



**Agimba and Associates v Michuki (Miscellaneous Application  
199 of 2019) [2024] KEHC 9422 (KLR) (Family) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9422 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION 199 OF 2019  
HK CHEMITEI, J  
JULY 25, 2024**

**BETWEEN**

**AGIMBA AND ASSOCIATES ..... APPLICANT**

**AND**

**WANJA YVONE MICHUKI ..... RESPONDENT**

**RULING**

1. This ruling relates to the notice of preliminary objection dated 26<sup>th</sup> May, 2023 filed by the Respondent, Wanja Yvone Michuki based on the Grounds That:
  - a. This honourable court lacks jurisdiction to hear and determine the application dated 23<sup>rd</sup> February, 2023 and the same should be struck off with costs.
  - b. The application is bad in law and an abuse of the due process of this court.
  - c. The Applicant is guilty of laches.
2. The Applicant has filed written submissions dated 15<sup>th</sup> October, 2023 placing reliance on the following:
  - a. Article 165 (3) of the *Constitution* of Kenya, 2010 which provides as follows:-
    - “(3) Subject to clause (5), the High Court shall have:
      - (a) Unlimited original jurisdiction in criminal and civil matters.



- (b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.
  - (c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144.
  - (d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of -
    - (i) the question whether any law is inconsistent with or in contravention of this constitution.
    - (ii) the question whether anything said to be done under the authority of this constitution or of any law is inconsistent with, or in contravention of, this Constitution.
    - (iii) any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
    - (iv) a question relating to conflict of laws under Article 191; and
  - (e) any other jurisdiction, original or appellate, conferred on it by legislation.”
- b. Article 165 (5) of the Constitution of Kenya, 2010 which provides as follows:-
- “5) The high court shall not have jurisdiction in respect of matter: -
    - a) Reserved for the exclusive jurisdiction of the supreme court under this constitution.
    - b) Falling within the jurisdiction of the courts contemplated in Article (2).”
- c. *The Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (1989) KLR 1 where the court stated, “I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



- d. *Samuel Kamau Macharia v KCB & 2 Others*, Civil Application No. 2 of 2011 where the court stated, “A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred upon it by law.”
- e. Halsbury’s Laws of England, 4<sup>th</sup> ed. Vol. 16 (2) 6910 where its was stated, “A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation... Equity aids the vigilant not the indolent or delay defeats equities. A court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (‘laches’).”
- f. *Benjob Amalgamated Limited & Another v Kenya Commercial Bank Limited* [2014] eKLR where the court observed as follows:-

“Lord Selbourne L. C. delivering the opinion of the Privy Council in the Lindsay Petroleum Co. Hurd (1874) L. R. 5 P. C. 221 said at page 240:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.”

3. The Respondent has filed written submissions dated 16<sup>th</sup> November, 2023 placing reliance on the following:-
  - a. Section 11 (2) of the *Advocates Act*, Chapter 16 of the Laws of Kenya which provides, “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.”
  - b. *Al Yusra Restaurant Limited v Kenya Conference of Catholic Bishop & Another* [2021] eKLR where the court held as follows:-

“ 31. The ruling by the Deputy Registrar on taxation delivered on 29<sup>th</sup> March, 2019 clearly stated the reasons for the decision she made. It therefore means that from the time of receipt of the ruling and reasons on 3<sup>rd</sup> April, 2019 the 1<sup>st</sup> Respondent/ Applicant and its advocate became aware of the reasons behind the taxation and time had already started running. The ruling by Justice Korir on 30<sup>th</sup> April, 2020



clearly states that the application was filed out of time, and what the 1<sup>st</sup> Respondent/ Applicant ought to have done.

“32. Instead, of seeking leave in line with the provisions of paragraph 11 (40) of the Advocates Remuneration Order, the 1<sup>st</sup> Respondent/ Applicant and its advocate went to sleep. Counsel talks of having served the parties with a notice for filing an application for extension of time dated 15<sup>th</sup> May, 2020. Besides that, he did not take any steps to file a reference.

