



REPUBLIC OF KENYA



**Kamau v Silva & 8 others (Constitutional Petition 51 of 2016)  
[2022] KEHC 12996 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 12996 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION 51 OF 2016**

**JM MATIVO, J**

**SEPTEMBER 21, 2022**

**BETWEEN**

**SAMMY MWANGI KAMAU ..... PETITIONER**

**AND**

**THUSHARA DE SILVA ..... 1<sup>ST</sup> RESPONDENT**

**ALLAN MOLA ..... 2<sup>ND</sup> RESPONDENT**

**EDWIN MIANO ..... 3<sup>RD</sup> RESPONDENT**

**KELI MUINDI ..... 4<sup>TH</sup> RESPONDENT**

**JON STOKES ..... 5<sup>TH</sup> RESPONDENT**

**MATTHEW GITHINJI ..... 6<sup>TH</sup> RESPONDENT**

**KEN MIGWE ..... 7<sup>TH</sup> RESPONDENT**

**PAULINE GACHIHI (SUED IN THEIR INDIVIDUAL CAPACITIES AND IN  
THEIR CAPACITY AS MEMBERS OF THE MAIN COMMITTEE OF NYALI  
GOLF & COUNTRY CLUB LIMITED) ..... 8<sup>TH</sup> RESPONDENT**

**NYALI GOLF & COUNTRY CLUB LIMITED ..... 9<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling determines an application dated November 3, 2021 filed by the firm of Kinyua Muya & Co advocates. At the 2<sup>nd</sup> page of the application, it is indicated that the application is drawn on behalf of the Petitioner. However, a reading of the application leaves no doubt that the application is actually drawn on behalf the Respondents. The confusion does not end there. The heading to the submissions filed by the firm of Kinyua Muya & Co advocates reads: - “9<sup>th</sup> Respondent’s/applicant’s submissions.” In the submission, counsel pointed out that the affidavit in support of the application was sworn by the Hon.



Secretary of Nyali Golf & Country Club stating that the application was made by the 9<sup>th</sup> Respondent. Evidently, the application as drawn is not on behalf of the Petitioners. Counsel for the Respondents prefers to proceed on the basis that the application was made on behalf of the 9<sup>th</sup> Respondent. No application was made, even informally to rectify the anomaly.

2. Significantly, in addressing this application, I will be guided by the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013<sup>1</sup> which govern constitutional Petitions. A useful point of reference is the overriding objective of the rules as provided under Rule 3 which is to facilitate access to justice for all persons as required under Article 48 of the Constitution. Rule 3 (3) provides that the Rules must be interpreted in accordance with Article 259 (1) of the [Constitution](#) and shall be applied with a view to advancing and realizing the- (a) rights and fundamental freedoms enshrined in the Bill of Rights; and (b) values and principles in the Constitution. Sub-rule 4 provides that in exercise of its jurisdiction under the Rules, the court shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.
3. Talking about the overriding objective of the Rules and the requirement that courts are to determine cases without undue regard to procedural technicalities, it is important at this stage to attempt to define the term a “legal technicality” which has been defined as follows:<sup>2</sup>

“Legal technicality” is a casual or colloquial phrase referring to a technical aspect of law and that it is not a term of art in the law, has no exact meaning and doesn't have a legal definition. That notwithstanding, the term implies that strict adherence to the letter of the law prevents the spirit of the law from being enforced and is often simply used to denote any portion of the law that interferes with the outcome desired by the user of the term.”

4. The court in *James Mangeli Musoo v Ezeetec Limited*<sup>3</sup> preferred the following definition: -

“A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.”

5. The House of Lords in *Henry JB Kendall & Others v Peter Hamilton*<sup>4</sup> had this to say: -

“Procedure is but the machinery of the law after all, the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to sub serve”

<sup>1</sup> Legal Notice No. 117 of 2013.

