



REPUBLIC OF KENYA



Ramji & 2 others v Kenya Power and Lighting Company Limited (Environment & Land Case 109 'B' of 2015) [2024] KEELC 4609 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4609 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 109 'B' OF 2015
CA OCHIENG, J
JUNE 11, 2024**

BETWEEN

HARISH RAMJI 1ST APPLICANT

BHARAT RAMJI 2ND APPLICANT

ASHVIN RAMJI 3RD APPLICANT

AND

KENYA POWER AND LIGHTING COMPANY LIMITED RESPONDENT

RULING

1. What is before Court for determination is the Plaintiffs'/Applicants' Notice of Motion dated the 23rd May, 2024, where they seek the following Orders:-
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the hearing and determination of the intended appeal in the Court of Appeal, there be a stay of execution of the Certificate of Taxation dated 20th March 2024 and the warrants of attachment dated 9th May 2024.
 - e. That pending the hearing and determination of the intended reference as against the decision of the Taxing Master dated 20th March 2024, there be a stay of execution of the Certificate of Taxation dated 20th March 2024 and the warrants of attachment dated 9th May 2024.
 - f. That the Honourable Court be pleased to grant leave to the Plaintiffs to file/lodge their reference out of time.



- g. That the cost of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Harish Ramji. The Plaintiffs' confirm filing a Notice of Appeal against the entire Judgment which included awarding of costs. They aver that the costs were taxed vide a decision delivered on 20th March 2024 and a Certificate of Costs issued on 12th April 2024. They claim they were not aware of the said decision since their previous advocates on record inadvertently failed to notify them. They insist that they should not be made to suffer as a result of not being aware of the decision. Further, after the resultant issuance of Certificate of Costs, the Defendant has commenced execution of the said Certificate of Costs by instructing auctioneers, who, on 21st May 2024, descended on their property and attempted to cart away goods belonging to them.
 3. They contend that they were never served with the proclamation notice or demand for payment which makes the entire process unlawful, null and void. They challenge the signatures on the proclamation notice. They insist that the process adopted by the Defendant is unlawful because the proclamation notice relied on by the Defendant's auctioneer is not signed as received by any of them. Further, the illegality of the execution process is premised on the Defendant purporting to execute a Certificate of Costs without first, converting the same to a Decree for purposes of execution.
 4. They reiterate that Warrants of Attachment and sale cannot in law be issued on the basis of a Certificate of Costs but there must be a Decree first as any money awarded by the court including costs is only payable under a Decree. They aver that they intend to pursue the Appeal, pursuant to the Notice of Appeal and in the event that execution proceeds in the manner commenced by the Defendant, the substratum of the intended appeal will be decimated thus rendered nugatory. Further, they also intend to challenge the taxed costs and in the event execution proceeds, the intended reference will be rendered nugatory.
 5. The Defendant opposed the instant Application by filing a Replying Affidavit sworn by Dennis Maanzo. He highlights the proceedings in court and contends that prayer No. 3 cannot be granted since warrants have already been executed by way of a proclamation and attachment dated the 21st May, 2024. He insists that the warrants were issued in furtherance of the Decree of the Court dated the 1st February, 2023 and formally issued on 2nd May, 2024. He argues that attachment in respect to the taxed costs cannot be separated from the Decree. He avers that the application for stay of execution of the decree or the warrants is coming up more than one year later. He avers that the delay in bringing up the said application is inordinate, unreasonable and no explanation has been preferred. Further, that the Applicants' have failed to plead or even advance the substantial loss that may result to them, unless the stay order is granted. He reiterates that there is no pending reference in respect to certificate of taxation, dated the 20th March, 2024, hence the court cannot be called upon to issue orders in a vacuum.
 6. The parties canvassed the Application by making oral submissions.

Analysis and Determination

7. I have considered the instant Notice of Motion Application including the respective Affidavits, annexures and oral submissions and the following are the issues for determination:-
 - a. Whether the Plaintiffs should be granted leave to file a reference out of time against the Taxing Master's decision dated the 20th March, 2024.
 - b. Whether there should be a stay of execution of the Certificate of Costs.



