



Wetende & 2 others v Population Services Kenya & 2 others (Cause 253, 254 & 255 of 2016 (Consolidated)) [2022] KEELRC 14694 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 14694 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 253, 254 & 255 OF 2016 (CONSOLIDATED)**

CN BAARI, J

JULY 7, 2022

BETWEEN

JEREMIAH MAKORE WETENDE 1ST CLAIMANT

MICHAEL KARANI GAKUYA 2ND CLAIMANT

AND

JAMES MWANGI MUCHIRI RESPONDENT

AND

POPULATION SERVICES KENYA 1ST APPLICANT

**SENIOR MANAGER, TRADE DEVELOPMENT, POPULATION SERVICES
KENYA 2ND APPLICANT**

AND

SAMSON ITONDE T/A DOMINION YARD AUCTIONEERS AUCTIONEER

RULING

Introduction

1. Before Court is the Applicants' application dated 27th February, 2022, seeking orders as follows:
 - i. Extension of time to file Memoranda of Appeal from the decision of the Hon. Taxing Master Beryl A. Omollo made on 15th February, 2022, taxing the Auctioneers Bills of Costs in ELRC Numbers 253, 254 and 255 of 2016 at Kshs.244,092.20, Kshs.265,190.20 and Kshs.266,448.40 respectively.



- ii. Pending the filing of a Memoranda of Appeal from the decision of the Hon. Taxing Master Beryl A. Omollo made on 15th February 2022, and the hearing and determination of the Appeals therefrom there be stay of Execution of the said Bills of Cost.
 - iii. The Costs of this Application be awarded to the Applicants.
2. The application is premised on the grounds on the face of the Motion and the Supporting affidavit of Allan Ngunze, the Human Resource Director of the Applicants.
 3. The crux of the application is that when the subject bills came up for Taxation on 30th November, 2021, the Applicants' Counsel was not in Court as the matter was not listed on the day's Cause list, and the Applicant's Counsel did not have any notice of the date of delivery of a ruling on the Taxation and was therefore not present at the point of delivery of the ruling on 15th February, 2022.
 4. The Applicants aver that it was not until Thursday 24th February, 2022, that they learnt of the delivery of the subject ruling upon being served with Proclamation Notices at its offices in Kisumu. The Applicants further states that they instructed their Advocates on record in the matter who filed the present Application on Monday 27th February, 2022, before this Court in Kisumu.
 5. The Applicants further aver that the foregone chronology of events explains the 4 days delay and that they have moved this Court without unreasonable delay.
 6. The application is opposed vide a replying affidavit sworn by a Mr. Samson Itonde Tumbo, the Auctioneer, who deposed that the application is an abuse of the process of the court for reason that he had earlier on proclaimed the Applicants property on 30th November, 2020. He states that he released the goods upon receipt of a release order, and subsequently filed a Bill of costs and served it upon the Applicants.
 7. The Respondent avers that the bill of costs was to be taxed by the Deputy Registrar, and that it was well indicated in the taxation notices, and the taxation proceeded on 30th November, 2021, ex parte as the Applicants though served, did not attend court. The Respondent further avers that the Applicants have not told the court why they did not attend court even after they were served with the taxation notices.
 8. The Respondent avers that he is not a party to the appeal and for reason that the orders from the appeal are consent orders, he did not participate and further that the consent did not bar the taxation of his costs.
 9. The Respondent avers that the proclamation that was levied was solely in relation to his (Auctioneer's) costs, hence there is nothing wrong in the execution.
 10. Parties canvassed the application by way of written submissions. Both parties filed their submissions.

The Applicant's Submissions

11. It is submitted for the Applicants that the bills subject of the taxation order arise from the decision of Justice Nduma Nderi in ELRC Cause Number 253, 254 and 255 *Jeremiah Makore Wetende and 3 Others Vs Population Services Kenya*, which decision is the subject of Civil Appeal No. 3 of 2021 Populaton Services Kenya Vs Jeremiah Makore Wetende.
12. It is further submitted that the Applicants sought Orders of Stay of Execution and Proceedings in Civil Application No. 156 of 2020 Population Services Kenya Vs Jeremiah Makore Wetende where it was agreed on 2nd February, 2021, that parties would compromise the matter and the Applicant



