



Njeru, Nyaga & Co Advocates v Thome V Residents Welfare Association (Environment & Land Miscellaneous Case E039 of 2021) [2023] KEELC 17651 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E039 OF 2021**

MD MWANGI, J

MAY 25, 2023

BETWEEN

NJERU, NYAGA & CO ADVOCATES ADVOCATE

AND

THOME V RESIDENTS WELFARE ASSOCIATION CLIENT

(In respect of the Client's Chamber Summons Application dated 28th July, 2022 seeking enlargement of time within which to file a reference against a taxation)

RULING

Background

1. As a starting point, it is important to note that there are two pending applications in this matter. One by the Advocate dated 9th November, 2022 seeking entry of Judgement whereas the other one is a Reference by the Client. The court directed that the Chamber Summons application by the Client be heard first; which informs this ruling.
2. In the Chamber Summons application dated 28th July, 2022, the Client/Applicant prays for the following reliefs: -
 - a. That time for filing this reference before this honorable court be enlarged and this reference be deemed to be filed on time.
 - b. That the ruling delivered by the Honorable Deputy Registrar Diana Orago on 1st December, 2021 taxing the Respondents Bill of Costs dated 8th March, 2021 in the sum of Kshs. 845, 486 be set aside and the said Bill be struck off.
 - c. That this honorable court do give such other or alternative orders it would deem fit.
 - d. That costs be provided for.



3. The application is based on the grounds on the face of it. It is further supported by the affidavit of Dominic Njuguna Mbigi deponed on the 28th July, 2022. The deponent avers that prior to the taxation of the Advocate Bill of Costs dated 5th March, 2021, the applicant had raised an objection to the taxation by way of an application on the basis that the Respondent had offered to represent the Applicant pro bono. The Taxing Master however, dismissed the said application and proceeded to tax the Bill at the sum of Kshs. 845,486/=. The Applicant was dissatisfied with the taxation and instructed their counsel to file a reference. They filed the Notice of Objection dated 2nd June, 2022 and requested for reasons for the taxation.
4. Counsel for the Applicant further avers that the Reference is made on the grounds that the Taxing Master erred in law by mixing up the hearing of an objection on the lawfulness of the Bill of Costs with the actual taxation giving an impression that she had already rejected the objection even without hearing it. That the Advocate's offer to represent the Client fell within the ambit of the agreements under Section 45 of the *Advocates Act*. Further, that despite not providing any document or evidence to the contrary to prove the nature of the advocate client relationship and instructions, the Taxing Master still found in favour of the Advocate.
5. The deponent further argues that the Taxing Master failed to take evidence relating to both the relationship between the parties and the subject matter of the case that led to taxation. The Applicant faults the Taxing Master for awarding instruction fee that was too high yet the value of the subject matter of the litigation had not been determined by any pleadings.
6. It is the Applicant's assertion that the reference was filed at the earliest time after receiving reasons for taxation by the Deputy Registrar, hence extension of time should be granted as provided under Rule 11(2) of the *Advocates Remuneration Order*.

Grounds of Opposition

7. The Advocate/Respondent opposed the application through the Grounds of Opposition dated 11th November, 2022. The Advocate contended that the Reference which is yet to be heard was filed out of time and the same should be dismissed. Further that the application offends the provisions of Section 45(2) of the *Advocates Act*. The aggrieved party being the Client is the one who is required to file an objection to the Advocate- Client Bill of Costs and not its Advocate as it is in the instant application.
8. The affidavit in support of the application further offends the provision of Order 19 Rule 2 of the *Civil Procedure Rules* and Rule 9 of the Advocates Practice Rules in that it is sworn by the Advocate on behalf of its Client on issues which are contentious.
9. The Advocate urges the court to dismiss the application with costs.

Court's directions

10. The court directed that the application be canvassed by way of written submissions. Both parties complied and filed their respective submissions. The Client's submissions are dated 9th February, 2023 whereas the Advocate's submissions are dated 1st March, 2023.

Client/ Applicant's submissions

11. The Clients submits that there are three issues for determination. The first issue is whether time for filing of the reference can be enlarged and this reference be deemed to be duly filed on time. The Applicant cites the provisions of Rule 11 of the Advocates Remuneration Order on the procedure an aggrieved party must adopt. Counsel submits that the Taxing Master in her Ruling on the 19th May,



2022 was brief and did not give her reasons for the decision. That the Applicant through the Letter dated 2nd June, 2022 gave its Notice of Objection and further requested for reasons for the decision. That they did not get the said reasons or the copy of the ruling on time despite the attempts at the registry. That explains the delay in filing the instant application. It is Counsel's submission that the delay was neither prolonged nor inordinate.

