



**Alvine Brooks Limited v Kirunyu (Environment & Land Case
E007 of 2022) [2024] KEELC 13996 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13996 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E007 OF 2022**

BM EBOSO, J

DECEMBER 17, 2024

BETWEEN

ALVINE BROOKS LIMITED PLAINTIFF

AND

GEOFFREY KIMANI KIRUNYU DEFENDANT

RULING

1. The subject of this ruling is the defendant's chamber summons application dated 20/9/2024, through which he seeks an order enlarging the time within which to file a reference against the ruling of the Taxing Officer of this Court rendered on 22/7/2024. The defendant further seeks an order of stay of execution proceedings pending the hearing and determination of the intended reference. The application is supported by an affidavit sworn by the defendant's advocate, Chacha Sammy, on 20/9/2024. The application was canvassed through written submissions dated 22/10/2024, filed by M/s Mogeni & Company Advocates.
2. The defendant's case is that the Taxing Officer, Hon. M Kurumbu, delivered a ruling on 22/7/2024 taxing the plaintiff's party and party bill of costs dated 29/11/2023 at Kshs 1,156,151. Aggrieved by the said ruling, the defendant challenged the ruling through a fresh cause, Thika ELC Miscellaneous Application No E057 of 2024 dated 14/8/2024. The defendant further contends that when parties appeared before the Court in the Miscellaneous Cause on 17/9/2024, his advocate on record conceded to the inadvertent and honest mistake of filing the reference in a fresh cause. The defendant adds that his advocate sought and was granted leave to withdraw the miscellaneous cause with no orders as to costs.
3. The defendant states that at that point in time, the prescribed limitation period had lapsed. The defendant contends that the plaintiff has initiated execution proceedings to recover the taxed costs. The defendant adds that if the plaintiff is allowed to proceed and execute the decree, then the defendant's intended reference will be rendered nugatory. The defendant argues that the plaintiff stands to suffer



no prejudice because if the reference is disallowed, they will be at liberty to proceed and execute the decree. The defendant further argues that the defendant stands to suffer irreparable harm if the orders sought are not granted because he will be condemned to pay costs without being granted the chance to canvass a proper reference. The defendant adds that the mistake of an advocate should not be visited on a party. Counsel urges the Court to exercise its discretion and allow the application.

4. The plaintiff opposes the application through a replying affidavit sworn by Anthony Mwangi Ndungu on 1/10/2024, and written submissions dated 30/10/2024 filed by Rapando & Odunga Advocates. The plaintiff case is that, in determining whether to grant an extension of time, the court looks at the length of delay; whether the delay is justifiable; the conduct of the parties; and the prejudice to be suffered by the parties. The plaintiff adds that mistakes of a counsel that don't amount to bona fide mistakes are punishable as professional negligence and cannot be used as a tool to influence the judicial discretion of the court. The plaintiff argues that the filing of the reference as a separate miscellaneous cause violated paragraph 11 of the Advocates Remuneration Order which stipulates that the reference should be filed and prosecuted in the same cause in which the party and party bill of costs was taxed. The plaintiff faults the defendant for failing to withdraw the miscellaneous cause and timeously file a reference in the proper forum the moment he was put on notice by the Court vide the order dated 20/8/2024. The plaintiff argues that Order 42 rule 6 (1) of the Civil Procedure Rules provides that a stay of execution can only be granted against an order or decree appealed from. The plaintiff further argues that the defendant neither seeks an order for a stay of the ruling of the Taxing Officer delivered on 22/7/2024 nor of the Judgment and decree of this Court rendered on 21/9/2023 that awarded it costs of the suit. The plaintiff adds that the defendant seeks to merely stay execution proceedings commenced by the plaintiff, which are not the basis of the intended reference.
5. The plaintiff further argues that the defendant's application is defective because it is anchored on Order 40 Rule 1 of the Civil Procedure Rules which provides for injunctive reliefs against a party pending the hearing and determination of a suit in order to preserve the substratum of the suit. It is the case of the plaintiff that once a court delivers its decision, the court is functus officio and cannot purport to re-open the case by granting injunctive orders. The plaintiff adds that even if the court were to be persuaded that the orders framed seek a stay of execution of the ruling dated 22/7/2024, the said orders can still not issue because there is no valid reference on record that is pending determination before the Court. The plaintiff contends that the payment of a debt owed upon execution of a judgment has never been a basis for a defendant to claim that they will suffer substantial loss. The plaintiff argues that it is in the interest of justice and fairness that the orders sought should be denied.
6. I have considered the application, the response to the application, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The two issues to be determined in this ruling are: (i) Whether the criteria for granting enlargement of time to file a reference against a decision of the Taxing Officer has been met; (ii) Whether the criteria for granting an order of stay of execution pending the hearing and determination of a reference has been satisfied. I will be brief in my analysis and determination.
7. The court's jurisdiction to grant an order for enlargement of time to file a reference is regulated by Rule 11 (4) of the Advocates Remuneration Order which provides that:

“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.”



8. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others* [2014]eKLR laid down the following general principles to be considered in an application for extension of time:
- i. 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.
 - ii. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court.
 - iii. Whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis.
 - iv. The party seeking an extension order is obligated to demonstrate a reasonable reason for the delay, to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents of the extension is granted is a relevant factor to be considered;
 - vi. The court is similarly required to consider whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
9. In the application under consideration, it does emerge that the applicant promptly initiated a reference within the prescribed limitation period. However, the reference turned out to be ill-fated because it was filed as a fresh cause instead of being filed as an application within the cause in which the party and party bill of costs had been taxed. At the point of withdrawing the ill-fated reference, the limitation period of 14 days had already lapsed.
10. The applicant's advocate has been candid in explaining the cause of the delay. It does emerge from the materials placed before the court that the delay was caused by a genuine and excusable human error. For being taken through the present motion, the plaintiff/respondent will be indemnified through an award of costs. For the above reason, the court is satisfied that a proper case has been demonstrated to warrant the exercise of the discretionary jurisdiction to enlarge time to bring a reference.
11. On the plea for an order of stay of execution, the court is alive to the fact that no reference has been filed at this point. At this point, it is not known if the contemplated reference will eventually be filed. It may or it may not be filed. Secondly, the court record indicates that the applicant has in the past had the opportunity to prosecute, in this court, an application for an order of stay of execution. The application was struck out after it emerged that the defendant did not have a competent pending appeal in the Court of Appeal and that what was pending in the Court of Appeal was an application for enlargement of time. At this point, there is no evidence that there subsists a competent appeal that would form the basis of an application for a broad order of stay of execution. Even if one were to focus on a stay that relates to costs only, no reference has been initiated.
12. Given the above contextual background, the view which the court takes is that, the plea for an order of stay of execution pending the hearing and determination of a reference should be brought and prosecuted after a competent reference has been filed and served.
13. In the end, the application dated 20/9/2024 partially succeeds and is disposed in the following terms:



- a. The period for initiating a reference against the ruling of the Taxing Officer dated 22/7/2024 is enlarged by seven (7) unexcluded days.
- b. The defendant/applicant shall pay the plaintiff/ respondent's advocates throw-away costs of the present application assessed at Kshs 20,000 within the same period of seven (7) unexcluded days. In default, the order enlarging time shall stand vacated.
- c. The applicant shall be at liberty to renew the plea for an order of stay of execution once a competent reference is lodged and served.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF
DECEMBER 2024**

B M EBOSO

JUDGE

In the Presence of: -

Mr Chacha for the Defendant/Applicant

Ms Morara for the Plaintiff/Respondent

Court Assistant: Hinga

