



REPUBLIC OF KENYA



**Musembi v Nzioka (Environment & Land Case 74 of 2018)
[2024] KEELC 7522 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7522 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 74 OF 2018
TW MURIGI, J
NOVEMBER 13, 2024**

BETWEEN

JOSEPH NDAVI MUSEMBI PLAINTIFF

AND

MBYUTA NZIOKA DEFENDANT

RULING

1. This ruling is in respect of the Chamber Summons dated 2nd June, 2022 brought under the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules in addition to Section 11(1), (2) and (4) of the Advocates Remuneration Order in which the Applicant seeks the following orders: -
 - i. Spent.
 - ii. That the time within which the Defendant/Applicant was to serve a Notice of Objection upon the Deputy Registrar/Taxing Officer in respect to the Taxation done on 28/03/2022 in this matter be enlarged.
 - iii. That the Defendant/Applicant be granted leave to serve a Notice of Objection upon the Deputy Registrar/Taxing Officer and file a Reference to the Judge out of time.
 - iv. That there be a stay of execution of the Ruling on Taxation delivered by the Honourable Deputy Registrar/Taxing Officer on 28/03/2022 in this matter this application is heard and determined.
 - v. That costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Mbyuta Nzioka sworn on even date.



The Applicant's Case

3. The Applicant averred that on 28th March, 2022, the Taxing Officer delivered a ruling on the Party and Party Bill of costs dated 21st September, taxing the same at Kshs. 285,623.33/= . He averred that the ruling of the Taxing officer was forwarded to the Advocates for the parties through their respective office emails.
4. He further averred that his former Advocates, M/S Andrew Makundi & Company Advocates informed him about the terms of the Ruling on 25/5/2022 by which time the period of Fourteen (14) days to serve an objection upon the Taxing Officer and file a Reference to the Judge had lapsed.
5. He further averred that he is desirous of objecting to the Ruling of the Taxing Officer on some items which were taxed against the law and thereafter file a Reference to the Judge against the Taxation. He contended that if the orders sought are not granted, his properties and/or goods shall be attached in order to recover the sum of Kshs. 285,623.33/= being the taxed costs. He further contended that should the Plaintiff/Respondent proceed to levy execution, the intended objection and reference to the Judge will have no purpose and a miscarriage of justice will occur.
6. He argued that the mistakes of his former Advocates should not be visited upon him since he is an innocent client. He further averred that he filed the present application immediately after he was informed about the terms of the Ruling. He contended that the Plaintiff/Respondent will not suffer any prejudice and urged the court to allow the application as prayed.

The Respondent's Case

7. The Respondent filed a replying affidavit sworn on 5th July, 2022 in opposition to the application. He averred that the matter was heard and determined in his favour on 19th April, 2021. He further averred that the party and party bill of costs dated 21st September, 2021 was determined in his favour vide the Ruling delivered on 28th March, 2022.
8. According to the Respondent, the Applicant has neither specified the items on the bill of costs that he intends to object nor stated whether there was a previous bill of costs. He argued that the Application is frivolous, an afterthought and an abuse of the court process meant to forestall the execution process.
9. He contended that the application was filed and served after inordinate delay which has not been explained. He further averred that the Applicant has not specified the part of the Ruling that he is uncomfortable with in the annexed letter requesting for reasons from the Taxing Officer. In conclusion, he urged the court to dismiss the application with costs.
10. The application was canvassed by way of written submissions.

The Defendant/Applicant's Submissions

11. The Applicant filed his submissions dated 2nd September, 2024. On his behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the time for giving Notice of Objection to the Taxing Officer should be enlarged by the court;
 - ii. Whether leave should be granted to the Defendant to file a reference to the Judge against the Taxation by the Taxing officer in this matter; and



- iii. Whether stay of execution of the Ruling on Taxation of the Taxing officer should be granted pending the hearing and determination of the application in this matter.
12. On the first issue, Counsel reiterated the contents of the Applicant's affidavit in support of the application. Counsel submitted that paragraph 11 (4) of the Advocates Remuneration Order vests power on this court to enlarge time for giving of a Notice of objection to the Taxing Officer. Counsel further submitted that the Applicant has satisfied the conditions set out under paragraph 11 (1) and (2) of the Advocates Remuneration Order.
13. On the second issue, Counsel urged the court to grant the Applicant leave to file a reference against the taxation since time had lapsed under the provisions of the law.
14. On the third issue, Counsel submitted that there is no order of stay to prevent the Respondent from recovering Kshs. 285,623.33/= being the taxed costs before the intended reference is heard and determined. Counsel urged the court to allow the application as prayed. To buttress his submissions, Counsel relied on the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010.
15. As at the time of writing this ruling, the Respondent had not filed his submissions as directed.

