



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Ouko, SCJJ)

PETITION (APPLICATION) NO. 16 OF 2019

— BETWEEN —

**NON- GOVERNMENTAL ORGANIZATIONS
COORDINATION BOARD.....APPLICANT**

-AND-

ERIC GITARI.....1ST RESPONDENT

ATTORNEY GENERAL..... 2ND RESPONDENT

AUDREY MBUGUA ITHIBU.....3RD RESPONDENT

DANIEL KANDIE.....4TH RESPONDENT

KENYA CHRISTIAN PROFESSIONALS FORUM.....5TH RESPONDENT

KATIBA INSTITUTE.....6TH RESPONDENT

(Being an application for enlargement of time to file and serve a Reference out of time against and stay of execution of the Taxation Ruling and Orders of the Supreme Court (Hon. B. Kasavuli, Deputy Registrar) delivered on 9th June 2023)

Representation:

Mr. Charles Kanjama, SC for the Applicant
(Muma & Kanjama Advocates)

Ms. Ligunya for the 1st Respondent
(Ligunya Sande & Associates Advocates)

RULING OF THE COURT

[1] RECALLING that on 27th June 2023, this Court (*W. Ouko, SCJ*) sitting as a single Judge certified this matter as urgent and directed that it be placed before the Hon. Vice President of the Court for further orders; that subsequently, on 29th June, 2023 the applicant filed a second certificate of urgency with affidavits in support to review those orders contending that there was a real threat of execution of orders arising from the Taxation Ruling of the Deputy Registrar issued on 9th June, 2023. Consequent, upon considering the prevailing situation, the Court granted on a temporary basis, prayer (*iii*) of the said Motion, staying the execution commenced by the 1st respondent, and also restrained the 1st respondent and the auctioneers from selling, or disposing of any of the applicant's proclaimed property and/or household equipment pending the hearing and determination of the instant application.

[2] NOW, THEREFORE, UPON considering the aforesaid Notice of Motion dated 24th June, 2023 brought under Article 159 and 163(4)(a) of the Constitution, Sections 11, 23(2)(e) and 23 of the Supreme Court Act, 2011 as well as Rules 15(2), 30 and 62 of the Supreme Court Rules, 2020 for orders:

- i) ... (Spent)*
- ii) That this Honourable Court be pleased to grant leave to the Applicant and enlarge time to file a Reference against the decision of the Registrar on taxation of costs dated 9th June 2023;*
- iii) That the execution proceedings commenced by the 1st Respondent/Decree Holder against the Applicant/ Judgment Debtor be stayed and/or set aside including restraining the 1st respondent and Zasha Auctioneers, their agents and/or employees and/or any person acting under their instructions or directions from selling, dealing, interfering, alienating or disposing any of the applicant's*

property and/household equipment pending hearing and determination of the present application;

- iv) That the Reference filed herein be deemed as properly filed;*
- v) That the Court be pleased to issue a stay of execution of the Ruling and Order of the Registrar of this Court dated 9th June 2023 pending re-taxation of the bill of costs;*
- vi) That the Court be pleased to set aside or review downwards the decision made by the Registrar of this Court dated 9th June 2023 as relates to item 1 on instructions taxed at Kshs. 5,000,000/-; and*
- vii) Costs of this Application be provided for; and*

[3] UPON reading the applicant's Supporting Affidavit sworn on 24th June, 2023 by Lindon Otieno, the Legal Affairs Manager of the applicant and their written submissions dated 27th June 2023 whose combined effect is that, although the decision under challenge was delivered on 9th June 2023, the applicant only became aware of it on 20th June 2023 when it was served with the Proclamation Notice; that upon receipt of the Proclamation Notice together with the ruling, the applicant was unable to issue instructions to counsel on the filing of the Reference Application as its Legal Manager was indisposed and out of the office for the whole week; that upon the Legal Manager resuming work, the instant application was brought without undue delay; and that the time taken between the deadline for filing the Reference and the filing of the instant application was only 10 days; and

[4] UPON considering the application for stay of execution of the Hon. Deputy Registrar's Ruling on Taxation and an order of injunction against the attachment and sale of the applicant's property, wherein, the applicant submits that the intended Reference has a high chance of success; in that the Hon. Deputy Registrar erred in failing to give consideration to the fact that the said Bill of Costs and Decree were lodged and drawn contrary to Rule 29 as well as paragraph 2(2) of the Third Schedule to the Supreme Court Rules 2020; and further, that no draft order

or decree was submitted by the 1st respondent to the applicant for prior approval contrary to Rule 29 aforesaid. Therefore, should the 1st respondent proceed to execute the order for costs made pursuant to the Deputy Registrar's ruling, the subject matter will be lost, and the Reference rendered nugatory; and

