



**Kiama Wangai and Co Advocates v Mwendwa (Miscellaneous Application  
3 of 2019) [2023] KEELC 17981 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17981 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
MISCELLANEOUS APPLICATION 3 OF 2019**

**TW MURIGI, J  
MAY 31, 2023**

**BETWEEN**

**KIAMA WANGAI AND CO ADVOCATES ..... APPLICANT**

**AND**

**CAROLYNE WAYUA MWENDWA ..... RESPONDENT**

**RULING**

1. By a Chamber Summons dated November 4, 2022 brought under Rule 11(1) and (2) of the [Advocates Remuneration Order](#), the Applicant seeks the following orders:-
  1. That this honourable court be pleased to grant leave to the applicant to file Reference for the ruling dated October 23, 2019 by Hon. Otieno J out of time.
  2. That the Honourable Court be pleased to consolidate Misc. Application No. 3 of 2019 Kiama Wangai & Co Advocates v Caroline Wanyua Mwendwa and Misc. 5 of 2019 Kiama Wangai & Co. Advocates Vs Dr. Alphonse Mwendwa.
  3. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Kiama Wangai sworn on even date.

**The Applicant's Case**

3. A summary of the grounds and the averments is that the applicant's bill of costs filed on July 24, 2018 was dismissed vide the ruling delivered on October 23, 2019. The applicant argued that striking out the bill of cost does not amount to taxation.
4. The applicant maintains that once the taxing master is convinced that a client has issued instruction and the same have been acted upon the next step would be to tax the bill which in this case was not done.



### **The Respondent's Case**

5. Opposing the application, Alphonse Mwendwa Nyalita filed a replying affidavit on behalf of the respondent herein. He averred that upon instructing the applicant to represent them in ELC No. 146 of 2017, the applicant asked him to sign a retainer agreement which he later discovered was unprofessional and illegal as the fees were pegged on the outcome of the suit.
6. He further averred that the retainer agreement was devoid of legal, filing and transport fees which he paid timely and in full. He averred that he decided to terminate the Advocate/Client relationship as he felt that his Advocate did not represent him adequately. That shortly thereafter the Advocate filed a bill of costs seeking to recover Kshs. 9,233,61276/= which was dismissed vide the ruling delivered on October 23, 2019.
7. That subsequently, the Advocate filed another bill of costs dated October 31, 2019 in Misc application No. 11 of 2019 which was dismissed by Hon. Justice Mbogo vide a ruling delivered on September 30, 2022.
8. He argued that the Advocate did not file a Notice of Objection against the ruling delivered on October 23, 2019, but instead filed Misc. Application No. 11 of 2019. He contended that the Advocate delayed in filing the present application.

### **The Response**

9. The applicant vide his supplementary affidavit averred that his client, Caroline Wayua ought to have filed a replying affidavit to oppose the application. He argued that the application is unopposed since the authority issued by Caroline to the deponent was in respect to ELC Case No. 146 of 2017 and not in the present Application.
10. He argued that the bill of costs dated July 23, 2018 was struck out on the grounds of duplicity hence the filing of the application dated October 31, 2019. He averred that the delay in filing the application was occasioned by his long illness.
11. In his further affidavit, Alphonse Mwendwa Nyalita denied that Caroline Wayua is the applicant's client since they had appointed the firm of Ngeresa & Okallo to act on their behalf. .
12. He averred that he is within the legal mandate to swear the affidavit as he has authority to act for Caroline Wayua. That after the dismissal of bill of costs dated July 23, 2018, the applicant ought to have filed a reference instead of filing the bill of costs dated October 31, 2019.
13. The application was canvassed by way of written submissions.

### **The Applicant's Submissions**

14. The applicant's submissions were filed on January 27, 2023.
15. The applicant reiterated the contents of his supporting and supplementary affidavits. In addition, the Applicant submitted that what is at stake is the issue of payment of professional fees rendered to the client.
16. To buttress his submissions, the applicant relied on the Court of Appeal case of [Micheal Karuku Gatura v Douglas Muindi Kangethe & 3 others.](#)



## The Respondent's Submissions

17. The Respondent's submissions were filed on March 9, 2023.
18. Counsel for the respondent conceded the grant of prayer no 2 of the application. Counsel submitted that the main issue for determination is whether the Applicant has shown sufficient cause to warrant the extension of time within which the reference should be filed.

## Analysis and Determination

19. Having considered the application, the respective affidavits and the rival submissions the only issue that arises for determination is;

Whether the applicant has made a compelling case to warrant enlargement of time to file a reference.

20. The Respondent conceded to prayer No 2 of the application. In the circumstances the same is allowed as prayed. The applicant is seeking extension of time to file a reference against the ruling delivered on October 23, 2019.

21. The legal framework on extension of time is clearly stipulated under paragraph 11(4) of the [\*Advocates Remuneration Order\*](#) which provides;

(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.”

22. The decision whether or not to extend the time is essentially discretionary. The Supreme Court in the case of [\*Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others\*](#) [2014] eKLR succinctly laid down the principles to guide courts in applications for extension of time 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.
23. Paragraph 11 of the *Advocates Remuneration Order* requires that a party aggrieved by the taxing officer's decision to apply to a judge by Chamber Summons setting out grounds for opposition within 14 days. If a party is still aggrieved by the decision of the judge, then they should appeal to the Court of Appeal.
24. In the case at hand, the Applicant argued that failure to abide by the set procedure was occasioned by the fact that striking out the bill of costs does not amount to taxation. That after the bill of costs dated July 23, 2018 was struck out, he filed the bill of costs dated 31<sup>st</sup> of October, 2019.
25. The Taxing Master gave a reasoned ruling providing reasons for her decision. It follows that the Applicant ought to have filed the reference upon being supplied with the ruling.
26. Extension of time is an equitable remedy that is only available to a deserving party at the discretion of the court. A reasonable explanation for the delay must be offered. The applicant must demonstrate that he did not wilfully disregard the timeframes provided for in the Rules. In explaining the delay, the Applicant averred that he was sick for a long time hence the delay in presenting the instant application.
27. It is not in dispute that the ruling on the bill of costs was delivered on October 23, 2019. Instead of filing a reference against the ruling, the Applicant filed a bill of costs dated October 23, 2019, which was eventually dismissed on September 30, 2022.
28. The applicant filed the present application on November 4, 2022. The applicant has not offered any reasonable explanation why he delayed in presenting the instant application.
29. I am not persuaded that the applicant has established a basis to warrant grant of the orders sought.
30. Accordingly, the application dated November 4, 2022 is dismissed terms of prayer No 1 with no orders as costs.

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**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT THIS 31ST DAY OF MAY, 2023.**

**IN THE PRESENCE OF: -**

Court Assistant – Mr. Kwemboi

Prof Kiama for the Applicant.

Ms Masengeli for the Respondent.

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***RLG MKN ELC MISC APPL NO. 3 OF 2019***