<sup>2</sup> Musembi Emmanuel Nzak, Due Regard versus Undue Regard To Procedural Technicalities: The Civil Procedural Tug-Of-War Technicality, citing Dictionary for US, <http://dict.us/technicality> accessed on 29 January 2016.

<sup>3</sup> {2014} e KLR.

<sup>4</sup> He111)1JB Kendall & Others v Peter Hamilton (1878) 4 AC 504.



6. In *Anchor Limited v Sports Kenya*<sup>5</sup> the court while searching for a fitting definition of procedural technicalities had this to say: -

“10. One workable and pragmatic definition of a technicality has been bequeathed to us by the Learned Honourable Justice Richard Mwongo, in *Kenya Ports Authority V Kenya Power & Lighting Co. Limited* (2012) eKLR and another one supplied by the Learned Hon. Justice C.W Githua in *James Muriithi Ngotho & 4 Others V Judicial Service Commission* (2012) eKLR: both decisions substantively say that procedural technicality is a lapse in form that does not go to the root of the suit. In the former case, Justice Mwongo defined a technicality thus:

Combining the meanings of these words, “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.”

7. Whatever definition we adopt, courts are constitutionally obligated to adopt an approach which prefers determination of cases on merits as opposed to procedural technicalities. Simply put, to be preferred is an approach that places emphasis on merits as opposed to undue technicalities. Courts should critically examine the meaning of the “on the merits,” how the principle has permeated our procedural theory and architecture, courtesy of our transformative, liberal and progressive Constitution and why, despite the allure procedure, we should prefer the “on the merits” principle.

8. Perhaps, I should clarify that a resolution “on the merits” occurs when a lawsuit is decided according to procedural rules that (1) are designed, interpreted, and implemented to give the parties a full opportunity to participate in presenting the proofs and reasoned arguments on which a court can decide a case, and (2) do not systematically affect the outcomes of cases due to the intended operation of a principle other than the principle of allowing the parties a full opportunity to participate. One thing is beyond argument, that is, the principle of resolving cases on their merits is now deeply ingrained in our Constitution. This observation enjoys a constitutional underpinning under Article 159 (2) (d) of the *Constitution*. On merit determination of cases is now a constitutional creed. It’s no longer a mere common law principle. Major aspects of the procedural laws both criminal and civil flow directly from the constitutional dogma that parties deserve a full opportunity to participate in shaping decisions about their claims and defenses. I am persuaded beyond doubt that it is only fair and just that the instant application should be heard on merits.

9. The application under determination is dated November 3, 2021. The applicant (wrongly described as the Petitioners), but now clarified to be the 9<sup>th</sup> Respondent seeks to set aside the Taxing Master’s ruling on the Party and Party Bill of Costs dated May 31, 2021 delivered on September 15, 2021. The applicant also prays that the said ruling be stayed pending the filing, hearing and determination of an appeal against the whole judgment. The applicant also prays for costs of this application to be borne by the Petitioner/Respondent.

<sup>5</sup> {2017} e KLR.



