



REPUBLIC OF KENYA



Sambu & another v County Government of Kericho & 2 others (Environment & Land Case 59 of 2015) [2024] KEELC 3955 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3955 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 59 OF 2015**

MC OUNDO, J

MAY 2, 2024

BETWEEN

THOMAS KIMAGUT ARAP SAMBU 1ST PLAINTIFF

MICHAEL NAL KIPKIRUI 2ND PLAINTIFF

AND

COUNTY GOVERNMENT OF KERICHO 1ST DEFENDANT

BEST CONTRACTORS LIMITED 2ND DEFENDANT

LAND REGISTRAR KERICHO 3RD DEFENDANT

RULING

1. Before me for determination are two Applications, one dated 21st July 2023 and another dated 15th September 2023. For ease of reference, the parties herein shall be referred to as they appeared in the suit. The Application dated 21st July, 2023, is a Notice of Motion Application brought by the Plaintiffs pursuant to the provisions of Section 1A, 1B, 3A of the *Civil Procedure Act*, Cap 21, Order 42 Rule 6, Order 50 Rule 1 of the *Civil Procedure Rules*, 2010 and all enabling provisions of law in which the Plaintiffs sought that there be a stay of execution of the 2nd Defendant's taxed costs of Kshs 191,560/= pending the hearing and determination of Nakuru Civil Appeal No. E026 of 2023. They also sought for the costs of the Application.
2. The Plaintiffs' application was supported by the grounds therein and a Supporting Affidavit of an even date sworn by Michael Nal Kipkirui, the 2nd Plaintiff herein, who deponed that on 13th October, 2022, the court had delivered judgment in their favour as against the 1st Defendant in which the 1st Plaintiff had been awarded a sum of Kshs 500,000/= while he had been awarded Kshs 200,000/= as general damages respectively. That on the other hand, the case against the 2nd Defendant had been dismissed with costs wherein being dissatisfied with the court's decision, they had lodged an appeal to the Court of Appeal via Nakuru Civil Appeal No. E026 of 2023.



3. That the 2nd Defendant had subsequently filed and served their Counsel with a Party and Party Bill of Costs dated 7th March, 2023 which was taxed on 18th July, 2023 at Kshs 191,560/= and it was likely to execute the taxed costs against themselves unless an order of stay was granted. That failure to grant stay orders would be prejudicial to them and cause them substantial loss since their appeal was arguable with high probabilities of success as had been disclosed in the Memorandum of Appeal annexed as MNK1.
4. That they were ready and willing to abide by any reasonable conditions that the court may impose for their compliance. He thus urged the court to grant an order of stay of execution of the Party and Party Bill taxed on 18th July, 2023 at Kshs 191,560/= pending the hearing and determination of the Nakuru Civil Appeal No. E026 of 2023.
5. The 2nd Defendant did not file any response to the Plaintiffs' application but filed an application by way of Chamber Summons dated 15th September, 2023 brought pursuant to the provisions of the Advocates Remuneration Order, Section 11 of the Advocates Act, Cap 16 Laws of Kenya, Section 3A, 80 of the Civil Procedure Act, Order 45 1(b) of the Civil Procedure Rules and Article 159 of the Constitution of Kenya, 2010 seeking to set aside/review/remove/quash and vacate any consequential orders of the honorable Taxing Master's ruling of 8th July, 2023. That in the alternative, the court exercises its inherent jurisdiction to re-tax the said Bill of Costs dated 7th March, 2023 and for costs of the application.
6. This Application was supported by the grounds therein as well as the Supporting Affidavit of Benard Kiptoo Arap Chepkwony, the 2nd Defendant's Director to the effect that the court's taxation ruling of 18th July, 2023 had an error apparent on the face of the record. That whereas the ruling presupposed that the matter had been decided in a summary manner, yet the same had had proceeded to full trial wherein several witnesses had testified before judgment had been delivered.
7. That subsequently, the instruction fees had not been properly taxed as the 2nd Defendant had been awarded a lower figure in comparison to what was provided for under the Advocates Remuneration Order.
8. That the instant application for review had been made without unreasonable delay and that if the said ruling is not set aside and/or reviewed, the 2nd Defendant would be highly prejudiced.
9. The Plaintiffs opposed the 2nd Defendant's application through their Grounds of Opposition dated 15th January, 2024 to the effect that the same was incurably defective, incompetent not only for want of form but also statutorily for having been filed under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules while overlooking the provisions of Rule 11 of the Advocates Remuneration Act.
10. That further the Reference had been filed 58 days from the date of the Taxing Officer's ruling, in contravention of the stipulated 14 days, as provided for by Rule 11 of the Advocates Remuneration Order, and without seeking the leave of the court for enlargement of time.
11. It was their contention that contrary to the Applicant's contention that the instruction fees had not been properly taxed by the taxing officer in his ruling delivered on 18th July, 2023, the reality of the matter was that the taxing officer had taken into consideration all matters before him including the pleadings and the judgement delivered on 13th October, 2022 in taxing the 2nd Defendant Party and Party bill of costs dated 7th March, 2023. There was therefore no sufficient ground to impugn the exercise of judicial discretion of the taxing officer to warrant the court's interference.