12. The second issue for determination is on the Client's Advocate swearing the affidavit on behalf of the Client. Counsel argues that the Respondent has not demonstrated how the affidavit sworn by the Advocate offends the best evidence rule of Order 19 Rule 3(1). The averments in the affidavit revolve around matters within the Advocate's personal knowledge.
13. The third issue is whether the Ruling of the Taxing Master should be set-aside, it has been argued that the Taxing Master was silent on the Applicant's application dated 5th October, 2021. This implies that she had made up her mind to dismiss the same without hearing it. That the Applicant was therefore denied an opportunity to be heard on merits of the application. It is therefore in the interest of justice that the prayers sought in the application be granted.

Advocate/ Respondent's Submissions

14. The Advocate/Respondent on his part submitted that the Client's application is misconceived and presumptuous as it seeks extension of time simultaneously with a purported reference which is not legally tenable. He submits that the Advocate for the Client has not given any explanation as to why his Client could not swear the affidavit or specify who exactly instructed him as the Client is an association.
15. As for grounds in support of the application, the Advocate cites the provisions of Paragraph 11 of the [Advocates Remuneration Order](#). He further submits that the Client does not even attempt to explain the reason for the delay in filing the reference.

Issues for Determination

16. Having considered the Chamber Summons Application dated 28th July, 2022 together with the supporting affidavit, the Grounds in opposition filed by the Advocate/Respondent and the written submissions filed by both parties, I am of the view that the issues for determination are;
 - a. Whether the applicant is entitled to orders for enlargement of time within which to file a Reference.
 - b. Depending on the outcome of (a) above, whether the reference filed by the Client/Applicant has merits to justify the setting aside of the ruling of the taxing officer dated 19th May, 2022.

Analysis and Determination

A. Whether the applicant is entitled to orders for enlargement of time within which to file a Reference.

17. Paragraph 11 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.

3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (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 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."

18. The discretion of the court to enlarge time was elaborately discussed in the case of the [*County Executive of Kisumu v County Government of Kisumu and 8 Others*](#) [2017] eKLR, where the Supreme Court of Kenya held thus:

"It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as "the under-lying principles that a Court should consider in exercise of such discretion:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

19. The Client herein concedes that it did not comply with the provisions of Paragraph 11(1) and (2) of the [*Advocates Remuneration Order*](#) which spells out the time within which to file a Reference. The Client attributes the delay to the alleged failure by the Taxing Master to give reasons for taxation and availing the Ruling in good time. Surprisingly, the Applicant does not state when it eventually received the said reasons and ruling, if at all it did.



20. In *Fabim Yasin Twaha v Timamy Issa Abdalla & 2 Others [2015]* eKLR the Supreme Court, reiterated the general principles governing extension of time, thus: -

1. 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;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”.

21. Mohammed J. (as he then was) held as follows in the case of *George Kagima Kariuki & 2 Others vs George M. Gichimu & 2 Others [2014]* eKLR, on the issue of delay: -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”

22. The same position was taken in *Stanley Kaboro Mwangi & 2 Others v Kanyamwi Trading Company Limited [2015]* eKLR where the court was of the view that: -

“A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised.”

23. From the decisions cited above the court has the discretion to allow an application for extension of time where ‘the whole period of delay is declared and explained satisfactorily to the Court’. From the record, the Advocate’s Bill of Costs is dated 5th March, 2021.

24. From the record, the Ruling of the taxing master was delivered on 19th May, 2022. The instant application was filed on the 28th July, 2022. The delay in filing the application is for about 65 days. A perusal of the impugned ruling clearly indicates that the reasons for taxation are contained in the ruling. This being the case, I find that it there was no need for the Client to yet again make a request for the reasons for taxation.

25. I am guided by the decision in *Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2) (2006) 1 EA 5* where the court held as follows: -

“Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the



said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons. Where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”

26. Similarly, Odunga J. (as then was) stated as follows in *Evans Thiga Gaturu, Advocate vs.- Kenya Commercial Bank Limited [2012]* eKLR:

“ However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference....

27. From the foregoing, I find that the Client/Applicant has not satisfactorily explained the delay and is therefore not entitled to the court’s discretion. The Prayer for extension of time therefore fails.

28. Having found that the prayer for extension of time is not merited, it logically follows that there would be no basis for addressing the second issue for determination on whether the Reference filed herein is merited or not.

29. The upshot is that the Client/Applicant’s Chamber Summons dated 28th July 2022 is hereby dismissed with costs to the Advocate/ Respondent.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Nyambura holding brief for Mr. Mbigi for the Client/Applicant.

No appearance for the Advocate.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

