied this Honourable Court of its ability to comply with this particular ingredient.

**Issue no. 3 - Is the applicant entitled to the orders sought in the present application?**

42. The third issue for determination is whether or not the Applicant is entitled to the orders sought in the present Application.

43. 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.

44. 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?**

45. The last issue for determination is who should bear the cost of the present Application.

46. It is a settled rule that costs follow the outcome of the proceedings unless otherwise ordered.

47. In the present Application, the intention was to enable the Applicant exercise his right of appeal in the pursuit of justice.

49. Costs of the present Application will therefore abide the outcome of the intended Reference.

**Conclusion**

49. In conclusion, this Honourable Court hereby makes the following Orders in determination of the Notice of Motion Application dated 20<sup>th</sup> of September 2023; -

- a. The application dated 11<sup>th</sup> 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 10.08.2023.
- c. An order of stay of execution of the ruling by the taxing officer pronounced on the 10.08.2023 together with all other consequential proceedings thereof 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 one million five hundred thousand (kshs 1,500,000/-) 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 either 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 18<sup>TH</sup> OF JANUARY 2024.**

**EMMANUEL.M.WASHE**

**JUDGE**

In the presence of:-



Court Assistant: Mr. Ngeno

Advocates for the Applicant: Mr. Osongo holding brief for Client/Applicant

Advocates for the 1<sup>st</sup> Respondent: Mr. Kere