12. That as per the court's judgment, the Plaintiff's had been entitled to the costs of the suit wherein the 2nd Defendant was to be paid costs by the 1st Defendant. The 2nd Defendant's demand for costs was not only misconceived but had also been ill-advised hence the same ought to be dismissed with costs.
13. The Applications were disposed of through written submissions to which I shall proceed to summarize the same as herein under.

2nd Defendant's submissions.

14. The 2nd Defendant in support of its Application dated 15th September, 2023 framed one issue for determination to wit; whether the Taxing Master erred in the assessment of the Bill of Costs, wherein it proceeded to submit in the affirmative and to the effect that whereas the matter had proceeded to a full hearing, wherein a total of eight (8) witnesses had testified, it had been erroneous for the Taxing Master to have found otherwise. That the instant case had raised complex issues of law which had involved a site visit wherein a survey had been conducted in the presence of the court after which a report was filed.
15. That judgment having been entered against the 1st Defendant, the Bill of Costs ought to have been taxed with consideration that the case had gone to full trial. That in the alternative, the court ought to take judicial notice of the property value as being above Kshs 25,000,000/= by dint of the instant case having been filed in the Environment and Land Court, and the complexity of the issues therein. Reliance was placed in the decided case of *Del Monte Kenya Limited v Kenya National Chamber of Commerce and Industry (KNCCI) Murang'a Chapter & 2 others* [2021] eKLR. The 2nd Defendant thus urged the court to review or order the Taxing Master to re-tax the Applicant's Bill of costs dated 7th March, 2023.
16. In respect to the Plaintiff's application dated 21st July, 2023, the 2nd Defendant opposed the same while placing reliance in the decided cases of *Vishram Ravji Halai v Thornton & Turpin* [1990] KLR 365 and *James Wangalwa & Another v Agness Naliaka Cheseto* [2012] eKLR wherein it framed its issues for determination as follows; -
 - i. Whether the substantial loss has been proven.
 - ii. Whether the application has been made without unreasonable delay.
 - iii. Whether there is security for the due performance of the decree.
17. On the first issue for determination as to whether substantial loss had been proven, the 2nd Defendant while asserting that a successful party was prima facie entitled to the fruit of his judgment, submitted that the Plaintiffs had not met the threshold for the grant of a stay of judgement/execution as they had failed to demonstrate the manner in which they would suffer substantial loss if the decree was to be executed. That they were merely engaging in delay tactics in a bid to frustrate the 2nd Defendant. That it was not enough for them to put forward mere assertions of substantial loss, instead, there ought to have been empirical or documentary evidence to support such a contention. Reliance was placed on the decision in the case of *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2020] eKLR, which cited the case of *Samvir Trustee Limited v Guardian Bank Limited* NRB ML HCCC 795 of 1997 (UR).
18. On the second issue for determination, the 2nd Defendant submitted that the instant application had been brought after inordinate delay and without an explanation. While placing reliance in the decided case of *Miriam Wambui Gitau v Boniface Mwangi Kibia* [2018] eKLR where the court had adopted the reasoning in the case of *Jaber Mohsen Ali & Another v Priscillah Boit & Another*, ELC No. 200 of 2012 [2014] eKLR, the 2nd Defendant narrated that the judgement herein had been delivered on 13th



