



**Mereka & Company Advocates v Kiereini & another (Miscellaneous Application E113 of 2022) [2023] KEHC 20231 (KLR) (Family) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20231 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E113 OF 2022  
PM NYAUNDI, J  
JUNE 30, 2023**

**BETWEEN**

**MEREKA & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**DOUGLAS KIHEREINI ..... 1<sup>ST</sup> RESPONDENT**

**NJERI KIHEREINI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By Chamber Summons Application dated 24<sup>th</sup> February 2023 presented under Rule 11(2) and (4) of the [Advocates Remuneration Order](#) the Applicant seeks the following orders-
  1. That the time limited for filing a reference under paragraph 11(2) of the Advocates Remuneration Order be and is hereby enlarged.
  2. That the Chamber Summons Application dated 9<sup>th</sup> February 2023 and filed on the same day be deemed having been duly filed
  3. That the costs of this Application be in the cause
2. The Application is supported by the Affidavit of David Muuki Mereka sworn on the 24<sup>th</sup> February 2023 and further affidavit sworn on 11<sup>th</sup> April 2023. The 1<sup>st</sup> Respondent has sworn a replying affidavit on 29<sup>th</sup> March 2023, in opposition to the Application.

**Analysis**

3. It is common ground that this is the sequence of events following the Ruling on the Bill of costs delivered on 16<sup>th</sup> December 2022-



- i. 16<sup>th</sup> December 2022, the Advocate filed Notice of Objection
  - ii. 19<sup>th</sup> January 2022, Advocate received the reasons from the taxing master
  - iii. 27<sup>th</sup> January 2023, the Advocates filed a Reference
  - iv. 9<sup>th</sup> February 2023, the Advocate withdrew the reference
  - v. 9<sup>th</sup> February 2023 the Advocate filed a fresh reference
  - vi. 16<sup>th</sup> February 2023 the Respondents filed a preliminary objection to the Reference filed on 9<sup>th</sup> February 2023
  - vii. 24<sup>th</sup> February 2023 the Advocates filed the instant Application seeking extension of time for filing a reference and combined this with a prayer that the reference filed on 9<sup>th</sup> February 2023 be deemed to have been duly filed.
4. The Applicant concedes that there has been a delay but urges that it is not inordinate and that it can be explained. Further the Applicant seeks to avail themselves of Article 159 (d) urging that the Court should ‘be guided by the principle that justice shall be administered without undue regard to procedural technicalities. In addition, the Application is predicated on Articles 48 and 50 of [the Constitution](#) which guarantee to all Access to justice and the right to fair hearing.
5. The Respondents oppose the Application on 2 main grounds, firstly that the Applicant has not given sufficient reasons for the delay to enable the court to exercise its discretion to enlarge time in his favour. Secondly that Prayer (b) is a nullity as the reference was filed out of time without leave and relies on Supreme Court decision in *Nick Salat v Independent Electoral & Boundaries Commission and 7 Others* [2014] eKLR where the Court stated:
- “ where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires.”

### **Determination**

6. Having considered the rival affidavits and submissions I discern the following as the issues for determination
- i. Whether the Applicant has shown cause to justify the granting of the extension sought
  - ii. Whether, if (i) is answered in the affirmative, the chamber summons application dated 9<sup>th</sup> February 2023 and filed on the same day should be deemed to have been duly filed?
7. On the 1<sup>st</sup> Issue, Whether the Applicant has shown cause to justify the granting of the extension sought-
- It is common ground that the Court has discretion under Rule 11(4) of the Advocates Remuneration Order to enlarge time for filing of a reference. The Principles to guide courts in considering applications of this nature are well articulated by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the court stated as follows:
- 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
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time
8. As set out in paragraph 3 above it is evident that at the earliest opportunity the Applicant indicated that they would be challenging the ruling. Along the way they stumbled and had to withdraw the Reference and by the time they were filing the subsequent application they were clearly out of time.
9. All factors considered I do not think that the delay was inordinate. I do not also consider that the Respondent will be prejudiced as they will have an opportunity to respond to the new reference.
10. Further the Respondent can be adequately compensated by costs, whereas the Applicant if denied an opportunity to be heard will be denied access to justice and a right to a fair hearing both of which are guaranteed under *the Constitution*.
11. In this regard I associate myself with the pronouncement by Aburili J in *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR where she stated
- [24] Article 48 of *the Constitution* guarantees every person access to justice, in addition, under Article 50(1) of *the Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- [25]. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out.
12. The Application therefore succeeds on the 1<sup>st</sup> limb. I deem it necessary to clarify that the Applicant cannot avail himself of Article 159 (d) because, as stated in the case of *Kakuta Maimai Hamisi Vs. Peris Pesi Tobiko & 2 Others* [2013] eKLR;
- “...the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of *the Constitution*. We do not consider Article 159 (2) (d) of *the Constitution* to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation”.
13. Courts have repeatedly stated that where the statute or the applicable rules state a procedure to be followed, parties ought to comply, for it is when rules are followed that there is orderliness in the manner in which proceedings are handled. If the courts were to totally disregard the rules of procedure, the result is likely to be anarchy.



14. Having answered the 1<sup>st</sup> issue in the affirmative, I will now consider the 2<sup>nd</sup> Issue, Whether the chamber summon application dated 9<sup>th</sup> February 2023 and filed on the same day should be deemed to have been duly filed?
15. The Respondent contends that the Chamber Application having been filed out of time absent of leave, it is a nullity and the illegality cannot be cured by the prayer to deem it as having been properly filed.
16. Aburili J had occasion to consider the same proposition in the case of *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR in which she distinguished the decision of the Supreme Court by finding that Rule 53 of the Supreme Court Rules only applies to applications before the Supreme Court and not before any other court.
17. The Hon. Judge then proceeded to allow an application that sought orders identical to the orders sought in this case while relying on the Court of Appeal decision in *Charles Karanja Kuru v Charles Gitbinji Muigwa* [2017] eKLR in which the court stated-

“Having expressed ourselves as herein above the other issues that falls for considered is whether the appeal filed out of time on 24<sup>th</sup> October 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to Section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule J. in the *Gerald M'Limbine Vs Joseph Kangangi* [2009] eKLR stated that:

“my understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the stipulated period to do so would actually be an abuse of the court’s process under Section 79B.”

18. For the foregoing reasons, I allow the 2<sup>nd</sup> limb of the Application and consequently make the following orders
  - a. The Application dated 24<sup>th</sup> February is allowed in its entirety
  - b. The time for filing a reference under paragraph 11(2) of the *Advocates Remuneration order* is enlarged
  - c. The Chamber Summons dated 9<sup>th</sup> February 2023 is deemed to have been duly filed.
  - d. The Respondent to file and serve Reply to the Application within 14 days.
  - e. The Applicant is granted leave to file further affidavit within 7 days of service of the Replying Affidavit.
  - f. The Application to be canvassed via written submissions.
  - g. The Applicant to file and serve their submissions within 14 days of the service of the Replying Affidavit. The Respondent to file and serve written submissions within 14 days of service of the Applicants submissions
  - h. Matter be mentioned on 31<sup>st</sup> July 2023 to confirm compliance and take a date for ruling.



i. Costs of the Application are awarded to the Respondent.

It is so ordered

**SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 30<sup>th</sup> DAY OF JUNE, 2023.**

**P M NYAUNDI**

**HIGH COURT JUDGE**

**In the presence of:**

**Court Assistant Karani**

