



REPUBLIC OF KENYA



**In re Estate of Khurshid Ahmed Butt (Deceased) (Reference E215 of 2021)  
[2024] KEHC 15511 (KLR) (Family) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15511 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
REFERENCE E215 OF 2021  
EKO OGOLA, J  
DECEMBER 5, 2024  
IN THE MATTER OF THE ESTATE OF KHURSHID AHMED BUTT (DECEASED)**

**BETWEEN**

**COL (RTD) FAROOQ ASIF ..... DECREE HOLDER**

**AND**

**JAMSHED AHMED BUTT ..... 1<sup>ST</sup> JUDGMENT DEBTOR**

**FEHMIDA BEGUM BUTT ..... 2<sup>ND</sup> JUDGMENT DEBTOR**

**RULING**

1. Before this court for determination is the Chamber Summons application dated 19<sup>th</sup> November 2021 by Alphaxard Mogikoyo. The application is premised upon Orders 11(1) & (2) of the Advocates Ruling P&A Reference Application No. E.215 of 2021 (Remuneration) Order 1962, Section 1A & 3A of the *Civil Procedure Act*, Rule 73 of the Law of Succession Rules, Article 159 (2) (d) of *the Constitution* of Kenya, 2010 and all other enabling provisions.
2. The application seeks for Orders:
  - a. That pending the hearing and determination of this reference, there be a stay of the Ruling delivered by the Deputy Registrar/Taxing master on 9.11.2021.
  - b. That the ruling of the Deputy Registrar/Taxing Master date 9.11.2021 be set aside, and the applicant's application dated 06.4.2017 be allowed with costs
  - c. That in the alternative to prayer 2 above, the Honorable Court be pleased to exercise inherent jurisdiction to refer back to the applicants' application dated 06.4.2017.
  - d. That the costs of this application be awarded to the applicants.



3. The application is based on the grounds on the face of the application and supported by an Affidavit of even date sworn by Alphaxard Mogikoyo who is an Advocate of the High court practising in the firm of Osoro Mogikoyo & Co. Advocates who are handling this matter on behalf of the applicants.
4. The applicants' case is that they filed an application dated 6<sup>th</sup> April 2017 before the Deputy Registrar seeking the following orders:-
  - a. That this application be certified urgent and then heard exparte in the first instance.
  - b. That the application be heard in priority to the application for settlement of terms and conditions of sale dated 9<sup>th</sup> December 2015
  - c. That this honourable court be pleased to grant the Respondent/applicants leave to satisfy the certificates of costs dated 20<sup>th</sup> March 2013 and 9<sup>th</sup> November 2016, whose amounts total to Kshs. 3,705,672/30 paying it into court
  - d. That the court do give a self-regulating Order that upon grant of prayer 3 above and payment into court of Kshs.3,705,672/30
    - i. The prohibitory order lodged against L.R. No. Mombasa/M.S/BLOCK/1/416 be vacated and removed forthwith
    - ii. The applicants/respondents do release the original certificate of lease over L.R. No. Mombasa/M.S/BLOCK/1/416 to the respondent/applicants forthwith
  - e. That this honourable court do find that an order of payment of interest on costs having not been made when the Bills of costs were taxed and certificates issued, interest on costs contained in the certificate of costs dated 20.3.2013 and 29.11.2016 is not claimable and/or payable
  - f. That the costs of this application be provided for.
5. The applicants' counsel claims that the parties recorded consent before the Deputy Registrar where Orders 1 to 4 of the application were granted. Order 5 was left for argument by the parties.
6. The applicants' counsel states that the issue before the Deputy registrar was whether interest was payable on the two certificates of taxation dated 20<sup>th</sup> March 2013 and 29<sup>th</sup> November 2011.
7. According to the applicant's counsel, prior to filing the application on 6<sup>th</sup> April 2017, the respondent had filed an application seeking to attach the applicant's property on the basis of the certificates of taxation.
8. According to the applicants' counsel, the applicants paid the amounts in certificates of taxation in full but via three instalments on 12<sup>th</sup> February 2019, 28<sup>th</sup> February 2019 and 4<sup>th</sup> March 2019.
9. The parties were to file submissions to canvass the remaining issue. The parties filed submissions and were issued with a ruling date of 2<sup>nd</sup> November 2021. However, according to the applicant's counsel, the ruling was not delivered since the Deputy registrar was unwell. Instead, the ruling was to be delivered on notice.
10. The applicants' counsel states that the ruling was delivered on 9<sup>th</sup> November 2021 without notice to the applicants. Counsel claims to have found out about the ruling on 16<sup>th</sup> November 2021 when they called the court assistant who informed them of its delivery.



11. The counsel deposes that the application dated 6<sup>th</sup> April 2017 was dismissed and interest awarded as calculated by the respondent. The Counsel contends that the Honorable Taxing Master made errors on principle and errors of law in dismissing the applicant's application of 6<sup>th</sup> April 2017.
12. On 14<sup>th</sup> March 2022, a Replying Affidavit opposing the chamber summons application was filed. The same was sworn by Col. (RTD) Farooq Asif Butt the respondent.
13. The respondent's case is that the application by the applicants is made with the intention of misleading the court into issuing prejudicial orders against the respondent.
14. According to the respondent, the ruling of 9<sup>th</sup> November 2021 was not in regard to the bill of costs but a ruling on the question of interest; the best way the applicants would have moved the court would have been through appeal and not through a reference.
15. On the issue of stay, the respondent deposes that the applicants have not demonstrated sufficient cause to warrant the issuance of orders for stay. Neither have they attached any memorandum of appeal or even a notice to appeal.
16. The respondent states that if the court is to grant the stay of execution, the same should be conditional on depositing into court as security for costs of the entire decretal suit into a joint interest-earning account in the name of the parties' advocates joint account. The respondent also states that since the instructions to realize the property have already been issued to the auctioneers, an order for stay should be followed by an order for the applicants to pay the auctioneers fees.
17. The respondent states that the application lacks merit and should be dismissed.
18. The matter was canvassed by way of written submissions. The Applicants filed submissions dated 13<sup>th</sup> March 2023 and supplementary submissions dated 22<sup>nd</sup> May 2023. The respondent's submissions are dated 18<sup>th</sup> May 2023.

