



Kavithi v Attorney General & 6 others (Environment & Land Case 1368 of 2013) [2024] KEELC 5730 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5730 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1368 OF 2013**

JA MOGENI, J

JULY 18, 2024

BETWEEN

DANIEL MULWA KAVITHI PLAINTIFF

AND

THE HONORABLE ATTORNEY GENERAL 1ST DEFENDANT

**THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICE,
MACHAKOS 2ND DEFENDANT**

THE DISTRICT SURVEYOR MACHAKOS 3RD DEFENDANT

THE DISTRICT LAND REGISTRAR MACHAKOS 4TH DEFENDANT

NZOMO MUSAU 5TH DEFENDANT

WILLY NZOMO 6TH DEFENDANT

MUTUKU NZOMO 7TH DEFENDANT

RULING

1. The plaintiff/applicant's Notice of Motion application dated 5/03/2024 had sought six (6) prayers. Amongst them were leave to the plaintiff/applicant to properly file their Notice of Objection to Taxation dated 23/02/2024, a stay of execution of the Ruling delivered on 7/02/2024 on the 5th, 6th and 7th defendant's Party and Party Bill of Costs dated 5th June 2023 pending the hearing and determination of this application and or reference, and allowing the application by granting the applicant fourteen (14) days to file a Reference.
2. The said application was supported by the Affidavit of Lauren N. Magotsi the advocate of the plaintiff. The same was sworn on the instant date.



3. The grounds upon which the application is based is that Party and Party Bill of Costs dated 5/06/2023 was taxed at Kshs. 631,637 on 7/02/2024. That the estate of the deceased being dissatisfied with the taxed bill sought to object to the bill but their advocate the notice of objection and request for reason two days after the time allowed that is on 23/02/2024. The advocate's error was genuine.
4. The applicant prays that this court does not visit the mistake of the advocate which was a bona fide mistake on the applicant. Also that the delay was not inordinate.
5. In opposition to the said application, on 14/05/2024, the 5th, 6th and 7th defendant/respondents authorized Mutuku Nzomo the 7th defendant to swear a Replying Affidavit in response to the application on their behalf.
6. The 5th -7th defendants aver that the suit from which the Party and Party Bill of Costs emanated from abated on 6/12/2016 and was also dismissed for want of prosecution on 12/03/2020. Thus the Party and Party Bill of costs was taxed and allowed as against the plaintiff's estate on 7/02/2024.
7. The 7th defendant avers that the plaintiff's counsel was in court and therefore in those circumstances, the aggrieved party had 14 days to file the Notice of Objection. Further that the arbitration training that the advocate has referred to was conducted virtually as evidenced by a copy the Form marked D and therefore it did not need the advocate to travel to a training venue.
8. It is the 5th to 7th defendant's contention that they can compensate the applicant if they win the appeal that they seek to lodge. Thus that there is no bona fide reason for the plaintiff filing Objection Notice late and also there is no alleged error or mistake established as alluded to.
9. They also aver that the applicant has failed to establish the substantial loss nor is there a Notice of Objection or Reference filed to warrant granting of a stay.
10. The 5th to 7th defendants have averred that the application lacks and since litigation must come to an end, the chamber application dated 5/03/2024 should be dismissed.
11. The parties canvassed the application by written submissions. The applicant filed their submissions and the 5th to 7th defendants filed theirs. The 1st to 4th defendants did not file any responses to the application nor submissions.

Analysis and Determination

12. I have read the application and the grounds in support of the application. I have also read the responses to the application, the submissions of the parties and the authorities cited by each party in support of the positions taken by each party. I find the following as the issues arising from for determination:
 - i. Whether this court should extend time within which to file the reference?
 - ii. Whether this court should grant stay of execution to the applicant?
13. Rule 11 of the *Advocates Remuneration Order* provides the procedure to be adopted before instituting a matter of the nature as the one before this Court. The rule provides that:
 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. In *Fabim Yasin Twaba v Timamy Issa Abdalla & 2 others* [2015] eKLR the Supreme Court, laid out the general principles governing extension of time thus:

“As regards extension of time, this court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the court;
3. whether the court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”.

15. On the issue of delay, in *George Kagima Kariuki & 2 others v George M Gichimu & 2 others* [2014] eKLR it was held that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”



16. The same position was taken by the Court of Appeal in the case of *Stanley Kaboro Mwangi & 2 others v Kanyamwi Trading Company Limited* [2015] eKLR where it was stated that:

“A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised.”
17. The common thread that runs through the above cited decisions is that the court is clothed with the discretion to allow an application for extension of time where the applicant demonstrates that there was sufficient cause for the delay.
18. In the instant case, it is not in dispute that the notice of objection herein was not filed within the stipulated time. The applicant stated that the notice of objection was not filed within the stipulated time because the applicant’s advocate mistakenly filed the Notice of Objection and Request for Reasons late since he was attending a training.
19. The question thus before this court is whether the reasons for the delay advanced by the applicant are plausible or acceptable to invoke the discretionary power of this court to grant extension.
20. The pleadings presented before this court by the applicant reveal that the advocate indeed filed the application late. The delay in this matter has been explained by the Applicant that his lawyer was attending a training and forgot to file the Notice of Objection and the Reference. The applicant has argued that the mistakes of his counsel should not be visited on him. This reason was highly challenged by the 5th to 7th defendants who stated that the advocate for the applicant was in court and that the training they claim to have attended was virtual. Therefore, there is no good reason to warrant their failure to file the Notice of Objection within 14 days as stipulated. Given the circumstances therefore the reasons for the delay are not excusable.
21. In determining whether to extend time or not, some of the factors a court considers are the length of the delay and reasons for such delay. The delay in this matter has been explained by the Applicant that he was attending a training and that the delay was only for one day. The ruling was delivered on 7/02/2024 he should have filed the Notice of Objection on 21/02/2023 but he filed it on 23/02/2024 which is two days after the deadline
22. It is trite that mistakes of counsel should not be visited on the client. In *Philip Chomwolo & another v. Augustine Kubede* (1982)-88) KLR 103 at 1040, it was stated (Apaloo, JA) that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case heard on merit”.
23. The Court enjoys wide discretionary powers under the *Civil Procedure Act* and Rules more specifically as stipulated in section 1 (A), 1(B),3(A), section 79 (G) on overriding objective, the inherent jurisdiction and on account of sufficient cause to exercise jurisdiction in matters of this nature for the interest of justice. It is noted that paragraph 11 (1) (2) of the *Advocates Remuneration Order* do not speak to the relevant factors that the Court should consider when exercising its discretion on whether or not an extension of time should be granted. Guidance must therefore be solved from case law in