[5] UPON reading the applicant's supplementary submissions dated 24th July, 2023, wherein the applicant has deponed that it is facing imminent threat of execution and stands to suffer irreparable harm in the event the auctioneers proceed to sell and dispose of the proclaimed goods; that despite the instant application being certified as urgent by the Court on 27th June, 2023, on the morning of 29th June, 2023, Zasha Auctioneers in the company of more than 50 men, proceeded to the applicant's office premises and sought to attach with the intention of selling the applicant's properties including the applicant's tools necessary for the performance of its statutory obligation; that taking advantage of the presence of auctioneers in the applicant's premises, the 1st respondent's advocate used her influence to unduly coerce the applicant's Executive Director into entering into a consent with it; that the applicant protested to the Registrar of the Court and pointed out that the purported consent was obtained under duress, coercion, undue influence and without the authority or consent of the applicant's Board as well as without authority of the applicant's counsel on record; and that the impugned consent does not settle the matter. The applicant finally submits that this being a public interest matter, the applicant has satisfied the principles in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 others***, SC Application No. 16 of 2014; [2014] eKLR for the grant of an order of extension of time and for an order of stay of execution; and

[6] UPON considering the 1st respondent's Replying Affidavit sworn on 7th July, 2023 by Eric Gitari opposing the application and submissions dated 11th July, 2023 to the effect that the application ought to be dismissed in its entirety on account of the consent dated 29th June, 2023 entered into by the parties; that contrary to the applicant's submissions, the applicant was at all times represented by the firm of

Messrs. Muma and Kanjama Advocates who were aware of the taxation ruling but failed to comply with the order of the Court, thereby prompting the execution process; that as a matter of fact, on its own initiative, the applicant reached out to the 1st respondent's counsel, Ms. Ligunya, inviting her to a meeting on 29th June 2023 to enter into a consent for the settlement of the matter; that the consent was willingly and lawfully signed by the applicant's Executive Director in the presence of the 1st respondent's counsel on record upon refusal by the applicant's counsel, Mr. Kanjama, even after he was instructed by the applicant to execute the same; that the allegations of undue influence, duress and coercion, which have not been proved are merely a calculated move by the applicant to run away from its obligations after obtaining a favorable orders of stay on 30th June 2023; that the consent itself having preceded the orders of stay, the latter was of no effect having been overtaken by events; and that consequently the consent agreement settled the matter between the parties and there is nothing left for this court's determination; and

[7] FURTHER, noting the assertion by the 1st respondent that, the applicant is not deserving of the grant of orders for extension of time as it has at all times, through its conduct and that of its advocate, acted in a fraudulent and deceitful manner with the aim of defeating court orders; that it has failed to prove in a satisfactory manner the reasons for delay and in a casual manner attributed its failure to file the reference to the Legal Manager's alleged illness; that no evidence had been tendered to suggest that the applicant's advocates had communicated to the Legal Manager or to the applicant's office of the Court's Ruling; that in any event, the applicant has not rejected the decree as drawn by this Court to hinge the same as a proper ground for review of the decision of the taxing master; that the application lacks merit and ought to be dismissed with costs; and that the Court considers adopting the consent dated 29th June, 2023 as entered into by the parties; and

[8] HAVING CONSIDERED the application, affidavits and rival arguments by both parties, **WE NOW THEREFORE OPINE** as follows:

[9] The foregoing lengthy arguments, notwithstanding, we are only concerned in this ruling with two prayers; enlargement of time and stay of execution. This Court, by the provisions of Rule 15(5) of the Supreme Court Rules, 2020, has jurisdiction to extend the time limited by the Rules. The guiding principles in considering an application for extension of time are well enunciated in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others*, SC Application No. 16 of 2014; [2014] eKLR but bears repeating:

“ 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) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis.

iv) Whether there is a reasonable 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

v) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

[10] Applying these principles, we note from the record that the Taxation Ruling in question was delivered by email to the parties on 9th June, 2023. Under Rule 62(1) of the Supreme Court Rules, 2020, **“A person who is dissatisfied with**

a decision of the Registrar in the taxing of costs may refer the matter, within seven days to a single judge for determination.” Consequently, the applicant was required to have lodged its reference by 16th June 2023. This was not done and the reason advanced by the applicant was that the applicant’s Legal Affairs Manager was indisposed as a result of which he was unable to review the said Ruling and give instructions to counsel on record for the applicant. To corroborate these assertions, the applicant has attached a Sick Off Form dated 12th June, 2023 in respect of Lindon Otieno, the applicant’s Legal Affairs Manager, as an illustration that he was away from office for 5 days. Based on this averment and evidence, we hold the view that the reason for the delay is plausible and satisfactory, in addition to the fact that the instant motion was brought without undue delay and the respondents have not shown any prejudice they stand to suffer if time sought is granted.