- would deposit Ksh.3,679,404.00 in Cooperative Bank in a joint interest earning account, an order the Applicant complied with.
13. The Applicants submit that the taxation proceedings should not have taken place until the hearing of Civil Appeal No. 3 of 2021, as the Respondents could not on the one hand agree to a compromise, and then unleash auctioneers to tax their bills on a judgment that is before the Court of Appeal.
 14. It is further submitted for the Applicants that the Respondent in commencing execution proceedings against the Applicants, did not obtain Judgment but curiously acted on the basis of Certificates of Costs, yet a Certificate of Costs is not a warrant to execute but must be adopted first as a Judgment of the Court in order to pave way for execution.
 15. The Applicants call upon the court to exercise its unfettered discretion and issue orders in their favour. They placed reliance in the ratio in *Nicholas Kiptoo Arap Korir Salat Vs IEBC* (2014) eKLR, where the Supreme court underscored the applicable principles but did not depart from the trodden path laid down in *Mwangi Vs Kenya Airways Ltd* (2003) eKLR as adopted and restated by Justice Joel Ngugi in *Samuel Mwaura Muthumbi Vs Josephine Wanjiru Ngugi* (2018) eKLR where the Court in the exercise of its unfettered discretion is called to consider the following matters:-
 - a. the period of delay;
 - b. the reason for delay;
 - c. the arguability of the appeal;
 - d. the degree of prejudice which would be suffered by the Respondent if the extension were granted;
 - e. the importance of compliance with time limits to the particular litigation or issues; and
 - f. the effect if any on the administration of justice or public interest if any is involved.
 16. The Applicants further submit that the *Civil Procedure Act* at Section 79G, gives this Court power to extend time for the filing of an appeal out of time, if the Applicants satisfies the Court that they had good and sufficient cause for not filing the appeal in time. They had reliance in the holding in *Joseph Schmaderer Vs Serah Njeri Ngene* (2021) eKLR.
 17. On the prayer for stay of execution, the Applicants submit that failure to be accorded a fair hearing by not being heard, amounts to sufficient reason that warrants the granting of stay of execution. They sought to rely in the holding in *Onyango vs Attorney General* (1996-1989) EA 456 where the court stated:

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”
 18. The Applicants further submits that they stand to suffer substantial loss in that in Civil Appeal No. 3 of 2021 population services vs Jeremiah Makore Watende and 2 others which Appeal challenges the decision that is the basis of the Bills of Costs herein, the Court directed the Applicants to deposit security of costs in the sum of Kshs.3,679,404/- in the joint names of the Advocates in Co-operative Bank, and which directive the Applicants complied with, and further that there is a stay of execution granted by the Court of Appeal.



19. The Applicants further submit that they acted promptly in moving this Court, as after being served on 24th February, 2022, by the Respondent with the Certificates of Costs and Notices of Proclamation dated 23rd February, 2022, the Applicants filed their Application on 27th February, 2022.

The Respondent's Submissions

20. It is submitted for the Respondent that extension of time to file an appeal is not an automatic right of a litigant and the same must be exercised judiciously. The Respondent had reliance in *Bagajo v Christian Children Fund INC* 2004 2 K.L.R 73 to support this position.
21. The Respondent submits that the Applicants failed to follow up with the court in good time to find out what transpired on 30th November, 2021, being the date set for taxation. Instead, they now seek to rely on the Judge's cause list knowing well that the taxation was to proceed before the Deputy Registrar. This, the Respondent submits is an abuse of the court process aimed at frustrating the wheels of justice.
22. It is submitted for the Respondent that the remedy in the instant case lies in an application to set aside the ex parte orders and not in an appeal. The Respondent had reliance in the case of *Francis Hinga Ruamba v The SRM Wanguru & 2 Others* (2010) eKLR to support this position.
23. The Respondent submitted that he was entitled to costs in each of the three files, premised on the fact that there was judgment, warrants of attachment and proclamation for each of the three files.
24. It is submitted that allowing the application will gravely prejudice the Respondent who has demonstrated service of the taxation notices upon the Applicants leading to the ruling, and that the delay in filing the appeal has not been sufficiently explained.
25. The Respondent submits that there is no appeal filed against the ruling of the taxing master, and hence there is no sufficient cause to grant a stay of execution in the absence of an appeal. It is further submitted that the Applicants have not demonstrated or particularized the substantial loss it is likely to suffer should the order of stay not be granted.

