



Bedrock Security Limited v Bedrock Holding Limited (Civil Case E133 of 2009) [2024] KEHC 6033 (KLR) (20 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E133 OF 2009
RE ABURILI, J
MAY 20, 2024**

BETWEEN

BEDROCK SECURITY LIMITED PLAINTIFF

AND

BEDROCK HOLDING LIMITED DEFENDANT

RULING

1. Vide Chamber Summons dated February 9, 2024, the applicant seeks the following orders:
 - i. That this court be pleased to enlarge time within which the applicant herein may file the reference from the said decision of the taxing officer delivered on November 6, 2023.
 - ii. That the reference herein be deemed to have been duly filed with leave of court.
 - iii. Spent
 - iv. That this Honourable Court be pleased to vary and/or set aside the ruling of the learned taxing officer delivered on the November 6, 2023 on items 1, 3, 5, 15, 18, 19, 20, 21, 22, 30 & 31 on the defendant's party – party Bill of Costs dated November 24, 2022 or in the alternative, the defendant's Bill of Costs dated November 24, 2022 be remitted back for taxation before the same or another taxing officer, with appropriate directions on the question of assessment of the stated items.
 - v. That the cost of the reference be awarded to the applicants.
2. The Chamber summons is supported by the Affidavit of the applicant Baron O. Ndolo and the grounds on the face of the summons.



3. The applicant's case is that it was dissatisfied with the taxed costs which were party and party costs. It then sought for a copy of the ruling of the taxing master but the registry could only avail the handwritten ruling which was not easy to read and did not contain the reasons for the taxing officer's decision. The applicant therefore vide the letter dated 20th November 2023, sought reasons for the assessment on items 1, 3, 5, 15, 18, 19, 20, 21, 22, 30 & 31 which reasons were never supplied until the 9.2.2024 vide a letter from the taxing officer stating that the reasons were in the said ruling of 6.11.2023.
4. In response to the Chamber Summons, the respondent through one Stephen O. Ayugi swore a replying affidavit on the 27.2.2024 deposing that contrary to the applicant's allegation, there was no evidence of any letter written following up the matter with the registry, that the handwriting of the Deputy Registrar is so clear that there is no difficulty in reading the same.
5. It was deposed on behalf of the respondent that the three months' delay was inexcusable as there was no proper explanation for the same. It was deposed that there are authorities that where there is an explanation in the body of the ruling on taxation, one does not need to write a letter and further that the applicant failed to disclose why he has a problem with the taxed items.
6. The application was canvassed by way of oral submissions.

The Applicant's Oral Submissions

7. On behalf of the applicant, it was submitted that it challenged the award on Item 1 as the Bill was taxed pursuant to instructions to defend the application in execution proceedings and that under Schedule 6 (i) of the *Advocates Remuneration Order*, is Kshs. 5,000 not Kshs. 50,000. It was submitted that this figure as awarded was exorbitant and no justification was given for that and thus it ought to be set aside as it is excessive in the circumstances. Reliance was placed on the case of *Singh Gitau Advocates v City Finance Ltd* [204] eKLR, *Mwakio Kiwa & Co. Advocates v County Service Public Service Board of Bomet & Another* [2022] eKLR where Onesmus Makau J. set aside the decision of the taxing officer and substituted it with an award of Kshs. 10,000. It was submitted that there was nothing complex in this case and that the judge never certified the matter as complex.
8. The applicant also challenged Item 3 fees on the award for attendance whereas the matter never came up before the court.
9. On item 5, it was submitted that Kshs. 3,000 was excessive as the matter only came up for mentions.
10. On items 15 & 30, it was submitted that the same were court adjournment fees that the court directed the defendant to pay and as such they cannot claim the same from the opposite party.
11. On items 18, 19, 20,21, 22, 30 & 31 it was submitted that they related to changes or expenditure based on documents expunged from the court records on th 22.7.2021 and thus a party cannot claim for costs on the same as this would amount to overturning the expunging order.
12. It was submitted that the applicant is seeking extension of time to file their reference as they filed the instant application on the 12.2.2024 having received the letter giving reasons for the ruling from the Deputy Registrar on the 9.2.2024.
13. It was submitted that Rule 11(4) of the *Advocates Remuneration Order* allows a party to apply for extension of time.
14. The applicant relied on the case of *Magdalene Alphonse v Chepsokoro & 5 Others* [2021] eKLR where the court dismissed a reference which was filed before communication from the taxing officer.



The Respondent's Oral Submissions

15. It was submitted that the ruling on taxation was delivered on the 6.11.2023 with both counsel present and the applicants were granted 45 days stay but the applicant still delayed and the current application was an attempt by the applicant to deny the respondent the fruits of the ruling.
16. The respondent submitted that the items challenged were granted based on the services rendered. On item 1 it was submitted that Kshs. 50,000 was justified as it depends on the type of case.
17. On court attendances, the respondent submitted that the same is charged based on the time the advocate takes being in court dealing with the matter. On item 3 it was submitted that the parties attended court on that day.
18. The respondent relied on the cases of *Paul Wanjobi Mathenge v Dancun G. Mathenge* [2013] eKLR, *Kennedy Mukora Mwangi v James G. Mwangi* Civil Appeal No. 26/2004 and that of *Mwangi v Kenya Railways Ltd* [2003] KLR where the courts dealt with whether extension of time should be granted.

