



**Shume v Yawa & 2 others (Civil Suit 52 of 2010)
[2023] KEELC 306 (KLR) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 306 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT 52 OF 2010
MAO ODENY, J
JANUARY 27, 2023**

BETWEEN

YAWA CHOME SHUME PLAINTIFF

AND

PHILEMON MAKUPE YAWA 1ST DEFENDANT

HUSSEIN ABDALLA SAID 2ND DEFENDANT

THE DISTRICT LANDS REGISTRAR KILIFI 3RD DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated February 24, 2022 by the 2nd Defendant/Applicant seeking the following orders: -
 - a. Spent
 - b. That leave be granted to the 2nd defendant/applicant to change his Advocates on record and appoint the firm of Idris Ahmed & Company advocates to act for him in this matter;
 - c. That this Honourable court be pleased to order a stay of execution of the certificate of costs issued on November 4, 2021 in this matter pending the hearing and determination of this application;
 - d. That this Honourable court be pleased to order a stay of execution of the certificate of costs issued on November 4, 2021 pending the hearing and determination of the Applicant's Reference;
 - e. That this Honourable court be pleased to enlarge the time within which to file a reference against the decision of the taxing officer delivered on June 30, 2021;



- f. That the draft reference attached herewith be deemed as properly filed upon payment of the requisite court fees.
 - g. That costs of this of this application be in the cause.
2. Counsel agreed to canvas the application which were duly filed.

Applicant's Submissions

3. Counsel gave a brief background to the case and submitted that Judgment in this suit was entered on June 26, 2019 and that at the time of the entry of Judgment the applicant was represented by the firm of J.K Mwarandu & Company Advocates who were shortly after delivery of judgment instructed by the Applicant to file a Notice of Appeal which they did within the prescribed time.
4. That the applicant then instructed the firm of Kagwima Karanja & Company Advocates to take over the matter from the Messrs J.K Mwarandu & Company Advocates and a consent was duly filed in court on July 8, 2019.
5. The plaintiff/respondent herein filed a Bill of Costs on March 5, 2021 and proceeded to serve the same on the firm of J.K Mwarandu & Company Advocates who were no longer on record as the Applicant's Advocates. No service was effected on the firm of Messrs Kagwima Karanja & Company Advocates despite them being on record and the plaintiff/respondent's Advocates admitting in paragraph 6 of the replying affidavit of Simon P.M. Mutugi that they were aware of Messrs Kagwima Karanja & Company being on record for the Applicant.
6. Counsel further stated that when the matter came up for taxation on April 26, 2021 Mr. Shujaa from J.K Mwarandu & Company Advocates informed the Court that he no longer had instructions but the Taxing Officer erroneously held that he was still on record and that he should proceed with the taxation to the prejudice of the Applicant.
7. It was counsel's submission that the applicant was therefore never granted a fair hearing on the Bill of Costs as his Advocates on record were never notified of the Bill of Costs or the Taxation and did not participate in the taxation process therefore the Applicant was denied his constitutional right to heard on the matter.
8. That service on a firm that is no longer on record for a party is as good as not serving the said party and any order emanating therefrom is irregular and ought to be set aside.
9. Counsel cited the provisions of Order 42 Rule 6(1) & (2) on stay of execution, the case of *Butt v Rent Restriction Tribunal* {1982} KLR 417 on exercise of discretion and submitted that the Applicant had shown sufficient cause as he was never given an opportunity to be heard during taxation.
10. On the issue whether the Applicant will suffer substantial loss, counsel submitted that the amount taxed in the Bill of Costs is a colossal sum of KShs1,886,869/= which sum if paid the Applicant is not certain would be able to recover should his intended Reference be allowed and relied on the Court of Appeal case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike*, Civil Application No.238 of 2005 where the court held that "while the legal duty is on an Applicant to prove the allegations that an appeal would be rendered nugatory because the Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has, since that is a matter which is peculiarly within his knowledge."



11. On the issue whether the application has been made without undue delay, counsel submitted that the applicant first found out about the taxation exercise having taken place vide a demand letter from the plaintiff/respondent's Advocates dated February 15, 2022 addressed to his advocates on record. That the applicant having had not participated in the taxation did not know and could not know of the Certificate of Taxation and further that the applicant filed the current application within 10 days of coming to notice of the Taxation which in the circumstances is a reasonable period and without any delay.
12. Counsel also submitted that the applicant has averred at paragraph 16 of the supporting affidavit that he is willing to abide by any reasonable terms for security as may be required by this honourable court. Further that the applicant has also set out at paragraph 12 of the supporting affidavit the various grounds on which he seeks to challenge the reasons advanced for the Taxation which are errors in principle which ought to be addressed by this Honourable Court and the Applicant ought to be granted an opportunity to be heard on the issues raised.
13. Counsel relied on Paragraph 11 of the *Advocates' Remuneration Order* on objections to decision on taxation and appeal to the Court of Appeal and enlargement of time and submitted that the Applicant is deserving of enlargement of time within which he should file a reference of the decision of the Taxing Officer. As per the draft application for reference setting out the grounds the applicant seeks to rely on.
14. Counsel submitted that as regards the issue of Stay of a Certificate of Costs, it would be unjust to hold a view that one cannot stay an order for payment of costs and relied on the case of *Labh Singh Harman Singh Ltd v Attorney General & 2 others* [2016] e KLR where the court held that taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules and that 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.
15. Counsel therefore urged the court to allow the application as prayed

