



REPUBLIC OF KENYA



Rosewa Agencies Limited v Ruiru-Juja Water & Sewerage Co. Ltd & another (Environment & Land Case 251 of 2018) [2024] KEELC 3998 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 251 OF 2018**

JG KEMEI, J

MAY 16, 2024

BETWEEN

ROSEWA AGENCIES LIMITED PLAINTIFF

AND

RUIRU-JUJA WATER & SEWERAGE CO. LTD 1ST DEFENDANT

COUNTY GOVERNMENT OF KIAMBU 2ND DEFENDANT

RULING

1. Before Court is the 1st Defendant/Applicant's Notice of Motion dated 31/1/2024 premised on Sections 1A, 1B, 3A *Civil Procedure Act*, Order 42 rule 6 (2) Civil Procedure Rules and Section 11 Advocates Remuneration Order (ARO) seeking in the main stay of execution of the warrants of attachment dated the 29th January 2024 pending the hearing and determination of the Reference.
2. The Application is based on the grounds on the face of it that vide a Decree issued by this Court on 18/1/2024 ordering the 1st Defendant to pay the Plaintiff the sum of Kshs. 2,059,243/-. That the 1st Defendant was served with a Proclamation and Warrants of Attachment on 29/1/2024. That the sum of Kshs. 2,059,243/= comprises of the decretal sum of Kshs. 650,000/- and taxed costs of Kshs. 1,407,743/=. That the Taxing Master erred in calculating the instruction fees using Kshs. 15M instead of Kshs. 650,000/-, the awarded decretal amount. That as a result the Applicants intends to file a Reference to challenge the decision of the Taxing Master. That unless the Court intervenes, the proclamation notice expires on 4/2/2024 and the Company's assets will be exposed to attachment. That the Applicants stands to suffer irreparable loss and damage that may not be compensate by an award of damages.
3. The Application is further supported by the Affidavit of even date of Pauline Wairegi, the Applicant's Legal Officer. Reciting the above grounds, the deponent annexed copy of the letter requesting for certified copy of the Ruling with the Taxing Master's reasoning annexed as PG-1.



4. The Application is opposed by the Plaintiff/Respondent only.
5. Charles Kigwe swore his Replying Affidavit on 8/2/2024 and averred that the application is a non-starter and based on falsehoods. That the Ruling on taxed costs was delivered in the presence of the Applicants and no objection was raised. That there being no objection, the application is an afterthought for want of compliance. That the instant application was filed when execution had set in motion. The Respondent prayed for dismissal of the suit.
6. On 22/2/2024 directions were taken and parties elected to canvass the application by way of submissions.
7. The Applicants filed its submissions dated 5/4/2024 through the firm of Triple N W & Co. AdvocatesLLP. Two issues were drawn for determination; whether the Court should grant a stay of execution of the warrants dated 29/1/2024 and whether the Court should strike out the application with costs. On the first issue, reliance was placed on Order 40 rule 1 Civil Procedure Rules and the case of Constantious Wambu Migwi Vs. Gichugu Water Sanitisation Trust & Anor. [2014] eKLR to argue that the risk of suffering substantial loss has been established. That if the Applicant's tools are attached, the services it offers in providing water to Ruiru and Juja will be halted. That the Applicants is ready to abide by any conditions of security as the Court may direct.
8. Regarding the second issue, the Applicants contended that it had filed its Reference before this Court contrary to the Respondent's averments. That the Reference raises a critical issue to wit the Taxing Master erred in adopting the value of the subject matter as Kshs. 15M.
9. On the other hand, the firm Albert Mumma & Co. Advocates filed submissions dated 24 /4/2024 on behalf of the Respondent. It was submitted that the Applicants has failed to establish substantial loss as required under Order 42 rule 6 Civil Procedure Rules. That the application was filed inordinately late, almost 90 days since the impugned Ruling was delivered. Further that no offer for security has been offered by the Applicants.
10. The Respondent contended that the Applicants failed to raise an objection as envisioned under Section 11(1) of the ARO and therefore a Reference is not tenable.
11. The main issue for determination is whether the Application is merited.
12. Before delving into the merits of the Application, it is imperative to address the competency of the Motion before Court. The Applicant's gravamen is based on the Taxing Master's decision to tax the Respondent's Bill of Costs at Kshs.1.4M. The Applicants contends that the award is exorbitant and erroneous. That the instruction fees ought to be based on the decretal award of Kshs. 650,000/- as opposed to the Kshs. 15M applied by the Taxing Master.
13. The procedure to be followed by a party who is aggrieved by the Taxing Master award if provided under the ARO. Rule 11 of the ARO states;

“ 11. 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.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

14. The Rules are to the effect that the aggrieved party can seek the Taxing Master's reasons for the award within 14 days of delivery of the Taxed costs. In this case the Bill was taxed on 20/11/2023 and 14 days thereto expired around 4th December 2023. Thereafter the aggrieved party applies to the Judge by way of Chamber Summons setting out the grounds of his objection. This is the reference that the Judge determines as an Appellate Court. Accordingly, the Applicants was at liberty to file his Reference within 14 days upon receipt of the Taxing Master's reasoned ruling.

15. In the persuasive authority in *Ahmednasir Abdikadir & Co. Advocates Vs. National Bank of Kenya Limited* (2) [2006] 1 EA 5 the Court held as follows;

"Although rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling ... Therefore the reference having been filed way out of the period prescribed should have been dismissed but having been given due consideration in substance, the same dismissed."

16. Additionally, in the case of *Twiga Motor Limited Vs. Hon. Dalmas Otieno Onyango* [2015] eKLR, the Court stated that:

"The limits in Rule II of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the said timelines would mean that the application would be rendered incompetent in the first instance."

17. I have perused the Court record and noted that the Taxation Ruling was delivered on 20/11/2023 in the presence of the Applicants only and the file was closed. The Ruling contains the Taxing Master's reasoning for the value of the subject matter at pages 2–3 therein. Contrary to the Applicant's averments in the Supporting Affidavit that the reason they have not filed a Reference is because they have not received the Taxing Master's reasoning does not stand because there is no request that was made to that end. The Taxing Master rendered the reasoning in the impugned Ruling.



18. The totality of the above is that the Applicants had about 28 days in light of Rule 11(1) and (2) above to file its Reference. That period lapsed around 19/1/2024. Failure to file a Reference within the given timelines, then Rule 11 (4) sets in which empowers the Court to enlarge the time for filing a Reference on application by way of chamber summons. Consequently, I agree with the Respondent's objection that absent any Reference on record, the instant Application is untenable.
19. The Applicants are asking the Court to stay warrants of attachment that were served upon it on 29/1/2024. The Applicants did not attach any warrants in its Supporting affidavit. The only annexure which was attached PG-1 is a copy of the Applicants' request to the Deputy Registrar requesting for certified copies of the Ruling dated 11/12/2023. The Request was done 21 days after the delivery of the Ruling on Taxation.
20. Further the Applicants have not filed any reference as envisaged under Rule 111 ARO to lay a basis for the instant Application for stay of execution. It is trite that stay of execution by itself does not amount to substantial loss. See the case of James Wangalwa & Another Vs. Agnes Naliaka Cheseto [2012] eKLR.
21. The upshot of the forgoing is that the Application is bereft of merit. It is for striking out with costs in favour of the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 16TH DAY OF MAY, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent but date taken by consent

Ms. Wainaina HB Ndegwa for 1st Defendant

2nd Defendant – Absent

Court Assistants – Phyllis & Oliver

