



Yooshin Engineering Corporation v AIA Architects Limited (Civil Appeal (Application) 147 of 2019) [2025] KECA 855 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KECA 855 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 147 OF 2019
F TUIYOTT, JA
MARCH 7, 2025

BETWEEN

YOOSHIN ENGINEERING CORPORATION APPELLANT

AND

AIA ARCHITECTS LIMITED RESPONDENT

(Being an application for extension of time to file a reference on taxation out of time from the ruling of the Deputy Registrar (Hon. H. Adika) dated 27th February, 2023 in Civil Appeal No. 147 of 2019)

RULING

1. In a ruling dated 27th February, 2023, Hon. Adika, a taxing officer of this Court, taxed the party and party bill of costs at Kshs.2,033,530 and in considering the Court Order that the appellant to the appeal (who is the respondent in the matter before me) gets half of the costs, awarded a sum of Kshs.1,016,765. Dissatisfied with the decision, the applicant, the respondent in the appeal, seeks that the taxed Bill of Costs be referred to a Judge for re-assessment or review, but is out of time.
2. Aware of this predicament, because the seven (7) days prescribed by Rule 117(4) of the [Court of Appeal Rules, 2022](#) for seeking a reference after a decision on taxation has lapsed, now brings this application dated 6th March, 2024 seeking the following orders;
 1. Spent
 2. That leave is to be granted to the applicant to refer the bill as taxed before a Judge out of time;
 3. That if leave is granted in prayer (1) above this instant application for reference for taxation is to be deemed to be duly filed within the statutory timelines and be placed before the Honourable Judge for reference;



4. That pending the hearing and determination of this application an interim order of stay of execution of the certificate of costs dated 27th February, 2023 to be issued against the respondents;
 5. That pending the hearing and determination of the reference before the Judge an interim order of stay of execution of the certificate of costs dated 27th February 2023 to be issued against the respondents.
 6. That the bill as taxed for instruction fees of Kshs. 2,000,000/- (Kenya Shillings two million) to be reduced to a reasonable amount.
 7. That the costs of the suit to be provided for.
3. This is an omnibus application where the applicant not only seeks leave of this Court to file an application for reference out of time but also an order of stay of execution of the ruling, and further, seeks substantive orders with regard to the reference. Whereas, as a single judge, I have powers under Rule 4 of the Rules of this Court to extend time for the doing of any act authorized or required by the Rules, I do not have like powers to grant orders for stay of execution as Rule 5(2)(b) requires such an application to be heard by the Court. So it is only the application for extension of time that I shall deal with.
 4. In the affidavit in support of the application sworn on 6th March, 2024 by Mohammed Munyanya, a director of the applicant, he deposes that neither they nor their advocates on record were served with the notice of taxation and were therefore not aware of the place and date of taxation and the bill was taxed in their absence. He further avers that the certificate of costs and ruling were served several months after it was issued and outside the statutory timelines for making an application for reference. He contends that there has not been inordinate delay in filing this application since the main suit is still ongoing and has not been heard. He further contends that they will be prejudiced if the orders herein are not granted as auctioneers have already proclaimed their office furniture and other equipment and if attached, will lead to the closure of their business.
 5. The application is opposed by the respondent. Bernard Kibet Sang, the advocate representing the respondent, vide a replying affidavit sworn on 12th March, 2024, contends that the Bill of Costs was served upon the applicant on the 18th August, 2022 via email and on 18th November, 2022, the Court notified the advocates for both parties that the matter was coming up for taxation on the 23rd November, 2022. He therefore contends that the applicant ought to have challenged the Bill of Costs at the point of taxation but failed to do so. He avers that at all times, the Court informed the parties of the status of the ruling and when the ruling was finally delivered on 27th February, 2023, the Court notified the parties via email on 27th April, 2023. Further, on 12th May, 2023 they forwarded the very email to the applicant's advocates for their settlement. He makes the argument that the applicant is only seeking to delay and deny the respondent the fruits of the ruling as the applicant's advocates were copied in all the email correspondences by the Court and for that reason they were aware of the court proceedings and did nothing about it. Counsel decries the delay of almost one year which he contends to be inordinate, is unexplained and prejudicial to his client
 6. Only the respondent has duly filed submissions to the Motion before me. I have considered the motion, affidavit in support and in opposition and the submissions.



7. The unfettered discretion granted to this Court under Rule 4 on extension of time is guided by the well settled considerations restated in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR) to be, inter alia:-

“The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors...”

8. It is contended by the applicant that the taxation and the ruling were heard and made without their participation or knowledge. On the other hand, it is asserted by the respondent that the applicant’s advocates were copied in all the emails by the Court informing the parties of the directions relating to the proceedings on the taxation and the email eventually forwarding the certified costs and ruling of the taxing master. This latter assertion may not be entirely true because although there is evidence the advocates for the applicant were notified of the ruling date of 27th February 2023 via an email of 23rd February 2023, the email of 27th April 2023 from Court forwarding the certificate of costs and the ruling was only addressed to the email of the respondent’s advocates.

9. Yet that is not the end of the matter. By their own admission, the applicant’s advocates were made aware of the certificate of costs and ruling by the respondent’s advocates in the email of 12th May, 2023. So to that date, the delay can perhaps be well accounted for. What is not explained is why it took the applicant from 12th May 2023 until 6th March 2024, a period of about 10 months, to file this Motion. I must therefore find, and so hold, that there has been an inordinate and unexplained delay in bringing the Notice of Motion of 6th March 2024 which is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