October, 2022 while the application for stay of execution had been made on 21st July, 2023, nine (9) months after the judgement had been issued. That subsequently, the present application had merely been an afterthought in a bid to frustrate it from enjoying the fruits of litigation and therefore the same ought to be dismissed.

19. Regarding the issue on security for due performance of decree, the 2nd Defendant relied on the decision in *Gianfranco Manenthi & Another v Africa Merchant Assurance Co. Ltd* [2019] eKLR to submit that the Plaintiffs had not demonstrated or made any indication as to their willingness to deposit a security for due execution of the Decree. That courts had now taken the position that a judgement morphs to a debt in civil litigation hence the fact that the same had not been paid, amounted to great prejudice to the 2nd Defendant. That Plaintiffs application for stay should be dismissed, but should the court find it reasonable to allow it, that the same be on condition that the Plaintiffs pay the entire decretal sum together with interest to the 2nd Defendant.

Plaintiffs' submissions.

20. The Plaintiffs vide their submissions dated 15th September, 2023 in opposition of the 2nd Defendant's application dated 15th September, 2023, framed three (3) issues for determination to wit;
- i. Whether the ruling delivered on 18th July, 2023 by Taxing Master should be set aside and/or reviewed.
 - ii. Whether the reference for the Bill of Costs dated 7th March, 2023 is merited.
 - iii. Who should bear the cost of the Application?
21. On the first issue for determination as to whether the ruling that had been delivered on 18th July, 2023 should be set aside and/or reviewed, the Plaintiffs placed their reliance on the decided cases of *Premchand Rainchad Limited & Another v Quarry Services of East Africa Limited and Another* [1972] E.A 162, *First American Bank of Kenya v Shah and Others* [2002] EA 64 and *Joreth Ltd v Kigano and Associates* [2002] 1 EA on the principles of setting aside and/or reviewing a decision of the Taxing Master to submit that it was clear from the 2nd Defendant's annexure 'BK1' that the taxing officer had taken into consideration all matters before him including the pleadings and the judgement that had been delivered on 13th October, 2022 when taxing the 2nd Defendant's party and party bill of costs dated 7th March, 2023.
22. Further reliance was placed on the provisions of Rule 11 of the Advocates Remuneration Order and the decided case of *Machira & Co. Advocates v Arthur K. Magugu* CA 199 [2012] eKLR, to submit that once a Taxing Officer had given his decision in respect to the taxation of the bill of costs, were the 2nd Defendant not satisfied with the said decision, it ought to have filed its reference within 14 days, hence there was no provision for setting aside and or review of the taxing master's decision.
23. As to whether the reference for the bill of costs dated 7th March, 2023 was merited, the Plaintiffs' reliance was hinged on the provision of Rule 11 of the Advocates Remuneration Order to submit that there had been no compliance of the provisions of the law by the 2nd Defendant. Reliance was placed on the decided case of *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* [2001] eKLR. The Plaintiffs further placed reliance on the provisions of Article 159 (2) (d) of *the Constitution* and the decided case of *Nicholas Kiptoo Arap Korir Salat v Independence Electoral and Boundaries Commission & 6 others* [2013] eKLR to submit that although the oxygen principle was meant to cure technicalities in the process of administration of justice, no plausible reason had been advanced by the 2nd Defendant for non-compliance. That the purpose of filing references was for expeditious disposal of cases and if notices as required by procedure were vague, the same defeated the purpose of the procedure. That the



2nd Defendant ought to have filed a reference within 14 days of the ruling which had been delivered on 18th July, 2023. No evidence had been presented to show the steps that it had undertaken to comply with the law before filing the application dated 15th September, 2023.