Plaintiff's /Respondent's Submissions

16. Counsel submitted that the plaintiff obtained a judgment against the defendants jointly and severally with costs on June 26, 2019 and that the 2nd defendant preferred and appeal vide Civil Appeal No. 15 of 2019 which was struck out by the Court of Appeal vide a ruling dated 4th February 2022 with costs.
17. That the costs in the suit were taxed vide the Plaintiff's Bill of Costs dated July 23, 2022 by the Deputy Registrar Honourable I. Wasike at Kshs. 1,886,869.00/- and further that costs of the appeal are yet to be taxed.
18. It was counsel's submission that from the onset the Applicant's Motion is premature, the Certificate of Costs dated 4th November 2021 has not been adopted by this honourable court as a decree capable of execution and further that the Plaintiff/ respondent has not placed such a motion before this Court under section 51 (2) of the *Advocates Act*, and that the instant application was prompted by the Plaintiff's quantification of costs in the Appeal vide the letter dated 15th February 2022. Counsel therefore submitted that there is no decree to stay as such and prayers No. 3 and 4 are therefore incompetent.
19. Counsel relied on the facts as set out in the Replying Affidavit of Simon P.M Mutugi which he stated that has not been controverted and that the Applicant's advocates Mssrs J.K Mwarandu & Co. Advocates were duly served with the Bill of Costs & Taxation Notice per annexure SPM-1.



- The applicants advocate Mr. Shujaa who had conduct of the trial herein came to court on 24th April, 2021 and informed the Deputy Registrar that he had no further instructions, that the consent on representation, is contrary to the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) 2010.
20. It was counsel's submission that the consent was neither adopted by the Court nor did Msrs Kagwima Karanja & Co. Advocates file any subsequent Notice of Change or take any steps at all in this suit. The Deputy Registrar having observed this directed that the taxation proceeds and despite this Mr. Shujaa defended the Bill on the same issue being raised herein- Instruction fees. The Plaintiff/Respondent gave a notice of taxation forwarding the Certificate of Taxation.
 21. Counsel submitted that the Applicant cannot be allowed to reopen the issue of taxation three (3) months down the line with no cogent reasons, further that the Applicant has not established an insufferable loss they would incur in settling these costs and it should be noted that the costs of their failed appeal also loom in the horizon.
 22. Counsel submitted on stay of advocates costs and relied on the case of [William Muthee Mutbami v Bank of Baroda \(K\) Limited](#) [2007] eKLR J where Kasango J held that there can be no stay of taxed costs as Civil Procedure Rules do not apply to the [Advocates Act](#) and relied on the case of [Sande Investment Ltd & 3 others v Kenya Commercial Finance Corporation & 5 others.](#)
 23. On the issue of enlargement of time counsel reiterated his submissions on delay and submit that the applicant has not given sufficient reasons to show any execution or warrant extension of time. Counsel urged the court to dismiss the application with costs.

Analysis and Determination

24. The issues for determination is whether the application is proper before the court, and whether the orders sought for enlargement of time to file a reference can be granted.
25. I will start with the issue of change of Advocate after Judgment, Order 9 Rule 9 of the [Civil Procedure Rules](#) provides that:
 - “Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –
 - a. Upon an application with notice to all the parties; or
 - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
26. I notice that there was a letter dated July 8, 2019 by Kagwima Karanja & Co Advocates addressed to the Deputy Registrar indicating that they had entered into a consent with J K Mwarandu & Co Advocates.
27. The Deputy Registrar directed the in Charge Registry to extract for endorsement on July 9, 2019. I have looked at the ensuing proceedings and I have not seen anywhere in the court file where such consent was endorsed and an order of the court.
28. Further Kagwima Karanja & Co Advocated did not file a Notice of Change of Advocates as per the purported consent. It therefore follows that J K Mwarandu was still on record for the 2nd defendant hence the service of the Bill of costs on taxation Notice which Mr. Shujaa Advocate attended on April 26, 2021 and informed the court that he had no further instructions and sought for 7 days to file an application to cease acting.



29. If Mr. Shujaa was not on record after filing the consent which was never endorsed, then why was he applying for time to file an application to cease acting. I find that the service was proper, counsel was on record and attended court during the taxation.
30. Secondly I also notice that the firm of Idris Ahmed & Company Advocates filed this application on February 24, 2022 and on the same day before the order to allow them to come on record for the 2nd Defendant they filed a Notice of Change of Advocate to replace Kagwima Karanja & Co Advocates who were never on record. This was irregular.
31. The parties gave the chronology of what happened in this case including an appeal that was filed in the court of appeal which was dismissed.
32. The court has power in its discretion to enlarge time as per Paragraph 11 (4) & (5) of the Advocates' Remuneration Order but this discretion must be exercised judiciously.
33. Further the applicant must meet the threshold as was laid in the Supreme Court case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR as follows:
 - 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 for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. The Court's exercise of its discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Where there is a sensible reason for the delay, the delay should be explained to the satisfaction of the Court
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. 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.
34. Since extension of time is not a right of a party and being an equitable remedy the court will only exercise this discretion to a deserving party who must explain the reason for the delay in filing the application and that there will be no prejudice suffered by the Respondent if the time is extended.
35. It should be noted that this is a very old matter which was filed in 2010 and has been in the court corridors for the last 12 years and that judgment was delivered in 2019. That is enough prejudice on the face of it noting that the appeal that the Respondent filed was also dismissed by the Court of Appeal. Litigation must come to an end at some point.
36. Having said so I find that the application lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF JANUARY, 2023.



M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

