



G.N. Thiongo Advocates v Mailua Estates Limited (Miscellaneous Civil Application E436 of 2022) [2024] KEHC 9504 (KLR) (Civ) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9504 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E436 OF 2022**

CW MEOLI, J

JULY 31, 2024

BETWEEN

G.N. THIONGO ADVOCATES APPLICANT

AND

MAILUA ESTATES LIMITED RESPONDENT

RULING

1. For determination is the motion dated 11.10.2023 by Mailua Estates Limited (hereafter the Applicant) seeking inter alia that the Court be pleased to enlarge time for the Applicant to file a reference out of time challenging the ruling delivered by the taxing officer on the 22.05.2023; and that the Applicant be granted twenty-one (21) days to file a reference from the date of the order granting leave. The motion is expressed to be brought pursuant to Paragraph 11(4) of the *Advocates Remuneration Order* (ARO) and Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA) among others. And premised on grounds on the face of the motion as amplified in the supporting affidavit sworn by Stephen Waigwa Murage, who describes himself as the managing director of the Applicant and duly authorized.
2. The gist of his deposition is that G.N. Thiongo Advocates (hereafter the Respondent) filed a bill of costs dated 01.07.2022 which was taxed on 22.05.2023. That unfortunately, the Applicant's counsel on record had no notice of the delivery ; that there was mix up in the Court date because when the matter came up for mention for directions 29.03.2023 a further mention was set for 29.06.2023 to confirm filing of submissions; and that counsel on record only learned of the delivery of the taxation ruling upon being served with the Respondent's motion dated 03.07.2023 seeking entry of judgment in respect of the taxed costs. Whereupon counsel promptly requested for a copy of the taxation ruling but the file had gone missing, and that follow up letters have equally not elicited any response delaying the filing of a reference. Meanwhile the Applicant is aggrieved by the taxed amount in the certificate of taxation exhibited in the Respondent's motion dated 03.07.2023.



3. Contending that the intended reference cannot be filed without reviewing of the contents of the ruling of the taxing officer he states that it is justifiable for the Court to extend time within which to file a reference. He further states that delay herein is not inordinate and that any prejudice to the Respondent can be compensated by an award of costs. In conclusion he states that if the motion is not allowed the Applicant will be prejudiced through curtailment of its right of appeal, and hence it is in the interest of justice that the motion be allowed as prayed.
4. The Respondent opposes the motion through the replying affidavit sworn by Geoffrey Thiongo. He views the Applicant's motion as a calculated attempt to deny him the fruits of successful litigation. That bill of costs in question was canvassed inter partes however conceding that the ruling was delivered in the absence of the Applicant's advocates on account of their failure to attend the court. He asserts that the Applicant is guilty of inordinate delay and the explanation advanced by the Applicant prompted by the Respondent's attempt to realize the taxed costs, and the Court ought not aid an indolent litigant by exercising its discretion in favour of the Applicant.
5. In rejoinder by way of a supplementary affidavit deposed by Beatrice Wairimu Kariuki , counsel on record for the Applicant, swore that in light of the proceedings before the Deputy Registrar on 29.03.2023, there was an honest but mistaken belief that the matter was next scheduled for 29.06.2023 and she had no notice that the taxation ruling was to be delivered on 22.05.2023, and only came to learn of the impugned ruling on 03.07.2023 upon receipt of an email from the Respondent's counsel. Counsel further asserts that the Respondent's counsel was equally absent when the ruling was delivered as no such ruling date had been scheduled. Hence it is dishonest of the Respondent to condemn the Applicant for failing to attend Court on 22.05.2023. In conclusion she states that the motion ought to be allowed as the mistake or error manifest on the record is not of the Applicant's making.
6. The motion was canvassed by way of written submissions. Counsel for the Applicant began by restating the events in the respective parties' affidavit material and record , which she said establishes that the taxation ruling was delivered without notice to the parties and or their counsel on record. Reiterating the explanations in the supporting affidavits, she contended that a reasonable explanation for the delay has been offered and that a litigant ought not be punished for the mistakes of counsel. Citing in this regard the decisions in *First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others* (Milimani HCCC No. 2255 Of 2000) [2002] 1 EA 65, *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR, *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR and Nairobi HCCC No 51 Of 2017 - *Bank of Africa VS. Put Sarajevo General Engineering Company Ltd. & 2*. Counsel concluded by urging the Court to allow the motion as prayed.
7. On the part of the Respondent, counsel reiterated the contents of the replying affidavit and pointed out that the present motion was filed more than the three (3) months from the date when the Applicant learned of the taxation ruling. Counsel proceeded to argue that the Applicant's explanation that the Court file was missing has no basis and is intended to mislead, the Applicant having failed to justify the exercise of the discretion as sought. Relying on the decision in *Nicholas Kiptoo Korir Arap Salat (supra)* counsel maintained that the motion has failed the test. That the Respondent would suffer prejudice, having offered legal services for which the Applicant seeks to avoid settling by the its motion. Counsel concluded by urging the Court to dismiss the Applicant's motion with costs.
8. The Court has considered the rival affidavit material and submissions in respect of the motion. The taxation ruling that is the subject of the motion was delivered by the taxing officer on 22.05.2023. The power of the Court to enlarge time for the filing of a reference on a taxation ruling is expressly donated by Paragraph 11(4) of the *ARO*. Paragraph 11 of the *ARO* in its entirety provides that:-