24. That without prejudice to the foregoing, the analysis of the court's judgement that had been delivered on 12th October, 2022 had led to a conclusion that they were entitled to costs of the suit wherein the 2nd Defendant was to be paid costs by the 1st Defendant. That the 2nd Defendant's demand for costs was not only misconceived but also ill-advised hence the same ought to be dismissed with costs.

Determination.

25. As earlier indicated at the beginning of the ruling, for ease of reference I shall refer to the parties herein as they appeared in the suit. I have considered the two applications herein one dated the 21st July, 2023 brought by the Plaintiffs who sought stay of execution of the 2nd Defendant's taxed costs of Kshs 191,560/= pending the hearing and determination of an Appeal filed in the Court of Appeal as Nakuru Civil Appeal No. E026 of 2023.
26. The Second Application dated the 15th September, 2023 is by the 2nd Defendant who seeks to set aside/ review/remove/quash and vacate any consequential orders of the honorable Taxing Master's ruling of 8th July, 2023 and/or in the alternative, the court exercises its inherent jurisdiction to re-tax the said Bill of Costs dated 7th March, 2023.
27. On the first Application, the Plaintiff seeks to stay execution of the 2nd Defendant's Party and Party Bill of Costs dated 7th March, 2023 which was taxed on 18th July, 2023 at Kshs 191,560/= pending the hearing and determination of his intended Appeal against the Court's judgement of 13th October, 2022. I have also considered the reasons for and against granting the orders as sought.
28. The Plaintiffs contend that they are apprehensive that the 2nd Defendants was likely to execute the taxed costs against themselves which would be prejudicial to them and cause them substantial loss since their appeal was arguable and had high probabilities of success.
29. The 2nd Defendant opposed the application arguing that the Plaintiff had not submitted that they had not met the threshold for the grant of a stay of judgment/execution but were merely engaging in delay tactics in a bid to frustrate it.
30. 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*. By analogy of the stay of execution pending Appeal under Order 42 Rule 6 of the Civil Procedure Rules, a court will in granting stay of execution pending hearing and determination of a Reference to a judge from taxation of costs be guided by presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the Applicant.
31. An application for stay of execution according to Order 42 Rule 6(2) of the *Civil Procedure Rules* can only succeed if the Applicant satisfies the following criteria:-
- “(1) The Applicant must show that he or she has filed the notice of appeal and that the stay of execution has been filed without undue delay.
 - (2) Secondly, from the facts of the case appealed from the Applicant would suffer substantial loss unless stay of execution is granted.



