



**Wakf Commissioners of Kenya v Kabundu Holdings Limited (Environment and Land Miscellaneous Application E114 of 2022) [2024] KEELC 4691 (KLR) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4691 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E114 OF 2022**  
**NA MATHEKA, J**  
**JUNE 12, 2024**

**BETWEEN**

**WAKF COMMISSIONERS OF KENYA ..... APPELLANT**

**AND**

**KABUNDU HOLDINGS LIMITED ..... RESPONDENT**

**RULING**

1. The application is dated 3<sup>rd</sup> January 2024 and is brought under Section IA & 3, 4 of the [Civil procedure Act](#), Order 42 Rule 6 of the [Civil Procedure Rules](#), Article 159 of the [Constitution](#) of Kenya 2010 seeking the following orders;
  1. That this Honourable Court be pleased to grant stay of execution of the Certificate of Cost for the Respondent's party and party bill of costs dated 30<sup>th</sup> May, 2023 issued on 6<sup>th</sup> December, 2023 by the Deputy Registrar Honourable Nyariki J. pending the hearing and determination of the Reference dated 3<sup>rd</sup> January, 2024.
  2. That the costs of and occasioned by this application be provided for.
2. The reference herein was also filed 3<sup>rd</sup> January 2024, however the respondent raised a notice of preliminary objection on the following paraphrased grounds:
  1. That the instant application is misconceived, frivolous and vexatious and should be dismissed.
  2. That the chamber summons dated 3/1/2024 is not properly a reference and failed to comply with the statutory timeline and steps under rule 11 (1), (2), (3) and (4) of the [Advocate Remuneration Order](#) and further that the deputy registrar had not yet given reasons for his ruling before filing of the said chamber summons.
  3. That stay of execution has been prayed for without a proper reference.



4. That the taxing master is an officer of this court and therefore a reference cannot be brought to this court as it will be contrary to rule 11 (4) of the [Advocate Remuneration Order](#).
3. The basis for the application dated 3<sup>rd</sup> January 2024 seeking stay was that the taxing master had delivered a ruling on 6<sup>th</sup> December 2023 awarding the respondent Kshs. 2,686,981.76/= and the same had instructed the firm of Makini Auctioneers who obtained warrants of execution on 21/12/2023 despite a 30 day stay ruling by the taxing master. Further, that the said auctioneers issued a proclamation of attachment on the same date and the applicant has already filed a reference dated 3<sup>rd</sup> January 2024 challenging the above ruling. The applicant is apprehensive that it will suffer irreparable loss.
4. Mr Benedict Odhiambo Oloo, counsel put in a response stating that Teddy Mbithi, a former associate in his firm recorded a consent with counsel for the respondents for withdrawing the suit which was adopted as an order of the court on 25<sup>th</sup> May 2023. He further alluded that the chamber summons dated 3<sup>rd</sup> January 2024 filed by the applicant has challenged the said withdrawal instead of objecting to the ruling of the taxing master, hence this court has been asked to sit as a review and/or appeal on the withdrawal orders; that the applicants objection is outside of the statutory period of 14 days. That the taxing master was not requested to give his reasons contrary to rule 11 of the [Advocate Remuneration Order](#) That the ruling by the taxing master will not unjustly enrich the applicant.
5. Counsel for the applicant in their submissions referred the court to Order 42 Rule 6 of the [Civil Procedure Rules](#) and also relied on *inter alia* [James Wangalwa & Another vs Agnes Naliaka Cheseto](#) (2012) eKLR which talks about not only having to suffer substantial loss but that the execution will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. Counsel expounded on the reason why they withdrew this current suit and stated that they filed ELC E034/2023 which has been partly heard and would have the defence hearing on 17<sup>th</sup> April 2024. With this in mind, counsel urged the court to stay the ruling of the taxing master so as to preserve the substratum of ELC E034/2023. Further, the respondent is willing to deposit security in accordance with the provisions of Order 26 Rule 1 of the [Civil Procedure Rules](#).
6. Counsel also argued that there would be undue prejudice as there is an existent suit in ELC E034/2023 and that the applicant is an independent body which administers property for charity (*Wakf*) on behalf of Muslims as well as monies for management costs hence its liquidity would be prejudiced. They argued that money should not be deposited if there is a reference in place otherwise it would be considered a waste of judicial time. They also emphasized that the application for stay was filed before lapse of the statutory period.
7. Counsel for the Respondent reiterated the statements in its replying affidavit and relied on [Molyn Credit Limited vs Odeny Maube & Company, Advocates](#) (Miscellaneous Civil Case E024, E025 & E026 OF 2022(Consolidated)) (2023) KEHC 17220 (KLR) (12 May 2023) (Ruling) which described the steps taken before filing a reference and that they are progressive, a litigant cannot jump any step such as the taxing master giving his reasons. They argued that the applicant has not satisfied the criteria for stay of execution as there is no valid reference on record.
8. I have perused the application, notice of preliminary objection, the responses and the submissions therein. The first issue is whether there is a valid reference and the second issue is whether the instant application for stay can be allowed or not?
9. The notice of preliminary objection has to be given priority as it has the potential of ending the reference before it begins. I find that the grounds therein are not pure points of law as was stated in *Mukhisa Biscuit Manufacturers Ltd. vs West End Distributors Ltd* (1969) E.A. 696. Further, the



