



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

Khator (Suing on Behalf of the Estate of the Late Rashid Khato Salim -Deceased) v Khalif & another (Environment & Land Case 107 of 2015) [2024] KEELC 737 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 737 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 107 OF 2015

EK MAKORI, J

FEBRUARY 15, 2024

**IN THE MATTER OF: THE ADVOCATES ACT IN THE MATTER OF
THE ADVOCATES REMUNERATION AMENDMENT ORDER, 2014**

AND

**IN THE MATTER OF: TAXATION OF PARTY & PARTY BILL OF COSTS ARISING
FROM ELC CASE NO 107 OF 2015 (FORMERLY MOMBASA ELC CASE NO 119 OF 2015**

BETWEEN

**HARUN RASHID KHATOR (SUING ON BEHALF OF THE ESTATE OF THE
LATE RASHID KHATO SALIM -DECEASED) PLAINTIFF**

AND

ABDULRAZAK KHALIF 1ST DEFENDANT

THEOPISTA MKIWA MWAZIGHE 2ND DEFENDANT

RULING

1. The application dated October 26, 2022 seeks the following orders:
 - i. Spent.
 - ii. That a stay of execution of the notice to show cause dated September 29, 2022 be granted pending the hearing of this application.
 - iii. That the applicant be granted leave to file objection proceedings out of time.
 - iv. The costs of this application be provided.
2. The respondent filed a bill of costs on 28th September 2017 for a sum of Kshs.404, 677/= following the conclusion of Malindi ELC Civil Suit No 107 of 2015 where the applicant was the plaintiff and the



respondent was the 2nd defendant. The taxing master gave a ruling on the taxation on April 27, 2018, the ruling according to the applicant was without notice and reasons. The applicant was aggrieved and objected to the award of the taxing master and wrote a letter to the Deputy Registrar, ELC Court at Malindi on October 23, 2019 seeking reasons why the 2nd defendant's bill of costs was taxed at Kshs.404,667/- yet the 1st defendant's bill of costs was taxed at Kshs.192,000/=.The 2nd defendant/respondent issued the applicant with a Notice to Show Cause on October 31, 2022 which the applicant responded to vide a replying affidavit dated October 26, 2022 where he stated that it would be an injustice to him if execution is allowed by the Honourable Court since he had not been heard.

3. There was irregularity in the manner the advocate for the applicant entered the proceeding after judgment without leave. The issue has long been corrected hence this ruling.
4. It will be noted that the application was filed on October 22, 2022, a relatively simple application, but as the record will show, the advocates for the applicant have not been providing the much-needed legal counsel leading to a whirlwind in the manner the matter has proceeded in this Court this far.
5. The reasons for filing this application late are said to have been the failure to be provided with reasons for the taxation by the taxing master, and filing the application in a skeleton file, that is ELC Misc. Civ. App.No. 20 of 2018.
6. The applicant has cited the case of *Stanley Kaboro Mwangi & 2 others v Kanyamwi Trading Company Ltd* [2015], on the need for this Court to exercise its discretion in enlarging the time within which to file the Objection Proceedings in favour of the applicant since reasons for the delay have been provided.
7. The applicant further stated that a stay will be paramount in this matter since if the same is not granted, the bill subject to the Objection Proceedings will be executed without the benefit of hearing the applicant. Therefore, the Court is called upon to exercise its discretion judiciously in favour of the applicant. The following cases are quoted to surmount the applicant's contention – *Global Tours & Travel Ltd* Nairobi winding Cause No. 43 of 2000, *Millicent Wamattha Njogu v Pauline Nyambura Waweru* [2022] eKLR and *Michael Ntouchi Mitheu v Abraham Kivondo Musau* [2021] eKLR.
8. The 2nd respondent on the other hand contended that the applicant had come to Court inordinately late, the same application was heard and determined by this Court - Olola J. had granted the applicants 14 days to file the Objection Proceedings. It never happened until execution proceedings in the nature of a NTSC were taken out, which triggered this application filed seeking the very same orders this Court had already granted but never complied with. The 2nd respondent stated that this violated the doctrine of res judicata as laid in section 7 of the *Civil Procedure Act* and as elaborately held in the cases of *Jonathan Baya Mketta & others v Witu Nyongoro Ranch (DA) Co. Ltd & 3 others* [2019] eKLR, citing with approval the case of *Uhuru Highway Development Ltd v Central Bank of Kenya and 2 others* [1996] eKLR and *Accredo AG & 3 others v Steffano Uccelli & another* [2019] eKLR.
9. The 2nd respondent averred under rule 11(4) of the *Advocates Remuneration Order* that the discretion to enlarge the time within which to file an Objection to taxation Proceedings is a right accorded to the party, not his advocate. A cogent basis has to be laid for the exercise of the Court's discretion as enunciated in the cases of *George Owino Odhiambo & 13 Others v Kenya Railways Corporation & another* [2022] eKLR and *Odera Obar & Co. Advocates v Aquva Agencies Ltd* [2021] eKLR.
10. The 2nd respondent further asserted that no reasons have been given why the Objection was not filed within 14 days as directed by this Court. The alleged mix-up on the parent file and the miscellaneous file is not excusable as no Objections were ever filed upon perusal of those files. The 2nd respondent concluded that it amounts to disobedience of Court orders issued by Olola J. which cannot be excused as held in the case of *IEBC v John Omollo Nyakongo T/A H.R Ganijee & Sons* [2020] eKLR.