33. The reference ought to have been filed within 14 days of delivery of the ruling on taxation. The application for enlargement of time has been made nine (9) months + 10 days after delivery of the ruling. All that counsel says is that she is unintentionally failed to file the application. That could have worked if the period of delay was a much lesser one.”

c. *Elijah Njuguna Njoki v Peter Muriu Njuguna & 4 others* [2021] eKLR where the court stated, “Rule 11 of the *Advocates Remuneration Order* makes provision for the procedure an aggrieved party must adopt. It provides:

1. Should any party object to the decisions 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 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 the grounds for his objection.
3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with 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 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.

The procedure contemplated above is:

- a. The aggrieved party issues a notice within 14 days on the items objected.
- b. The taxing officer shall forthwith give reasons for his decision.
- c. Upon receipt of the reason, the objector shall within 14 days file an application to the high court setting out grounds for objection.
- d. If dissatisfied with the high court, the objector shall with leave of court appeal to the court of appeal.

The procedure as stated above carries a mandatory requirement. Undoubtedly, the Applicant did not comply. It is trite that rules of procedure are handmaidens and not mistresses of justice, and they are meant to aid in the administration of justice and not to cause injustice (See Nairobi



Civil Appeal 810 of 2001: [\*Microsoft Corporation v Mitsumi Computer Garage Ltd & another\*](#) [2001] eKLR)

Article 159 (2) (d) of the [\*Constitution\*](#) and the oxygen principles as drafted were meant to cure technicalities in the process of administering justice. However, this court concurs with the findings of Kiage J in Nairobi CoA Application No. 228 of 2013 [\*Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others\*](#) where he held that:

“I am not in the least persuaded that Article 159 of the [\*Constitution\*](#) and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free – for – all in the administration of justice. This court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms innocent party who strives to abide by the rules.

The court has noted that no plausible reason was advanced by the Applicant for non - compliance, save for the allegations that the Applicant was not served with the bill of cost in question. The court of appeal in Nairobi CoA No. 199 of 2002: [\*Machira & Co. Advocates v Arthur K. Magugu & Another\*](#) [2012] eKLR, held that purpose of filing of references is for expeditious disposal of cases and if notices as required by procedure are vague, the same defeats the purpose of procedure.”

d. [\*KCB Bank Limited & another v Yeswa Antony Joseph\*](#) [2022] eKLR where court held as follows:

“26. In the circumstances, taking into consideration the authorities cited above, I find that the reasons for the taxing master’s decision were contained in the decision. It follows that the Applicants herein had no reason to delay the filing of this reference and more so, in filing the same after the lapse of more than 14 days after the delivery of the same, contrary to the stipulations in Rule 11 of the Advocates Remuneration Order. Accordingly, the Reference as filed out of time without leave of court enlarging or extending time for filing of the same is incompetent.

27. By filing this reference application on 20<sup>th</sup> September, 2021, the Applicants waited for a month and a half for the taxing master to provide reasons for his rulings. The Applicants no doubt failed to comply with paragraph 11 of the [\*Advocates Remuneration Order\*](#). In Evans Thiga Gaturu 9supra), Odunga J observed that:

“In most cases the court is aware that the taxing officers in their decisions on taxation do deliver comprehensive rulings which are self – contained thus obviating the necessity to furnish fresh reasons thereafter. In such circumstances, it would be fool hardly to expect the taxing officer to redraft another “ruling” containing reasons.



28. The Applicants herein have not advanced any reasons for the delay in bringing this reference. In any event, they had the opportunity to seek leave of court to enlarge the time for filing of the application. They did not utilize that opportunity. In *Twiga Motor Limited v Hon. Dalmas Otieno Onyango* [2015] eKLR the court stated that:

“Time limits in Rule II of the *Advocates Remuneration Order* have been put there for a reason. Failure to adhere to the said timelines would mean that the application would be rendered incompetent in the first instance.”

## Background

4. The instant notice of preliminary objection is in response to the application dated 23<sup>rd</sup> February, 2023 filed by the Applicant, Agimba and Associates, seeking for Orders That:
- (a) The matter be heard ex – parte in the first instance.
  - (b) The court be pleased to grant the Applicant herein leave to file its reference against the ruling of Hon. Wandia delivered on 30<sup>th</sup> July, 2021 be filed out of time.
  - (c) The costs of the application to be in the cause.