[11] CONSIDERING the applicant’s second prayer for stay of execution of the order arising from the Taxation Ruling, this Court has, under Section 23A of the Supreme Court Act, jurisdiction to issue an order for stay of execution, an injunction, a stay of further proceedings or any other conservatory or interim orders, on such terms as the Court may deem fit. The principles for grant of stay of execution as enunciated in *Gatirau Peter Munya v. Dickson Mwenda & 2 others*, SC Application No. 5 of 2014; [2017] eKLR are, as it were, old hat. First, the applicant must satisfy the Court that the appeal is arguable and is not frivolous; second, that unless the orders of stay are granted, the appeal will be rendered nugatory; and third, it is in the public interest that the order of stay be granted.

[12] NOTING the appellant’s grievance with the Hon. Deputy Registrar’s ruling that the Bill of Costs and Decree were lodged and drawn contrary to Rule 29 as well as paragraph 2(2) of the Third Schedule to the Supreme Court Rules, 2020 for the reason that the decree was neither drawn and certified nor was it lodged after making the order for costs; and that no draft order or decree was submitted by the 1st respondent to the applicant for approval. Besides these, both parties also have

rival arguments regarding the validity of the consent agreement and whether it settled the matter between the parties. In our view, these issues which are to be raised in the intended reference are indeed arguable and not frivolous.

[13] FURTHER NOTING that the impending and imminent threat of execution of the decree arising from the Ruling will render the intended reference nugatory should the auctioneers proceed to sell and dispose of the proclaimed goods before the determination of the Reference. Lastly, in view of the fact that the dispute involves a statutory body funded by public coffers, we are of the view that it is in public interest that the order of stay be granted pending the determination of the intended Reference. In the result, the strictures in Section 23A of the Supreme Court Act and Rule 15(5) of the Supreme Court Rules, 2020 together with the principles in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission* (supra) and *Gatirau Peter Munya v. Dickson Mwenda & 2 others*, have fully been met to warrant the granting of the two prayers.

[14] COGNIZANT that, by the provisions of Rule 62 of the Supreme Court Rules 2020, the jurisdiction to determine a reference on Taxation is donated to a single judge as opposed to the full bench. Secondly, the applicant's invitation of the Court in this application to deem "*the Reference filed herein as properly filed*" is untenable for a second reason. This Court has laid the principle that once time is enlarged, the applicant must properly and formally lodge the document, serve it and pay fees for it. The Court cannot sanitize by "deeming" documents irregularly lodged before granting leave. It is presumptive and inappropriate to file a document out of time and then seek the Court to extend the time. See *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (supra) and *Kenya Hotel Properties Limited v. Attorney General & 5 others*, SC Application 2 of 2021; [2021] eKLR. The proper course is to file and serve the reference for consideration before a single Judge.

[15] On costs, the award of the same is discretionary and follows the principle set out by this Court in *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR that costs follow the event. In exercise of our discretion, we defer the costs of this application to await the ultimate outcome of the Reference on Taxation.

[16] ACCORDINGLY, we make the following orders:

The Applicant's Notice of Motion dated 24th June 2023 be and is hereby allowed in the following terms:

- i) Leave be and is hereby granted to the Applicant to file and serve the Reference against the decision of the Deputy Registrar on taxation of costs dated 9th June 2023 within 7 days of delivery of this ruling.***
- ii) An order staying the execution of the Order of the Deputy Registrar of this Court dated 9th June 2023 commenced by the 1st respondent, including an order restraining the 1st respondent and Zasha Auctioneers, their agents and/or employees, and/or any person acting under their instructions or directions from selling, dealing, interfering, alienating or disposing of any of the applicant's property and/or household equipment be and is hereby issued pending the determination of the Reference on Taxation.***
- iii) Costs of this Application shall abide the outcome of the Reference on Taxation.***
- iv) We direct that the file be placed before the Deputy Registrar of the Court for the purposes of issuing***

***directions on the filing of the Reference on Taxation and
the subsequent exchange of submissions.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd Day of September 2023.

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

**I certify that this is a true copy
of the original**

REGISTRAR
SUPREME COURT OF KENYA