Analysis and Determination

19. Having considered the material placed before this court and the submission for and against the chamber Summons, the issue for the Court's determination are:
 1. Whether or not extension of time to file a reference under paragraph 11 (1) and (2) and (4) of the *Advocates Remuneration Order* should be granted
20. Paragraph 11 of the *Advocates (Remuneration) Order* provides a detailed procedure for objection to taxation of costs as follows:
 - " 11. Objection to decision on taxation and appeal to Court of Appeal.
 - (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.”[emphasis added]

21. The paragraph however, does not state the relevant factors that the Court should consider when exercising its discretion on whether or not an extension of time should be granted. Guidance must therefore be solved from case law. In *Paul Wanjobi Mathenge V Duncan Gichane Mathenge*[2013] eKLR the Court of Appeal while referring to other authorities observed that:

“The discretion under rule (4) is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi V Charles Gichina Mwangi* – Civil Application No. Nai 26 of 2004, this Court held; -

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi V Kenya Airways Ltd* [2003] KLR 486 in which this Court stated;-Over the years, the Court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* – Civil Application No Nai 255 of 1997(unreported), the Court expressed itself thus; -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general 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 reasons for 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.”

22. As stated in the above case, the length of the delay and reasons for non-compliance of the time lines are important factors to influence the exercise of discretion of the Court.
23. In calculating the length of delay in making the application for an extension of time, the period will start running from November 6, 2023 when the bill of costs was taxed by the taxing master to the February 9, 2024 which time the aggrieved applicant lodged the chambers summons for extension of time.
24. In complying with rule 11, the applicants ought to have filed their reference by the 20.11.2023. Accordingly, the delay in filing the application was 2 months and 9 days. However, the applicant in his affidavit has explained the reasons which let time to lapse. It was submitted that the applicant wrote to the Deputy Registrar seeking reasons for the ruling on taxation which letter was responded too late on the 9.2.2024.
25. I have perused the impugned ruling on taxation and am unable to decipher the reasons contained therein for taxing each of the items complained of. That hurdle has therefore been satisfied as a sufficient cause for this Court to extend time in favor of the applicant to file a Reference challenging the taxation.
26. In my view, the delay in filing the reference was not inordinate and it has been explained to the satisfaction of this court.



27. As to whether or not execution should be stayed, the Statutory anchorage of the discretion to consider stay of execution rests on order 42 rule 6 (1) of the Civil Procedure Rules. It is on the basis that the Reference is a path way for an aggrieved party from the Certificate of Cost of the taxing master it may be argued correctly that the principles shall apply Mutatis Mutandis.
28. The Court has considered numerous cases laid down for the exercise of judicial discretion. See for example: Housing Finance Company of Kenya V Sharok Kber Mohamed Ali Hirji & another[2015]eKLR, Reliance Bank Ltd(In liquidation) V Noriake Investments Ltd, Rep V kenya Anti-Corruption Commission & 2 Others[2009]KLR 31, Carter & Sons Ltd V Deposit Protection Fund Board & 2 others, Edward Kamau & another V Hannah Mukui Gichuki & another[2015]eKLR. The guiding principles for determining whether or not to stay execution are; -
- i. Where special circumstances of the case so requires
 - ii. There is proof of substantial loss that may otherwise result
 - iii. There is substantial question of law to be adjudicated upon by the appellant court
 - iv. Where if the stay is not granted, the appeal is successful, would be rendered nugatory.
29. The Court in RWW v EKW [2019] eKLR held that:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
30. That being the general principle, the question is whether the subject matter of the reference if successful will be rendered nugatory. It has also been stated that the applicant is likely to suffer substantial loss in the event that the respondent is allowed to proceed with entry of judgment and subsequent execution.
31. For the reasons contained in the applicant’s affidavit, the Court accepts the submissions for counsel for the applicant which discloses material averments necessary for the court to exercise discretion to grant a stay of execution of the Certificate of Costs pending the determination of the reference.
32. Further, this court notes the Items contested by the applicant and reserves its comments on the same as they are subject of the yet to be considered reference.
33. On whether the chamber summons as filed should be deemed to be a duly filed reference, as there are serious issues raised in the taxed bill of costs, I order that a reference properly so called shall be filed upon this court enlarging time for such filing.
34. Accordingly, the application dated February 9, 2024 is found to have merit and is allowed to the extent stated in this ruling, but without the merits of the challenge to the taxation of the specific items complained of. The Court directs that the reference be filed and served within seven(7) days of today,



unless otherwise extended by the Court. The court does not consider the application subject of this ruling as being a reference. Pending the filing, hearing and determination of the said reference, there shall be no execution of the decree or certificate of costs.

35. Costs of the Chamber Summons shall be in the reference.

36. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF MAY, 2024.

R.E. ABURILI

JUDGE