Determination

26. I have considered the application, the grounds and the affidavit in support, the replying affidavit in opposition and the parties' submissions. The issue for determination is whether the Applicants are deserving of the orders sought.
27. Section 79G of the *Civil Procedure Act*, provides as follows on the power of the court to extend time: -
- “Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
- Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
28. The principles that guide the grant or otherwise of an order for extension of time were set out by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others*, SC Application No. 16 of 2014 (2014) eKLR, as follows:
- “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”
29. The impugned ruling was rendered on 15th February, 2022, while the instant application was filed on 27nd February, 2022. This is about twelve (12) days from the date of the decision subject of the application. The Applicants in my view were still within time to file a Notice of Appeal but did not, and chose instead to file this application.
30. The reasons given for the alleged delay in filing the appeal is that the taxation was not listed in the day’s cause list and orders were granted ex parte. The Respondent’s position is that he served the Applicants with notices of the taxation, and that their absence in court on the date of the taxation was not adequately explained.
31. The Applicants have produced in evidence cause lists before the ELRC Courts Number 1 and 2 on the day the taxation subject of this proceedings was scheduled to take place, and matters giving rise to the Bills for taxation were not listed on the two caused lists. It is however not lost on this court that taxation is a mandate of the Deputy Registrar, and the Applicants did not produce the cause list for the Deputy Registrar’s Court to prove that the matters were not listed on the day’s cause list.
32. The bills subject of the taxation order arose from the decision of Justice Nduma Nderi in ELRC Cause Number 253, 254 and 255 *Jeremiah Makore Wetende and 3 Others Vs Population Services Kenya*, which decision is the subject of Civil Appeal No. 3 of 2021 Populaton Services Kenya Vs Jeremiah Makore Wetende. The Applicants sought Orders of Stay of Execution and Proceedings in Civil Application No. 156 of 2020 *Population Services Kenya Vs Jeremiah Makore Wetende* where parties compromised the matter and the Applicant deposited Ksh.3,679,404.00 in Cooperative Bank in a bid to stay execution of that judgment.
33. Although the Respondent contend that he is not a party to the suit before the Court of Appeal where a stay of execution has been granted, the decision of the Court of Appeal will certainly have an effect on the Respondent’s Bills of cost, as the bills a rise from the same judgment that was stayed by the Court of Appeal.



34. For this reason, I find the reasons upon which this application is premised sufficient to warrant the grant of orders for extension of time to lodge an appeal. In *Daphne Parry v Murray Alexander Carson* (1963) EA 546, the court had this to say on extension of time:

“Though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant...”

35. Guided by the principles set out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others* (Suppra), I find and hold that the Applicants herein have laid a basis to the satisfaction of the Court for extension of time to file an appeal out of time.

36. On the prayer for stay of execution, the general rule is that if there is no overwhelming hindrance, a stay of execution ought to be granted so that an appeal, if successful, may not be rendered nugatory. Cotton LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at pg. 458 said:

“I will state my opinion that when a party, is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

37. In this matter, the court has held in favour of extending time for the Applicants to file their appeal out of time. It then follows that declining to grant a stay of execution will render the intended appeal nugatory.

38. The upshot is that the Applicants’ application dated 27th February, 2022, is merited and is hereby allowed as follows:

- i. That an order of extension of time is hereby issued allowing the Applicants to file Memoranda of Appeal from the decision of the Hon. Taxing Master Beryl A. Omollo made on 15th February, 2022, taxing the Auctioneers Bills of Costs in ELRC Numbers 253, 254 and 255 of 2016 at Kshs.244,092.20, Kshs.265,190.20 and Kshs.266,448.40 respectively.
- ii. That Pending the hearing and determination of the Appeals, there be a stay of Execution of the Bills of Cost taxed by the taxing master.
- iii. The Costs of this Application shall be costs in the appeal.
- iv. The orders herein shall apply to Causes No. 254 and 255 of 2016.

39. Orders of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 7TH DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Mureithi h/b for Mr. Marete for the Applicant

N/A for the Respondent

Ms. Christine Omollo-C/A