11. The issue for the determination of this Court is whether to grant an extension of time within which to file an Objection to the bill of costs subject to this litigation and whether to grant a stay of the NTSC proceedings before the Deputy Registrar of this Court.

12. Ruling in taxation was rendered by the taxing master of this Court on the 27th of April 2018. It was expected that the following steps were to be taken by the applicant pursuant to rule 11 of the [Advocates Remuneration Order](#):

Objection to decision on taxation and appeal to Court of Appeal

(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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal..

14. The applicant filed a similar application in Malindi Misc. App. No. 20 of 2018 for enlargement of time before this Court on 20th of September 2019 Olola J. gave the applicant 14 days to file Objections to the bill. It never happened until a NTSC was taken out, provoking the current application. Already by the fact that Olola J. rendered himself on an application similar to this one, then the issues raised herein have already been settled, or constructively settled necessitating the activation of the *res judicata* rule under section 7 of the [Civil Procedure Act](#). See the decision in [Kennedy Mokuu Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende](#) [2022] eKLR, where Mugo J. richly set out the parameters of *res judicata* to include applications and motions already decided which cannot be relooked again:

“Kuloba J., in the case of *Njangu vs Wambugu and another* Nairobi HCCC No 2340 of 1991 (unreported), held that:

‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic facelift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.....’

In the Court of Appeal case of *Siri Ram Kaura v M.J.E. Morgan*, CA 71/1960 (1961) EA 462 the then EACA stated that: -

“The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...

The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to



be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”

Hon. Justice G.V. Odunga in *Republic v Attorney General & another Ex parte James Alfred Koroso*, expressed himself thus on the issue of access to justice: -

“Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others.”

In *Uburu Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* the court in an earlier Application ruled that the Application before it was Res Judicata as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined “thrice by the High Court and twice by the Court of Appeal”, it could not be resuscitated by another Application.

The Court of Appeal further stated that:

“That is to say, there must be an end to Applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of or Civil Procedure Act caters for.”

15. This Court already gave the applicant a chance to object to the taxation which is the subject of the current application. 14 days were granted by Olola J. on the 8th of October 2019. The offer was not taken by the applicant. It bars me from further pronouncing myself on the issue of extension. It will lead to an absurdity and an abuse of the Court process. The applicant seems to be employing the legendary musical chair theatrics. What extension am I to provide that Olola J. did not provide? The current application was activated upon the realization that execution was imminent, a NTSC had been taken out. This abuse of the Court process cannot be allowed to hold further.
16. Flowing from the foregoing it will not be necessary to discuss whether to grant a stay of execution or not. The NTSC taken out arises from the impugned bill of costs. I have declined to grant an extension



of time and therefore it follows that I will not grant a stay of execution. It will serve no purpose. There will be nothing in this Court pending for consideration. Even if I were to exercise discretion to stay the proceedings before the Deputy Registrar of this Court, this is not one of those parties in whose favour discretion should be extended – see Mutungi J. in the case of *George Owino Odhiambo & 13 others v Kenya Railways Corporation & another* [2022] eKLR:

In the present matter the ruling given by the taxing officer contained the reasons and it was superfluous for the applicant to seek reasons on the taxation when the same had been provided. The notice of objection to the taxation was filed well over two months from the date the ruling was delivered. No reasons whatsoever have been proffered for the delay. It was incumbent on the applicants to explain the delay in giving notice of objection and in filing the reference against the taxation. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. See the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* (2014) eKLR where the Supreme Court laid the principles that should guide a court in exercising its discretion to extend time.

17. The upshot is that the application dated October 26, 2022 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 15TH DAY OF FEBRUARY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Thuku for the 2nd Respondent

Court Clerk. Happy

In the absence of:

Mr. Obonyo for the Applicant

