



Mugane & Company Advocates v Rift Dairy Products Limited (Environment and Land Miscellaneous Application E025 of 2021) [2023] KEELC 16619 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16619 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E025 OF 2021
CA OCHIENG, J
MARCH 28, 2023

BETWEEN

MUGANE & COMPANY ADVOCATES ADVOCATE

AND

RIFT DAIRY PRODUCTS LIMITED CLIENT

RULING

1. What is before Court for determination is the Advocate/Applicant Chamber Summons Application dated the April 26, 2022 and filed on May 6, 2022 brought pursuant to Rules 2, 11(1) and (2) of the *Advocates Remuneration Order* and Section 3A of the *Civil Procedure Act* as well as Article 159 of the *Constitution*. The Advocate/Applicant seeks the following orders:
 1. That the decision of the Taxing Master delivered on the 9th day of March, 2022 in so far as the same relates to the reasoning and determination pertaining to the taxation of the Bill of Costs dated April 8, 2021 is set aside.
 2. That the Honourable Court be pleased to refer the matter back for taxation of the Bill of Costs dated April 8, 2021 and with proper directions thereof.
 3. That in the alternative to prayer 2, the Honourable Court exercises its inherent jurisdiction and be pleased to tax the Bill of Costs dated April 8, 2021.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of George Mugane where he deposes that on January 25, 2017 the Applicant entered into a Retainer Agreement with Mr Kiuna Ngugi Kiuna, a Director of the Respondent where it agreed to provide legal services to the said Respondent. He claims to have duly performed his obligations under the Agreement and executed various instructions issued by the Respondent. He contends that parties had a good relationship until 2019 when the Respondent refused to pay the Applicant's legal fees on several matters including Machakos ELC No 242 of 2018 that gave rise to these proceedings. He insists that



the Applicant raised a Fee Note which was drawn as per the scale in the [Advocates Remuneration Order 2014](#). He explains that it was understood by both parties that not all matters and legal instructions would be covered by the Kshs. 300,000 quarterly retainer fee and therefore those matters where fees had not been agreed upon were to be charged in accordance with the [Advocates Remuneration Order](#). He refers to Clause 6 of the Retainer Agreement and avers that for Machakos ELC No 242 of 2018, fees was to be charged separately hence the reason the Applicant raised its first Fee Note on the said matter on October 16, 2019 without any protestation. He states that the Respondent is guilty of non-disclosure of material facts and cannot now attempt to use the Retainer Agreement to deny the Applicant the fruits of its hard labour. He confirms that the Applicant filed their Advocate/Client Bill of Costs dated the April 8, 2021 for Taxation and on the March 3, 2022, the Taxing Officer in her Ruling declined to tax it on grounds she did not have jurisdiction. He reaffirms that the Taxing Officer erred in her Ruling in finding that the Retainer Agreement dated January 25, 2017 barred the Applicant from raising the Bill of Costs dated April 8, 2021. Further, that the Taxing Officer erred in her Ruling and misapplied Section 45(6) of the [Advocates Act](#) in finding that the items on the Bill of Costs dated April 8, 2021 were covered by the aforementioned Retainer Agreement. He reiterates that the Applicant was entitled to raise the Bill of Costs and the Taxing Officer had jurisdiction to examine all evidence tendered and make a finding on the said Bill of Costs. Further, that the application has been made in good faith and timeously as they were only able to get the typed Ruling on April 8, 2022 yet they requested for the same on March 17, 2022 and made payment on March 21, 2022.

3. The Client claims to have filed a Replying Affidavit and Grounds of Opposition which were not in the Court file.
4. The Application was canvassed by way of written submissions.

Analysis and determination

5. Upon consideration of the instant Chamber Summons Application including the respective Affidavits and rivalling submissions, the following are the issues for determination:
 1. Whether this Court can validate a Reference filed out of time without leave.
 2. Whether the Taxing Officer had jurisdiction to tax the Advocate/ Client Bill of Costs.
6. As to whether this Court can validate a Reference filed out of time without leave.
7. The Applicant filed the instant Reference on the May 6, 2022 which the Respondent insists is defective since it was filed out of time without leave of court. The Applicant has explained the reasons for the delay in filing this Reference on time, and has sought leave of court in his Affidavit, to validate it.
8. On filing of a reference and enlargement of time to file one, paragraph 11 of the Advocates Remuneration Order stipulates 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)



- (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. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR the Court held that:

What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court.”

10. While in the case of *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR the Court of Appeal stated as follows:

“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 the 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.”

See also the decision of *Neptune Credit Management Limited & another v Jigisha P. Jani & another* [2021] eKLR.

11. In this instance, the Applicant filed the instant Reference approximately two (2) months without seeking leave of court to do so. The deponent in his Supporting Affidavit provided an explanation that it delayed to file the instant Application as it got the typed Ruling late. I note the Taxing Officer’s Ruling which forms the fulcrum of the dispute herein was delivered on March 9, 2022. The Applicant explains that it requested for the Typed Ruling on March 17, 2022, made payments on March 21, 2022 and received it on April 8, 2022. In the Supporting Affidavit, the Applicant avers that the delay in filing the instant Reference was not occasioned by themselves and sought for the court to exercise judicial discretion and enlarge time for its filing. From a reading of the legal provisions cited above and applying them to the circumstances at hand, I opine that it would have been prudent for the Applicant to first seek leave of court to file the instant Reference instead of filing it then seeking validation. Based on the facts as presented while relying on the legal provisions I have cited above as well as associating myself with the decisions quoted, I find that this Application is incompetently before court as the Applicant has not provided plausible reasons for the delay especially after getting the typed Ruling on the April 8, 2022, it only proceeded to file the instant Application on May 6, 2022 which was almost one (1) month later. It is trite that a document or pleadings filed out of time without leave, is *ipso facto* a nullity



and can only be allowed if the party filing it, approaches the court properly to have the same admitted, which is not the case in this instance. Further, from the face of the instant Application, there was no prayer seeking enlargement of time to admit the Reference and this was only raised in the Supporting Affidavit and it is trite that parties are bound by their pleadings.

12. Since the Application is incompetently before court, I need not proceed to handle the second issue as to whether the Taxing Officer had jurisdiction to tax the impugned Advocate/Client Bill of Costs.
13. It is against the foregoing that I find the instant Application incompetent and will proceed to strike it out. I direct each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 28TH DAY OF MARCH, 2023

CHRISTINE OCHIENG

JUDGE