grounds therein are contested facts which have also been raised in the instant application seeking stay. It is therefore dismissed.

10. Rule 11 of the *Advocate Remuneration Order* states as follows:
  - (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.”
11. Counsel for the respondent argues that the chamber summons dated 3<sup>rd</sup> January 2024 is not a valid reference however the above rule is clear and it states that an objection is filed by way of chamber summons. The prayers in the said chamber summons pray as follows:
  1. ....
  2. That this Honourable Court be pleased to review, vary and set aside and/or dismiss the entire ruling and orders of the learned Deputy Registrar, Hon J.M Nyariki (the ‘taxing master’) delivered on 6<sup>th</sup> December, 2023 in respect of the Respondent’s bill of costs dated 30<sup>th</sup> May, 2023. (the ‘bill of costs’) and that the bill be taxed on merit.
  3. That in the alternative, the Respondent’s bill of costs dated 30<sup>th</sup> May, 2023 be remitted back for taxation before another taxing officer accordingly.
  4. That the Honourable court be pleased to grant any other or further orders which it may deem fit and just to grant in the circumstances.
  5. That costs of this application be provided for.”
12. Counsel for the respondent also argued that the taxing master was yet to give his reasons for the ruling. I am guided by a principle of judicial authority given to this court by Article 159 (2) (d) which states that justice shall be administered without undue regard to procedural technicalities. I also rely on *Postal Corporation of Kenya vs Donald Kikorir & 3 others* (2005) eKLR in which Waweru J., quoted with approval *Machira & Co. Advocates vs Arthur K. Magugu & Another*, Nairobi HCCC No. 358 of 2001 (UR), *Mburu Thuku vs Muthanga Thuku*, Nyeri HC. Misc. Application No 87 of 2004 where the need to comply with the provisions of Rule 11 with regard to lodging objection were emphasized.
13. Judge Waweru in the same case quoted *Kobil Petroleum Ltd v. Almost Magic Merchant Ltd*, Nairobi HCCC No. 1970 of 2000 where Ringera J., (as he then was) was of the view that further reasons need not be sought or supplied where a taxing officer has given a reasoned ruling on taxation and that a reference to the High Court can be lodged upon such ruling. I need say no more on this.
14. On the second issue, I have to look at Order 42 Rule 6 (1) and (2) of the *civil procedure rules* state as follows:
  - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made,



to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
15. Counsel for the applicant has stated that there will be substantial loss and has relied on several authorities explaining several authorities. I agree with the James Wangalwa case (*supra*) and I fail to see what substantial loss will be suffered considering that the amount to be executed is Kshs. 2,686,981.67 yet the value of the properties proclaimed is less than Kshs. 50,000. However, both parties have introduced the fact that there exists another case ELC E034/2023 whose pleadings and documents have not been produced before this court.
16. The court reminds itself that counsel for the applicant had argued that the applicant holds monies for management costs which if deposited as security might prejudice them. I am also of the opinion that if the respondent is allowed to execute, the said monies might paralyze the day to day running of the applicant as Kshs. 2,686.981.67 is a huge amount. In the circumstances I allow the application with no orders as to costs.
17. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 12<sup>TH</sup> DAY OF JUNE 2024.**

**N.A. MATHEKA**

**JUDGE**