Paul Wanjobi Mathenge v Duncan Gichane Mathenge[2013]Eklr the Court of Appeal while referring to other authorities observed;-

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi v Charles Gichina Mwangi – Civil Application No. Nai 26 of 2004*, this Court held; -

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi v Kenya Airways Ltd [2003] KLR 486* in which this Court stated;-Over the years, the Court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No Nai 255 of 1997*(unreported), the Court expressed itself thus; -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reasons for delay; thirdly(possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

24. As stated in the above cases the length of the delay and reasons for non-compliance of the time lines are important factors to influence the exercise of discretion of the Court. In calculating the length of delay in making the application for an extension of time the delay in filing the application was on or about an overreach of 2 days. In seeking to balance the interest of the respective parties the failure to comply was not inordinate. In addition, the applicant in his affidavit has explained the reasons which let time to lapse. That hurdle has therefore been satisfied as a sufficient cause for this Court to extend time in favor of the applicant to file a Reference under paragraph 11 (1) (2) of the *Advocates Remuneration Order*.

Whether or not execution should be stayed.

25. The Statutory anchorage of the discretion to consider stay of execution rests on order 42 rule 6 (1) of the *Civil Procedure Rules*. It is on the basis that the Reference is a path way for an aggrieved party from the Certificate of Cost of the taxing master it may be argued correctly that the principles shall apply *Mutatis Mutandis*.
26. The Court has considered numerous cases laid down for the exercise of judicial discretion. The guiding principles for determining whether or not to stay execution are; -
- i. Where special circumstances of the case so requires
 - ii. There is proof of substantial loss that may otherwise result
 - iii. There is substantial question of law to be adjudicated upon by the appellant court
 - iv. Where if the stay is not granted, the appeal is successful, would be rendered nugatory. See for example; - *Housing Finance Company of Kenya v Sharok Kber Mohamed Ali Hirji &*



another[2015]Eklr, Reliance Bank Ltd(In liquidation) v Noriake Investments Ltd, Rep v kenya Anti-Corruption Commission & 2 Others[2009]KLR 31,Carter & Sons Ltd v Deposit Protection Fund Board & 2 others, Edward Kamau & another v Hannah Mukui Gichuki & another[2015]eKLR.

27. The Court in RWW v EKW [2019] held that; -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

28. That being the general principles. The question is whether the subject matter of the reference if successful will be rendered nugatory. It has also been stated that the applicant is likely to suffer substantial loss in the event the respondent is allowed to proceed with entry of judgment and subsequent execution.

29. For the reasons in the affidavit the Court accepts the submissions for counsel for the applicant which discloses material averments necessary for the court to exercise discretion to grant a stay of execution of the Certificate of Cost pending the determination of the reference.

30. This court also has to consider the availability of security for performance. This is a safeguard to ensure that the court process is not abused. The security envisioned must be binding on the applicant as provided under Order 46 Rule(2)(b). In the case of Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR it was the position of the court that:

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

31. Further, in consideration of both prayers for stay of execution. Article 48 of the Constitution of Kenya 2010 guarantees every person right of access to justice. Further, Article 50(1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. I am therefore inclined to grant the orders only on the strength of the Constitution.



32. I am reminded of the role of the court in administration of justice as stated in the case of *Kamuti v Kariuki (Miscellaneous Civil Cause E001 of 2023)* (2023) observed that:

“The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out unless for a good reason.”

33. In the end, having considered the arguments of both parties, and relevant laws, I dispose of the application in the following manner:

- a. That the applicant is hereby granted leave to file and serve their Notice of Objection to Taxation dated 23/02/2024 within 14 days of this ruling. Once filed, the same should be prosecuted on priority basis;
- b. Execution of the ruling of the Taxing officer delivered on 7/02/2024 and Party to Party Bill of Costs dated 5/06/2023 is hereby stayed pending hearing and determination of the reference; and
- c. The applicant to deposit in a joint interest earning account of Counsels for the applicant and 5th to 7th respondents the full taxed costs within 30 days of this ruling.
- d. Failure to comply with order (a), and (c) above the order staying the ruling of the Taxing Officer shall be vacated and the 5th- 7th Respondents will be at liberty to proceed with execution.
- e. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF JULY 2024.

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MOGENI J

JUDGE

In the presence of:

Ms. Magotsi for the Plaintiff

Mr. Munyasya for the Respondent/Defendant and 5th to 7th Defendant

No appearance for the 1st – 4th Defendant

Caroline Sagina - Court Assistant

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MOGENI J

JUDGE

