



**Wangombe v Nyamu (Land Case 123 of 2023) [2024] KEELC 5719 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5719 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA**

**LAND CASE 123 OF 2023**

**YM ANGIMA, J**

**JULY 25, 2024**

**BETWEEN**

**SAMUEL M WANGOMBE ..... PLAINTIFF**

**AND**

**CHARLES MURIITHI NYAMU ..... DEFENDANT**

**RULING**

**A. Introduction**

1. By a chamber summons dated 15.04.2024 filed pursuant to the provisions of Paragraph 11(2) and (4) of the Advocates Remuneration Order, Section 3A of the *Civil Procedure Act* (Cap.21), and all enabling provisions of the law the Defendant sought the following orders:
  - a. That the decision of the taxing officer Hon. V. Kiplagat on the Plaintiff's bill of costs dated 24.02.2023 be reviewed and/or varied.
  - b. That leave be granted to the Defendant to file the reference out of time.
  - c. Spent;
  - d. That the draft notice of objection and reference be deemed as properly filed.
  - e. That costs of the application be provided for.
2. The application was supported by an affidavit sworn by the Defendant on some unknown date and the annexures thereto. The Defendant contended that he was unable to file his objection to the taxing officer's decision within the prescribed period because of the unavailability of the court file. He further contended that the delay in filing the instant application was not inordinate and that he had a reasonable explanation for the delay. It was his case that he had a meritorious reference in that the taxing officer erred in principle in his assessment of, inter alia, the instruction fee and court attendances



and that, in any event, the amount awarded was so high and so excessive as to be a wholly erroneous estimate of costs.

3. The Defendant also filed a notice of motion dated 25.04.2024 expressed to be founded upon Order 50 rule 6, Order 51 rule 1, Order 22 rule 22 of the Civil Procedure Rules, Section 3A of the [Civil Procedure Act](#) and all enabling provisions of the law seeking a stay of execution of the taxing officer's decision of 14.09.2023 pending the hearing and determination of the reference. The same was supported by the Defendant's supporting affidavit sworn on even date. The court takes the view that the said application is now spent since it was seeking interim orders pending the hearing and determination of his reference and none were granted at the ex parte stage. The instant ruling shall determine the entire application dated 15.04.2024.

### **B. Plaintiff's Response**

4. The Plaintiff filed two replying affidavits both sworn on 11.06.2024 by his advocate on record, Nderitu Komu in opposition to the two (2) applications. He stated that the relevant court file was available at Nyahururu at all material times and that he applied for a certificate of taxation which was issued on 20.09.2023. He further stated that he filed an application for execution on 01.02.2024 and paid for it hence the relevant court file was readily available at all material times. It was thus the Plaintiff's case that there was no plausible explanation for the Defendant's failure to file his notice of objection to the decision of the taxing officer within 14 days from 14.09.2023 when it was made.
5. It was the Plaintiff's case that the instant application was merely an afterthought which was filed long after commencement of execution proceedings. The Plaintiff further stated that the Defendant had failed to exhibit a copy of the taxing officer's decision the subject of the reference hence his application for review of the taxation was a non-starter.
6. In response to the Defendant's prayer for a stay of execution for the taxed costs, the Plaintiff stated that there was no evidence on record to demonstrate the risk of substantial loss. It was also contended that there was no evidence to demonstrate that the reference might be rendered nugatory in the absence of a stay.

### **C. Directions on Submissions**

7. When the application was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff's submissions were filed on 18.06.2024 but the Defendant's submissions were not on record by the time of preparation of the ruling.

### **D. Issues for Determination**

8. The court has considered the Defendant's notice of motion dated 15.04.2024, the Plaintiff's replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following are the key issues which arise for determination:
  - a. Whether the Defendant has made out a case for extension of time to file his reference out of time.
  - b. Whether the Defendant is entitled to the consequential orders sought.
  - c. Whether there is merit in the Defendant's reference.
  - d. Who shall bear costs of the application.



## **E. Analysis and Determination**

### **a. Whether the Defendant has made out a case for extension of time to file his reference out of time**

9. The court has considered the material and submissions on record on this issue. Whereas the Defendant contended that he had satisfied the requirements for extension of time, the Plaintiff contended otherwise. The court is aware that the court has discretionary power to grant an extension of time. However, such discretion must be exercised judicially and upon reason. It ought not to be exercised capriciously or upon sympathy.
10. The factors to be considered in such application were judicially considered in the case of County Executive of Kisumu -vs- County Government of Kisumu & 8 Others [2017] eKLR whereby it was held, inter alia, that a party seeking extension of time must explain the cause of the delay to the satisfaction of the court and that the application for stay should be filed without undue delay.
11. The court has considered the period of delay in the instant application. There is no dispute that the impugned decision of the taxing officer was rendered on 14.09.2023. It is also evident that the Defendant filed the application for extension of time on or about 15.04.2024, that is, about 8 months later.
12. The court has considered the explanation advanced by the Defendant for failing to file a notice of objection seeking reasons for the taxation within the prescribed period of 14 days. The Defendant claimed that the court file was not available at Nyahururu Law Courts because it was on transition to Nyandarua Law Courts. The Plaintiff has discounted the explanation by demonstrating that he sought and obtained a certificate of taxation which was issued on 20.09.2023 and that he also filed an application for execution for costs on 15.02.2024 at Nyandarua. The Plaintiff's position was that the court file was readily available at all material times.
13. The court is not satisfied that the court file went missing for a whole 8 months thereby making it impossible for the Defendant to take steps to file his reference or an application for extension of time. The court is thus of the view that the delay of 8 months in filing the application for extension of time was inordinate and that the Defendant has failed to provide a genuine and satisfactory explanation for the delay. As a result, the court is not inclined to exercise judicial discretion in favour of the Defendant.

### **b. Whether the Defendant is entitled to the consequential orders sought**

14. Among the consequential orders sought by the Defendant was an order for the draft notice of objection to the taxation be deemed as properly filed and for the reference to be deemed as properly on record. In view of the court's finding and holding on the first issue, it would follow that the Defendant is not entitled to those orders.

### **c. Whether there is merit in the Defendant's reference**

15. In view of the court's finding and holding that the Defendant is not entitled to an extension of time, it would follow that the reference does not fall for consideration on merit.

### **d. Who shall bear costs of the application**

16. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967]



EA 287. The court finds no good reason to depart from the general rule. As a consequence, the Plaintiff shall be awarded the costs of the application.

#### **F. Conclusion And Disposal Order**

17. The upshot of the foregoing is that the court finds no merit in the Defendant's chamber summons dated 15.04.2024. As a consequence, the same is hereby dismissed in its entirety with costs to the Plaintiff.

Orders accordingly.

**Ruling Dated And Signed At Nyandarua This 25<sup>th</sup> Day Of July, 2024 And Delivered Via Microsoft Teams Platform.**

In the presence of:

Mr. Nderitu Komu for the Plaintiff

Mr. Magatta for the Defendant

C/A - Carol

**Y. M. ANGIMA**

**JUDGE**

