



**Achola & 2 others v Otieno (Miscellaneous Civil Application
E006 of 2024) [2024] KEHC 11483 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CIVIL APPLICATION E006 OF 2024**

JN KAMAU, J

SEPTEMBER 30, 2024

BETWEEN

CHARLES OCHIENG ACHOLA 1ST APPLICANT

JOSEPH OTIENO OLUOCH 2ND APPLICANT

PLATINUM CREDIT LTD 3RD APPLICANT

AND

STEPHEN OKOTH OTIENO RESPONDENT

RULING

Introduction

1. In their Chamber Summons dated 15th April 2024 and filed on 17th April 2024, the Applicants herein sought leave to file an Objection and a Taxation Reference against the assessment of costs that was delivered on 22nd February 2024 in Vihiga PMCC No 9 of 2019 *Stephen Okoth Otieno vs Charles Ochieng Achola & 2 Others*. They also prayed that the Objection to the Taxing Officer and the Application for Reference annexed to their application herein be deemed as having been duly filed and served upon payment of requisite fees.
2. When the said application came up for hearing on 4th July 2024, the parties indicated that they would not file Written Submissions but would rely on their respective affidavit evidence. The Ruling herein is therefore based on the said affidavit evidence that they all relied upon in their entirety.

Legal Analysis

3. The Applicants' Advocate, Maureen Tesot, swore an Affidavit in support of the said application on behalf of the Applicants herein.



4. The Applicants averred that on 22nd February 2024, costs in Vihiga PMCC No 9 of 2019 *Stephen Okoth Orieno vs Charles Ochieng Achola & 2 Others* were assessed at Kshs 224,393/= and a Decree and Certificate of Costs issued. It was their averment that they only became aware of the taxed costs when the Respondent's counsel served them with a letter dated 23rd February 2024 demanding for payment of the judgment sum and the assessed costs.
5. They contended that their Advocates engaged the Respondent's counsel on post-assessment negotiations considering that they were not invited for taxation but that the negotiations collapsed.
6. They pointed out that they were aggrieved and dissatisfied with the costs assessed on 22nd February 2024 and hence were seeking the court's leave to file Notice of Objection and a Reference out of time as they were unable to file the same within fourteen (14) days specified under Section 11(1) and (2) of the [Advocates Remuneration Order](#), 2014.
7. The Respondent's Advocate, Stanley N. Kagunza, swore a Replying Affidavit on 28th May 2024 on behalf of the Respondent herein. The file copy did not bear a court stamp so it was not possible to ascertain when the same was filed.
8. The Respondent asserted that the Applicants' application was not urgent in anyway. She termed it as an afterthought, misadvised, baseless, frivolous, scandalous, misconceived, lacked merit and was an abuse of the court's process as the same did not disclose any reasonable legal and/or factual grounds to warrant this court to grant the prayers sought. She added that the same was incompetent, a non-starter, dead on arrival and should be dismissed and/or struck out in the first instance.
9. She contended that as the Taxing Master's Ruling was delivered on 22nd February 2024, the Applicants ought to have filed the reference before the expiry of fourteen (14) days in accordance with the procedure that was set out in Paragraph 11 of the [Advocates' Remuneration Order](#). She stated that they had not demonstrated any good and sufficient cause or given a satisfactory explanation of the period of delay in not having filed the reference within time as set out in Paragraph 11(1) and (2) of the [Remuneration Order](#).
10. She stated that the Applicants only got interested in the case after warrants of attachments were issued against them. She pointed out that they had approached the court with unclean hands and had failed to disclose material facts.
11. She asserted that the application had been brought in utmost bad faith and they were culpable of indolence as they were authors of their own misfortune. It was her averment that the present application did not meet the threshold of the granting of the orders that had been sought herein but was only an approbation and reprobation intended to frustrate the realisation of the impugned taxed costs and/or her fruits of litigation.
12. She contended that it was in the interest of justice that the case be brought to finality and that allowing the application would delay the same and the unwarranted orders cause her prejudice. She urged the court to dismiss the Applicants' application for being untenable in law.
13. Paragraph 11(1) and (2) of the [Advocates Remuneration Order](#) provides as follows:-
 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.”

14. Indeed, in exercising its discretion to allow an application seeking extension to file a reference out of time, a court had to be satisfied that the omission to file the same within time was excusable. In other words, there had to be a plausible explanation for the delay in filing the reference.
15. It was apparent from the court record that the Ruling the Applicants intended to appeal against was delivered on 22nd February 2024. The present application was filed on 17th April 2024. About one (1) month and twenty-six (26) days had since passed. This was not an inordinately long period.
16. Going further, the Applicants pointed out that there were not invited for taxation, a fact that was not rebutted by the Respondent. Be that as it may, the impugned proceedings of 22nd February 2024 were not annexed herein to enable this court determine the said facts.
17. Having said so, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.
18. Notably, Order 50 Rule 6 of Civil Procedure Rules, 2010 empowers the court to enlarge the time to do a particular act. The said Order 50 Rule 6 of Civil Procedure Rules stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.
19. Against this backdrop, this court therefore perused the Applicants’ application but did not see the Notice of Objection and the Reference they had claimed to have annexed. Be that as it may, it was not upon its duty to consider the merits or otherwise of the Notice of Objection and the Reference as that was strictly under the purview of the court that was to hear and determine the reference. All that it was expected to do at this stage was to consider if the Applicant herein had demonstrated that he had arguable grounds of appeal as against the impugned Ruling.
20. While considering whether or not to grant an order for extension to do any act, the court was also required to consider if the opposing side would suffer any prejudice if extension of time was granted. This court did not see any prejudice that the Respondent would suffer or was likely to suffer if the Applicants herein exercised their constitutional right of appeal. If there was any prejudice, then she did not demonstrate the same.
21. Taking all the factors hereinabove into account, it was the considered view of this court that that it was in the interests of justice (emphasis court) that the Applicants be given an opportunity to have their Reference heard on merit as they would suffer prejudice if they were denied an opportunity to fully present their Reference to be heard on merit.



22. Indeed, the power to grant orders in the interest of justice and/or for the ends of justice (emphasis court) is well captured in Section 3A of the *Civil Procedure Act* that states that: -

“Nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice (emphasis court) or to prevent abuse of the process of the court.”

Disposition

23. For the foregoing reasons, the upshot of this court’s decision was that the Applicants’ Chamber Summons application dated 15th April 2024 and filed on 17th April 2024 was merited and the same be and is hereby allowed in terms of Prayer No (3) and (4) therein on the following conditions: -

1. That the Applicants be and are hereby granted leave to file a Reference against the decision of the Taxing Master of 22nd February 2024.
2. That the Applicants be and are hereby directed to file and serve their Notice of Objection within fourteen (14) days from the date of this Ruling.
3. That the Applicants be and are hereby directed to file and serve their Reference within fourteen (14) days after the Taxing Officer forwards to them the reasons for her decision.
4. That in the event the Applicant fails to comply with Paragraph 23(2) and (3), the Respondent will be at liberty to commence legal proceedings for recovery of the taxed costs.
5. That this matter will be mentioned on 5th December 2024 to confirm compliance of the order in Paragraph 23 (2) and (3) hereinabove and/or for further orders and/or directions.
5. Costs of the application herein will be in the cause.

24. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF SEPTEMBER 2024

J. KAMAU

JUDGE

