



**Mulela v Fort Properties Limited (Environment & Land Case
162 of 2015) [2024] KEELC 7465 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 162 OF 2015
SM KIBUNJA, J
NOVEMBER 13, 2024**

BETWEEN

ROSE EMMA MULELA PLAINTIFF

AND

FORT PROPERTIES LIMITED DEFENDANT

RULING

1. The defendant moved the court through the notice of motion dated the 5th September 2024 seeking for;
 - a. Stay of execution of the ruling of 3rd July 2024, and warrants of attachment and sale issued on 23rd August 2024 and any subsequent orders emanating therein, pending the hearing and determination of the application.
 - b. Review and or vary, set aside the ruling delivered on 3rd July 2024 by Hon. Nyariki, that held that the plaintiff's party and party bill of costs dated 20th November 2023 was unopposed.
 - c. The court to consider the defendant's written submissions filed on 19th June 2024 and "rewrite its ruling in respect to the plaintiff's party and party bill of costs dated 20th November 2023."
 - d. Costs be provided for.

The application is based on the twelve (12) grounds on its face and supported by the affidavit of Suleiman Yawa, sales representative, sworn on the 5th September 2024, inter alia deposing that the said bill of costs was taxed at Kshs. 329,025 without considering its written submissions; that the ruling was delivered in their absence and it was only on 3rd September that they got a copy; that the plaintiff has commenced execution and the defendant will suffer irreparably if execution is done.

2. The plaintiff opposed the application through her replying affidavit sworn on 24th September 2024, inter alia deposing that the bill of costs was drawn to scale and that the defendant was served with the ten days' notice to settle the same but ignored to do so; that the reference that the bill of costs was



undefended was an typographical error that does not change anything; that no reference has been filed on the taxation ruling and the defendant has not complied with the condition to the temporary stay order and the application should be dismissed with costs.

3. The court heard the application on the 26th September 2024, when Mr. Matheka and Mr. Ochieng learned counsel for the defendant and plaintiff made their submissions which the court has considered.
4. The following are the issues for the determinations by the court:
 - a. Whether the application was meant to be heard by this court or the taxing master.
 - b. Whether the defendant has made a reasonable case for the orders sought to be issued.
 - c. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, oral submissions by the learned counsel for the two parties, the record and come to the following conclusions:
 - a. That indeed, the plaintiff filed the party and party bill of costs dated the 20th November 2023, that was taxed through the ruling delivered by the taxing master on the 3rd July 2024. In the said ruling the taxing master in line 2 of the first paragraph inter alia stated that “The bill was unopposed.” That is what prompted the defendant to file the instant application as it had reportedly filed its written submissions on the 19th June 2024, dated 18th June 2028.
 - b. That contention by the defendant has not been disputed by the plaintiff. Indeed, the plaintiff has at paragraph 7 of the replying affidavit termed the finding of the taxing master that the bill was unopposed to be an error. The plaintiff has proposed in the same paragraph that “This court can review the ruling by removing the word “Un” in the ruling and allow the execution for costs to proceed.”
 - c. The application has invoked sections 1, 1A, 1B, 3, 3A, 80, 95 & 99 of the [Civil Procedure Act](#) and Orders 45, 50, 51 & 22 Rule 22 of Civil Procedure Rules. The margin notes next to sections 1, 1A, 1B, 3, 3A, 80, 95 and 99 of the Act show that they provides for; the title and application; objective of the Act; duty of court; saving of special jurisdiction and powers; saving of inherent powers of court; review; enlargement of time; and amendment of judgements, decrees or orders. Other than prayer (2) that was for stay of execution pending the hearing and determination of the application, the other two principal prayers (3) and (4) could not have been meant to be considered by this court.
 - d. Prayer (3) is for review which is provided for under Order 45 of the Civil Procedure Rules. Under sub-rule 1(1)(b) that applications for review should be made before the “court which passed the decree or made the order without undue delay” and Sub-rule 2(1) provides that “An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.” Rules 2 & 3 provides for situations where the judge who passed the order or decree subject matter of the review application has left the station or is away for periods three months. The taxation ruling delivered on 3rd July 2024 that is subject matter of the instant application for review was not by myself, and is evidently by Hon. J. Nyariki. The application, being one for review, should have been filed before the taxing master, to be handled by the said Hon. J. Nyariki, and if he is not the station under the situations set out above, by another suitable taxing master.



- e. There is also no evidence that the defendant ever issued any objection to the taxation ruling, and this application is not a reference or appeal on the taxing officer's ruling of 3rd July 2024. This court is therefore the wrong forum to handle the defendant's review application. The application having been filed before the court whose jurisdiction has not been properly invoked should be struck with costs.
6. Flowing from the foregoing, the defendant's notice of motion dated the 5th September 2024, is hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 13TH DAY OF NOVEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA

In the presence of:

Plaintiff : Mr. Murei

Defendant : Mr Manga for Matheka

Leakey- Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