- (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.
9. Loosely stated, the provisions above echo the provisions of Order 50 Rule 6 of the *Civil Procedure Rules* (CPR). Therefore, the applicable principles would be dissimilar; a reference is essentially a form of appeal, challenging the decision of a taxing officer. The principles governing leave to appeal out of time and or enlargement of time within which to lodge an appeal are settled and require no restatement. It is trite that a successful applicant seeking leave to appeal out of time must demonstrate "good and sufficient cause" for not filing the appeal in time.
10. In *Thuita Mwangi v Kenya Airways* [2003] e KLR, the Court of Appeal while considering Rule 4 of the old *Court of Appeal Rules* which was in pari materia with Order 50 Rule 6 of the *CPR* as well as Section 79G of the *CPA*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:
- "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 generally the matters which this Court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."
11. While the discretion of the Court in an application of this nature is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in his favor. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat* (supra) enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:
- "(T)he underlying principles a court should consider in exercise of such discretion include;
1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

12. The court has reviewed the explanations offered by the Applicant and the retort by the Respondent in the respective affidavits. The Applicant’s affidavit material in support of the motion and perusal of the record before the court reveals the following facts. Directions on the bill of costs filed on 06.07.2022 were given by the Deputy Registrar on 22.09.2022, following which a compliance date was scheduled for 08.11.2022. On the latter date, the matter was rescheduled for mention on 15.12.2022 to confirm compliance with the Deputy Registrar’s directions. From the record it appears that the latter date apparently collapsed, and subsequently, the latter date came up on 25.01.2023 when parties further took compliance directions and further mention set for 29.03.2023. Once more, the date collapsed and the next activity in the matter was the delivery of the taxation ruling on 22.05.2023, evidently in the absence of both parties.
13. Although the record of proceedings leading up to the ruling appears scant, it seems that, as asserted by the Applicant, the last court session prior to the ruling was on 25.01.2023 when the Court directed that parties appear before it on 29.03.2023 to confirm compliance. Further, there is no indication from the record that notice was issued to the respective parties regarding delivery of the ruling on 22.05.2023. The Applicant’s assertion that there was a further scheduled mention date for 29.06.2023 is not supported by the record before the Court. That said, there appears to be merit in the Applicant’s assertion that the impugned ruling was delivered without notice to either party and or their counsel, despite the date scheduled for purposes of compliance not materializing.
14. As to the question of delay, in filing the motion, it is trite that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party must not be seen to presume on the Court’s discretion only. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR said that :

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”
15. Here the Applicant asserts that when counsel learned of the delivery of the impugned ruling, the file was missing. The Applicant has attached to its affidavit material a request for a copy of the impugned ruling and a letter dated 14.07.2023. It is however not shown that the Applicant had earlier on made a follow up on the matter when the dates earlier assigned collapsed, and especially after 29.03.2023. Despite this, and the Respondent’s reservations on the explanations offered by the Applicant for delay, it seems to the court that that the explanations may be plausible. Nor does the delay involved appear unduly



prejudicial to the Respondent. It would be a travesty of justice for the Court to drive the Applicant from the seat of justice for what appears to be an omission by the Court. Besides, it does not seem that the Respondent will suffer prejudice that cannot be compensated through costs if the motion is allowed.

16. Concerning the arguability of the intended reference, based on the language employed in Mutiso (supra) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this kind. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR stated that “an arguable appeal need not (be one that will) succeed so long as it raises a bona fide issue for determination by the Court.” The Court emphasizing the right of appeal in the following terms:-

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of *Richard Ncharpi Leiyagu vs. IEBC & 2 Others* (supra); *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding inter alia that:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and
- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

17. In the circumstances, the Court is persuaded that to facilitate the Applicant’s undisputed right of appeal, leave ought to be granted to the Applicant to file its reference out of time. The motion dated 11.10.2023 is therefore granted, the court however allowing 14 days for the filing of the reference. The costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms. Kariuki

For Respondent: Mr. Siage

C/A: Erick