8. As to whether the Plaintiffs' should be granted leave to file a reference out of time against the Taxing Master's decision dated the 20th March, 2024. The Plaintiffs' have sought for leave to file a reference out of time against the Taxing Master's decision. I note the Judgement in this matter was delivered on 1st February, 2023 wherein the Plaintiffs' suit was dismissed with costs to the Defendant. The Defendant filed its Party and Party Bill of Costs dated the 9th February, 2023 which was taxed at Kshs. 10,743,956.70 on 20th March, 2024. Further, a Certificate of Costs was issued on 12th April, 2024. The Plaintiffs' are desirous of filing a reference against the decision of the Taxing Master and filed the instant application seeking leave to do so, as the time to file the objection including reference lapsed.
9. On challenging taxed costs, Rule 11 of the *Advocates Remuneration Order* stipulates that:-
- “(1) Should any party object to the decision of the Taxing Master, he may within fourteen days after the decision give notice in writing to the Taxing Master of the items of taxation to which he objects. (2) The Taxing Master 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.”
10. In the current scenario, the Plaintiffs' have lodged an application seeking to enlarge time to file a reference, after 43 days. It was their contention that they were not aware of the Ruling of the Taxing Master since their erstwhile advocates did not inform them of the same and only discovered the issue of costs on 21st May, 2024 when the auctioneer sought to attach their properties. The Respondent has vehemently opposed the application for leave to file the reference out of time, insisting that the delay is inordinate and reasons given are not plausible.
11. The Plaintiffs insist that it has filed an Appeal and since it intends to challenge the costs awarded, they should be granted leave to file the reference. In the case of *Peter Julius Njoroge V Fidelity Commercial Bank Limited & Another* (2018) eKLR, the Court found a delay of 45 days not inordinate and allowed an application for enlargement of time. In the instant case, I note that the Plaintiffs' were not aware of the outcome of the taxation since their erstwhile Advocate did not inform them of the same. Insofar as the Defendant has opposed the issue of leave, I opine that failure to be informed of the outcome of taxation by an advocate is a plausible reason for failing to lodge an objection to the taxed costs within the stipulated fourteen (14) days; of the impugned Ruling.
12. Since the Defendant did not demonstrate what prejudice it stood to suffer if the Plaintiffs were allowed to file a reference out of time to challenge the taxed costs, and in associating myself with the above cited case as well as the legal provisions cited above, I will excuse the delay as it was not inordinate and allow the prayer No. (f) of the instant application. I direct the Applicants to lodge an objection as well as a reference within fourteen (14) days from the date hereof.



13. As to whether there should be a stay of execution of the Certificate of Costs. The Plaintiffs' have sought for stay of execution of the Certificate of Costs insisting that there is no Decree. Further, that they intend to file a reference. They claim that they were not served with the Proclamation of Sale and challenged the signatures in the said Proclamation of Sale. The Defendant as opposed the application insisting that the Plaintiffs' have not demonstrated sufficient cause to warrant the orders sought. The Defendant contends that the Decree was extracted after Certificate of Costs was issued. Further, that the Plaintiffs' will not suffer any substantial loss if the orders of stay is not granted as the Defendant can refund the monies in case the intended reference is successful.
14. On stay of execution, Order 42 Rule 6(1) of the [Civil Procedure Rules](#) states that:-

“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. 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. From these provisions, it is clear that granting or rejecting an application for stay of execution is purely a discretionary exercise of the court. This renders it subject to determination on a case to case basis with consideration to special circumstances of each case.
16. In the case of [Rubo Kimngetich Arap Cheruiyot v Peter Kiprop Rotich](#) [2006] eKLR, Ibrahim J (as he then was) held that:-

“In this case, there was no decree under which the certificate of costs could be underpinned. The certificate of costs is only for the payable costs, it is not the decree. It is my view that a decree duly approved and signed had to be on record for any execution to take place, whether for eviction, costs or otherwise. As far as the parties in a suit are concerned, a certificate of costs is not an executable legal instrument. A certificate of costs is not capable of being “executed”.
17. As per the Court record, I note the Defendant got the Decree on 2nd May, 2024 proceeded to apply for Warrants of Attachment which were issued on the 9th May, 2024. The Plaintiffs explain that they were not aware of the taxation of costs until the Defendant's auctioneer descended on their properties on 21st May, 2024. From the Court record, there is no indication if the Decree was approved by both parties before extraction. Further, there is also no indication whether the Plaintiffs' were issued with a demand notice for the costs awarded before the Warrants of Attachment were issued. Further, I opine that since I have granted the Plaintiffs leave of fourteen (14) days to file the reference out of time, it would make no sense if the execution of the Certificate of Costs proceeds while the reference challenging the said costs has not been determined. In the interest of justice, I will allow a temporary stay of execution of the Certificate of Costs for fourteen (14) days pending the filing of the reference.



18. In the circumstances, I find the instant Notice of Motion Application merited and will allow it in the following terms:-
- a. The Plaintiffs be and are hereby directed to file and serve the Reference within fourteen (14) days from the date hereof, failure of which the execution process will proceed.
 - b. Costs will abide outcome of the reference.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 11TH DAY OF JUNE, 2024.

CHRISTINE OCHIENG

JUDGE

In the presence of:

Okeyo for Defendant/Respondent

Nyanyuki for Plaintiffs/Applicants

Court Assistant – Simon/Ashley