- (3) That the Applicant has provided security for due performance of the decree or any such order which may be issued by the court at the end of the determination of the appeal.”
32. In the instant application, the 2nd Defendant’s Bill of Cost was taxed on the 18th July, 2023 at Kshs 191,560/= wherein the Plaintiffs filed their application dated the 21st July 2023 which was not inordinate delay. However although the Plaintiff’s states that they will suffer substantial loss if the application is not allowed, it was incumbent upon them to demonstrate the kind of substantial loss they would suffer if the stay order was not made in their favour.
33. In the case of *Charles Wabome Gethi v Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal held -
- “The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”
34. In an application of this nature therefore, the Plaintiffs ought to have shown the damages they would suffer were the order for stay not granted since by granting stay it would mean that the status quo should remain as it were before the ruling and that would be denying the 2nd Respondent costs. See *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410.
35. On the last condition as to provision of security, I find that the Plaintiffs are ready and willing to abide by any reasonable conditions that the court may impose for their compliance for the performance of the decree which is a condition precedent in granting the application. Although this is a mandatory legal requirement under the provisions of Order 42 Rule 6(2) (b) of the *Civil Procedure Rules*, however it should be noted that the court has been called upon to exercise its discretion and consider the application in the interest of justice. This court is enjoined under Article 159 (2) (d) of *the Constitution* to dispense justice without undue regard to procedural technicalities. I am thus not persuaded that the 2nd Defendants will suffer any prejudice if the application is allowed as long as they can be compensated in costs in respect thereof.
36. The second application is dated the 15th September 2023 wherein the 2nd Defendant has sought to set aside/review/remove/quash and vacate any consequential orders of the honorable Taxing Master’s ruling of 8th July, 2023 and in the alternative, the court exercises its inherent jurisdiction to re-tax the said Bill of Costs dated 7th March, 2023. The Application is brought on the premise that the taxation ruling of 18th July, 2023 had an error apparent on the face of the record. That whereas the ruling presupposed that the matter had been decided in a summary manner, yet the same had proceeded to full trial wherein several witnesses had testified before judgment had been delivered. That subsequently, the instruction fees had not been properly taxed as the 2nd Defendant had been awarded a lower figure in comparison to what was provided for under the Advocates Remuneration Order.
37. Paragraph 11 of *Advocates Remuneration Order* which deals with objections to decision on taxation and appeal to Court of Appeal stipulates as follows;
- (1) Should any party object to the decision of the taxing officer, he may within fourteen 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 fourteen days from the receipt of the reasons apply



to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - (4) 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."
38. It is clear that rule 11 (1) of the *Advocates Remuneration Order* stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his Reference within 14 days from the date of the receipt of the reasons.
39. As per the annexure BK-1 annexed to the 2nd Defendant's Application, the impugned ruling was delivered on the 7th March 2023 wherein this reference was filed on the 15th September 2023, which was six months and 7 days later. I also note that there had been no Notice in writing to the Taxing Master seeking further reasons for his reasons and more so on the contested item. As provided by the law herein above stated, the 2nd Defendant having objected to the decision of the Taxing Master on the taxed Bill, it behooved it (2nd Defendant) to seek further reasons by giving notice in writing to the Taxing Officer for the said decision and within fourteen days after the decision, before filing Reference to this court. The Applicant failed to comply with the set down procedures.
40. As was held in the decided case in *Paul Imison & Another v Jodad Investments Limited* [2014] eKLR, the 2nd Defendant could pursue the Reference but with regard to only those items which it had given notification in writing that it was objecting to and no more. To do otherwise would amount to sneaking into the Reference items which were outside the objection.
41. Indeed the Court of Appeal in *Machira & Co Advocates v Arthur K. Magugu & Margaret Wairimu Magugu* CA 199/2002 [2012] eKLR, held that:-
- “Having not specified the items objected to and sought reasons for their taxation, the Respondent's notice of 1st August 2001 was fatally defective. It follows that the Respondent's reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.
- Having not given a proper notice specifying the items objected to and seeking the reasons for their taxation at the figures they were taxed, the issue of when the taxing master's decision was received is immaterial and does not avail the Respondent...”
42. Pursuant to the provisions of the law as herein stipulated above as well as the decisions as cited, I find the 2nd Defendant's Application dated the 15th September 2023 is incompetent before this court and the same is struck out with costs.
43. On the other hand, and so as not to prevent an Appeal, I shall allow the Plaintiffs' application dated the 18th July, 2023 on the following terms;
- i. There shall be stay of execution of the 2nd Defendant's Party and Party Bill of Costs taxed on 18th July, 2023 at Kshs 191,560/= pending hearing and determination of the Plaintiffs' intended Appeal.



- ii. The Plaintiffs shall within 30 days from the date of delivery of this ruling, deposit Kshs 191,560/= (one hundred and ninety one, five hundred and sixty) in Court. In default, the stay shall automatically lapse.

There shall be no Costs.

DATED AND DELIVERED AT NAIVASHA VIA TEAMS MICROSOFT THIS 2ND DAY OF MAY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