### **Determination**

19. I have carefully considered the pleadings; the supporting documents and the parties' submissions and the following issues have come out clearly for determination.
  - i. Whether the ruling delivered by the Deputy Registrar on 9<sup>th</sup> November 2021 should be stayed
  - ii. Whether the ruling of 9<sup>th</sup> November 2022 should be set aside and the applicants' application of 6<sup>th</sup> April 2017 be allowed.

### **Whether the ruling delivered by the Deputy Registrar on 9<sup>th</sup> November 2021 should be stayed**

20. The applicants seek for stay of the ruling delivered on 9<sup>th</sup> November 2021. The Deputy Registrar was to determine the issue of interest. The Deputy Registrar stated that interest should be calculated as per Rule 7 of the Advocate Remuneration Order which is to the effect that interest on a bill of cost will accrue automatically if a taxed bill remains outstanding for more than one month. The Deputy Registrar held that the total amount payable is Kshs. 6,976,963 plus Kshs. 417,656/- the total being Kshs. 7,394,619/-.
21. The applicants have sought stay of the ruling which means stay of execution of the ruling.

“Order 42 rule 6(2) of the Civil Procedure Rules provides: "No order for stay of execution shall be made under sub rule (1) unless-



- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
22. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
23. The applicants' counsel has stated that the applicants will suffer irreparable loss if their property number Mombasa MS/BLOCK 1/416 is sold through the public auction since there is already a notice from the auctioneers regarding the same.
24. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheeto* [2012] eKLR, that:
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
25. The applicants' counsel claims that there is a contention when it comes to the decretal sum and therefore if the ruling is not stayed, the applicants will suffer substantial loss.
26. The application herein was filed on 19<sup>th</sup> November 2021 after the ruling was delivered on 9<sup>th</sup> November 2021. There was therefore no unreasonable delay in filing the application.
27. Order 42 rule 6 makes it a requirement for a person seeking stay of execution to furnish security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. The applicants have not stated anywhere that they will be providing security for costs.
28. The respondent's counsel has argued that the applicants have not demonstrated sufficient cause to warrant the issuance of stay orders. The respondent submitted that he obtained a valid ruling of the court and by virtue of the decree; that he is entitled to the fruits of his ruling.
29. The applicants herein have not filed any Notice of Appeal or any Memorandum of Appeal with regard to the appeal. It is not clear to this court why they are seeking stay. One cannot just seek stay of execution without demonstrating why the stay is needed. Granting a stay without a justifiable cause like an appeal would mean that the party getting the stay would use it to his own advantage since there is no timeline or pendency of anything that would automatically discharge the stay.



30. I am therefore not inclined to give stay of execution orders since the applicants have not filed any kind of proof that they have filed an appeal that would be rendered nugatory were the orders for stay not issued.

Whether the ruling of 9<sup>th</sup> November 2021 should be set aside and the applicants' application of 6<sup>th</sup> April 2017 be allowed.

31. The applicants have argued that the ruling should be set aside since the Deputy registrar erred in principle and in law; that the taxing officer used Order 7 of the remuneration Order which relates to the advocate-client bill of costs while the taxed certificates relate to the party-to-party bill of costs.

32. The principles of setting aside the decisions of the taxing Master were well established in the cases of Premch and Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162, First American Bank of Kenya vs Shah and Others (2002) EA 64 and Joreth Ltd vs Kigano and Associates (2002) 1 EA 92. These include

- a. That there was an error of principle
- b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
- c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
- d. That so far as practicable there should be consistency in the award.

33. The applicants have argued that the taxing master erred in principle by applying provisions of the advocate-client bill of costs to party-to-party costs. The taxing master relied on Order 7 of the Advocates remuneration order which provides that: -

“An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full”

34. The wording of this section is to the effect of an advocate charging interest on his disbursements and costs. The bill of costs as rightfully stated by the applicants is a party-to-party bill of costs.

35. In light of the above provision, it is clear the taxing master erred in principle and in law by applying Order 7 to the party-to-party bill of costs. The Ruling of 9<sup>th</sup> November 2021 is hereby set aside on the issue of interest.

36. This court makes the following orders:

- a. The prayer for a stay of execution of the ruling of 9<sup>th</sup> November 2021 is denied.
- b. The prayer to set aside the ruling of 9<sup>th</sup> November 2021 is allowed.
- c. The application dated 6<sup>th</sup> April 2021 is to be returned to the Taxing Master for a fresh hearing of the issue of interest.

d. Cost shall be in the cause

Order accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF DECEMBER 2024**



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**E.K. OGOLA**

**JUDGE**

In the presence of:

Ms. Njuguna h/b Mr. Bulle for the Applicant

Mr. Andati for the Respondent

Ms. Gisiele Mohammed Court Assistant