## Analysis and Determination

5. I have carefully considered the notice of preliminary objection and the rival submissions and address it as follows:
6. The law on notices of preliminary objection was well discussed In The East African Court Of Justice At Arusha First Instance Division: Reference No. 8 Of 2017: *Pontrilas Investments Limited Versus Central Bank Of Kenya & The Attorney General Of The Republic Of Kenya* where it was stated as follows:-

“23. Having carefully considered the parties’ submissions, it is the considered view of the court that prior to a substantive consideration of the said submissions at this stage, it is imperative that the court confirms that what is before it, is indeed a preliminary objection point of law that would be properly determined as a preliminary objection.

24. whereas the matter under consideration was raised and argued by all the parties as a preliminary objection, the court is alive to the importance of proper procedure in the judicial process.

25. In *Attorney General of the Republic of Kenya v Independent Medical Legal Unit* (*supra*), the Appellate Division of this Court held:

“The improper raising of points by way of preliminary objections does nothing on occasion confuse the issues. The court must therefore, insist on the adoption of the proper procedure for entertaining applications for Preliminary Objections. In that way, it will avoid treating, as preliminary objections, those points that are only disguised as such; and will instead, treat as preliminary objections, only those points that are pure law; which are unstained



by facts or evidence, especially disputed points of facts or evidence or such like.”

26. This point was underscored in *The Secretary General of the East African Community v. Rt. Hon. Margaret Zziwa*, Appeal No. 7 of 2015 where the court cited with approval the following exposition in *Mukisa Biscuit Manufacturing Company Limited v. West End Distributors Limited* (1969) EA 696 (per Newbold, P):

“A Preliminary Objection is in the nature of what used to be demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”

27. The question of what would constitute a proper preliminary objection was further addressed in *Attorney General of Tanzania v African Network for Animal Welfare* (ANAW) EACJ Appeal No. 3 of 2011, where the Appellate Division of this court held that a Preliminary Objection could only be properly taken where what was involved was a pure point of law, but that where there was any issue involving the clash of facts, the production of evidence and facts, the production of evidence and assessment of testimony it ‘should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross – examined, and a finding of fact then made by the Court.”

7. In *Joseph Lekodi Teleu v Jonathan Paapai 7 another* [2022] eKLR the courts stated as follows:-

“14. Paragraph 11 of the *Advocates Remuneration Order* (ARO) stipulates as follows on the filing of reference objecting to the decision of the Taxing Master:

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 which he objects.
2. The Taxing Officer shall forthwith record and forward to the objector the reasons or 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 subparagraph (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 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 expired. (Emphasis supplied)"

8. In light of the foregoing, I do not find merit in the preliminary objection dated 26<sup>th</sup> May, 2023. From the above cited authorities, the jurisdiction of this court is clearly wide and capable of handling such an application by the Respondent.
9. There is no evidence in my view that the Applicant has abused the court process in any way. All that he has sought is an extension of time to file the reference out of time.
10. Consequently, I do not find any merit in the preliminary objection and it is hereby dismissed.
11. On this note I do not see any reason why the court should not deal with the application dated 23<sup>rd</sup> February 2023 exhaustively. The issues therein are clear.
12. I have read the ruling by Muchelulei J (as he then was) dated 28<sup>th</sup> February 2022. The gist of that ruling was that the Applicant filed the reference two days' outside time. In other words, he ought to have sought the leave of the court. It run afoul the provisions of Section 11 of the Advocates Remuneration Act.
13. I do not think a delay of two days can be considered inordinate in the circumstances. There is evidence that the taxing master delivered his ruling and for some reasons the Applicant was unable to beat the 14 days rule.
14. I do not think that the Applicant should be denied a place in the hallowed seat of justice just because of a two days' delay. The Respondent in any event will have sufficient time as well to respond to the said reference.
15. Consequently, and pursuant to the provisions of Article 159 of our *Constitution* where this court is empowered to deal with substantive justice expeditiously and with all fairness the Applicant ought to be granted a second chance despite faltering in the first attempt.
16. In the premises it is ordered as follows:-
  - (a) The preliminary objection dated 26<sup>th</sup> May 2023 is hereby disallowed.
  - (b) The application dated 23<sup>rd</sup> February 2023 is allowed and the Applicant granted leave to file his reference and serve it within 14 days from the date herein.
  - (c) The Respondent shall have the costs of this application.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2024.**

**H K CHEMITEI**

**JUDGE**