Analysis and Determination

16. Having considered the application, the respective affidavits and the submissions by the Applicant, the following issues fall for determination:-
 - i. Whether the court should extend time for filing of the reference out of time
 - ii. Whether an order of stay of execution should be granted.
17. The procedure for filing a reference to oppose a taxed bill of costs is set out in paragraph 11(1) and (2) of the Advocates Remuneration Order which provides as follows:-
 - (1) Should any party object to the decision of the taxing officer he may within 14 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 14 days from the receipt of the reasons apply to a judge by chamber summons which shall be served on all parties concerned, setting out the grounds of his objection.
18. Paragraph 11 (4) of the Advocates (Remuneration) Order allows the court to enlarge time within which an aggrieved party may file an objection and provides as follows: -

The High Court shall have power in its discretion by order to enlarge the time fixed by sub-paragraph (1) or sub-paragraph (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.
19. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR the Supreme Court set out the principles that a court should consider in exercise of its discretion to extend time as follows:-
 1. Extension of time is not a right of a party. It is an equitable remedy only available to a deserving party at the discretion of the court;



2. A party who seeks for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 5. Whether there will be any prejudice suffered by the Respondents if the 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.”
20. Similarly, in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. Nai 251 of 1997* the Court of Appeal held that: -
- “It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the 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 reason for the 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.”
21. The Applicant explained that the delay in complying with the provisions Paragraph 11(1) and (2) of the Advocates Remuneration Order was occasioned by failure on the part of his former Advocate to inform him on the terms of the ruling on time. He lamented that he was given a copy of the ruling after the period to serve a notice of objection and reference to the Judge had lapsed. The ruling of the Taxing officer was delivered on 28th March, 2022. The instant application was filed on 20th June, 2022.
22. The Applicant argued that the mistakes of his former Advocate should not be visited upon him. In the case of *CFC Stanbic Limited v John Maina Githaiga & another [2013] eKLR*, the Court of Appeal held as follows: -
32. “Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of *Lee G Muthoga V Habib Zurich Finance (k) Ltd & another, Civil Application No. Nai 236 of 2009*, where this Court held: “It’s a widely accepted principle of law that a litigant should not suffer because of his advocate’s oversight.” In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel.”
33. In the case of *Belinda Murai & 9 others v Amos Wainaina [1978] eKLR*, Madan JJA (as he then was) appreciated that mistakes will inevitably occur during litigation and that a party should not be penalized at the expense of justice. The court held as follows: -
- “A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience



who ought to have known better. The Court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

32. Similarly in the case of *Gideon Mose Onchwati v Kenya Oil Co Ltd & Another* (2017) eKLR cited in the case of *Shah v Mbogo* the court held that :-

“ Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate is bound by the acts and omissions of the Advocates in the course of representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure on the part of the litigant, to give the Advocate due instructions”.

23. I note that the Applicant has given a reasonable explanation for failing to serve a notice of objection and a reference to the Judge on time. The Applicant has demonstrated that failure was on the part of his Advocate. In the circumstances, I find that the mistakes of his Advocate cannot be visited upon him. I will therefore in the interest of justice allow the prayer for extension of time.

24. The Applicant has sought for a stay of execution pending the filing of the reference. He contended that he is apprehensive that the Plaintiff may proceed to execute on the assessed costs if a stay of execution is granted. In the case of *Labh Singh Harman Singh Ltd v Attorney General & 2 others* [2016] eKLR observed as follows: -

“I am unable to agree with the submission by counsel for the respondent that the Court has no power to order stay in cases of taxation for costs as exists in the Civil Procedure Rules. It is clear to me that taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. Indeed, section 94 of the *Civil Procedure Act* provides as a general rule that execution of orders of the court should await the confirmation of the costs by taxation unless the Court grants leave for execution before taxation of costs.”

25. The power to order stay of execution of taxed costs is discretionary. Having found that the Applicant is entitled to orders for extension of time, this court finds and holds that it will be in the interest of justice to stay execution of the taxation pending the hearing and determination of the reference.

26. In the end, I find that the application is merited and the same is hereby allowed in the following terms:-

1. The time within which to serve a Notice of Objection in respect of the taxation done on 28/03/2022 is extended.
2. The Defendant/Applicant be and is hereby granted Fourteen (14) days leave to file and serve a Reference against the Ruling of the Taxing Officer delivered on 28th March, 2022.
3. An order for stay of execution of the Ruling of the Taxing Officer delivered on 28th March, 2022 is hereby issued pending the hearing and determination of the reference.
4. The Applicant to deposit Kshs. 100,000/= in court within Thirty (30) days from the date hereof.
5. In default of prayer number four (4) the order of stay of execution shall lapse automatically.

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HON. T. MURIGI



JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF NOVEMBER, 2024.

In the Presence of:

Parties absent

Court Assistant Alfred

