



Archer & another v Archer & 2 others (Civil Appeal (Application) E039 of 2020) [2024] KECA 188 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 188 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E039 OF 2020
GV ODUNGA, JA
FEBRUARY 23, 2024**

BETWEEN

JAMES ARCHER 1ST APPELLANT

JOANNA TRENT 2ND APPELLANT

AND

INGER CHRISTINE ARCHER 1ST RESPONDENT

ANNALISE ARCHER CLARK 2ND RESPONDENT

HELLEN KAY HARTLEY 3RD RESPONDENT

(Being an Objection Notice under Rule 11 of the Advocates (Remuneration) Order against the Ruling of the Taxing Officer, Deputy Registrar, H. Adika delivered on 15th November, 2023)

RULING

1. James Archer and Joanna Trent, the appellants herein, appealed to this Court against the judgment delivered on November 26, 2019 in Mombasa Environment and Land Court (ELC) suit 345 of 2017 by Yano, J. The learned Judge dismissed the appellants’ suit filed by way of an originating summons dated June 5, 2012 wherein the appellant sought beneficial interests in the properties known as Kwale/Diani Beach Block/806, 807 and 808 (suit properties), which were registered in the names of the respondents herein. This court (Gatembu, Nyamweya & Lesiit JJA) found merit in the appeal, set aside the judgment in its entirety and awarded the costs both of this appeal and in the trial court to the appellants.
2. Pursuant to the order for costs, the appellants filed a party and party bill of cost dated July 11, 2023 in the sum of Kes 71, 375,451,92/=. By a ruling dated November 15, 2023, the learned Deputy Registrar, hon. H. Adika, dismissed taxed the said costs in the sum Kes 1,556,571/= and ordered that 5% of the amount would be charged for the certificate of taxation. In arriving at his decision, the learned



taxing officer found that the amount claimed by the appellant was grossly exaggerated since the value could not be determined either from the pleadings or the judgment hence Kes 1.5 million was proper and adequate to compensate the appellants. According to the taxing officer, VAT was taxed was not awardable in a party and party bill of costs. On getting up fees, the taxing officer found that the item was not provided for under the third schedule in paragraph 9(3) of the Court of Appeal Rules. The taxing officer also taxed off Items 5, 6, 10, 25, 41, 42, 50 by virtue of paragraph 9(3). Item 43 was taxed at Kes 3000/= while item 61 was taxed at Kes 1000/=. Regarding the disbursements, items 70, 73, 74, 78, 81 and 87 were taxed off for lack of receipts while item 72 was taxed off as it is refundable.

3. Dissatisfied by the decision, the appellants filed an undated objection notice against the said ruling. In response the respondents filed a replying affidavit.
4. I heard the reference to the taxation on February 7, 2024 when learned counsel, Ms Caroline Mwai appeared for Mr Muthama for the respondents while there was no appearance for the appellants who, nevertheless, had filed their submissions.
5. One of the objections raised by the respondents was that the reference was made out of time. According to the respondents, the impugned ruling was delivered on November 15, 2023 while the notice of objection was filed on November 28, 2023, long after the prescribed period and without any explanation.
6. Since this is an issue that goes to the power of this court to entertain the reference, it is important that the same be determined in limine. Rule 117(4) of the Court of Appeal Rules provides that:

An application for a reference may be made to the Registrar informally at the time of taxation or in writing within seven days thereafter.

7. The notice of objection filed herein was dated November 28, 2023. It was expressed to be challenging the decision made on November 15, 2023. The issue of failure by the appellants to file the notice within the prescribed time was taken in the replying affidavit. No action was taken by the appellant to remedy the irregularity. No further affidavit was sworn and filed to challenge the respondents' objection that the notice of objection was filed out of time and that no step was taken to regularise the said defect. Further, in their submissions, the appellants have not addressed this contention.
8. In John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others [2016] eKLR, the strict timelines, it was appreciated:

“...is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the court processes dispense justice in a timely, just, efficient and cost-effective manner.”

9. The rationale for strict adherence to rules of practice and procedure was explained in Chelashaw v Attorney General & another [2005] 1 EA 33, where it was held that without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law.

10. As was held by this Court in Onjula Enterprises Ltd v Sumaria [1986] KLR 651:

“The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily



lead to disregard of the principle involved. See *London Association for the Protection of Trade & another v Greenlands Limited* [1916] 2 AC 15 at 38.

11. This court in *Taracisio Gitbaiga Ruitibibo v Mbuthia Nyingi* Civil Appeal No 21 of 1982; [1984] KLR 505, cautioned that no court, particularly this one, should wish away the rules of court so ignobly.

12. Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR was not:

“...in the least persuaded that article 159 of the *Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

13. It is clear that the notice of objection was filed outside the prescribed timelines and no step has been taken to regularise the position. It follows that the notice of objection is incompetent and is hereby struck out with costs to the respondent.

14. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