10. The application is premised on the following grounds: - (a) that the Party and Party Bill of Costs was taxed at Kshs. 409,105.05 vide a ruling delivered on September 15, 2021 but expressed to have been read and signed in open court on September 9, 2021; (b) that the Petitioner forwarded a draft decree to the Respondent's advocates for approval on September 23, 2021 giving the Respondents 7 days' notice within which to approve or disprove the decree, but the applicant did not approve the decree; (c) that the applicant filed a Notice of Appeal on May 18, 2021 against the judgment and requested for typed proceedings *vide* their letter May 17, 2021; (d) that the impugned ruling concerns a suit and not the constitutional petition that was before the court because bills in constitutional Petitions are not taxed under the *Advocates Remuneration Order* but under the rules made under the *Constitution*.
11. Additionally, the applicant states that on November 1, 2021, the Petitioner sent auctioneers to the 9<sup>th</sup> applicant seeking to proclaim to recover the decretal sum of Kshs. 70,000/= plus the taxed costs. The applicants state that even though the amount awarded was for Kshs. 70,000/=, the Petitioner's bill was Kshs. 3,742,439/= which was eventually taxed at Kshs. 409,105.07 which he argued is manifestly excessive compared to the said awarded. The applicant states that despite requesting for reasons, the Deputy Registrar only made hand written endorsement on its letter which the applicant only saw on November 1, 2021. Further, the applicant states that this application could not be filed earlier because the Deputy Registrar did not provide the reasons for the taxation
12. The Petitioners filed the Replying affidavit of Kelvin Asige advocate dated February 11, 2022 urging two points. One, that the prayers sought are overtaken by events because execution is complete. Two, that the application lacks merits.
13. The applicant's counsel submitted that the application is properly before the court. He cited *Violet Ombaka Otieno & 12 others v Moi University*<sup>6</sup> in support of the proposition that the complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently. He argued that the instant case is not complex and attributed the delay in concluding the matter to the Petitioner, a reason he argued cannot be used to double the instruction fees. He argued that even though it is said the ruling was delivered on September 15, 2021, the typed ruling shows that it was delivered on September 9, 2021. He relied on *Musa Hassan Bulhan v Kenya Airways Limited & another*<sup>7</sup> which held that a judgment was a nullity for wrong dating and non-signing.
14. The Petitioner's/Respondent's counsel submitted that this court is *functus officio*. He relied on *Telkom Kenya Ltd v John Ochanda (Suing on his behalf and on behalf of 996 former employees of Telkom Kenya Ltd)*<sup>8</sup> which described *functus officio* as an enduring principle of law which prevents the re-opening of a matter before a court that rendered the final decision. He argued that the judgment was delivered on May 4, 2021 while the taxation was delivered on September 9, 2021. He submitted that execution is complete and argued that the applicant seeks to re-open the case on merit, yet they have not brought out issues which fall within the permissible exceptions. He argued that this court has no jurisdiction to determine the application and cited *Owners of Motor Vesel "Lillian" S v Caltex Oil (Kenya) Ltd.*<sup>9</sup>
15. First, I will address the Respondent's/Petitioner's argument that this court is *functus officio*. True, complementary to the doctrine of *res Judicata* is the conception that, when a judicial tribunal becomes

<sup>6</sup> [2021] e KLR.

<sup>7</sup> [2006] e KLR.

<sup>8</sup> [2014] e KLR.

<sup>9</sup> [1989] KLR 1.



*functus officio* in respect of a particular case, its powers and jurisdiction are exhausted in respect of that issue. A judicial tribunal, after giving a decision as to the merits of a case, ceases to exist as an instrumentality in its previous form or at all, or is deprived of all the judicial functions it previously possessed, it is *functus officio* in respect of the issues decided. (See *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation and Kenya Commercial Bank Group Limited (Garnisbee)*<sup>10</sup>).

16. A court which, after a trial, has given a valid decision determinative of right, liability or status, has no jurisdiction to recall it whatever mistakes may have been made in facts or law.<sup>11</sup> This test is applicable only if there happens to have been a "final" and "determinative" decision, after a trial; and that a judicial tribunal becomes *functus officio* in this sense only in relation to a particular matter, not in respect of all matters. Clearly, if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature or review or setting aside or stay) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment or ruling is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment or ruling can be pleaded by way of estoppel in the subsequent case. The highlighted paragraph aptly answers the Petitioner's/Respondent's objection. The said argument is manifestly misguided and has no relevance to the issue at hand. Before me is an application seeking two substantive prayers. One, setting aside a taxation ruling. By any stretch of imagination, this court cannot be *functus officio* to grant an order seeking to set aside a taxation. The taxation was not pronounced by this court but by the Taxing Master. This court is statutorily ordained to determine references challenging taxations. Two, the other argument propounded by the Petitioner/Respondent is that execution is complete. I will address this later.
17. Second, I will address a pertinent question which is, whether the instant application was filed out of time. Even though this is highly dispositive question, the parties did not accord it the consideration it deserves. The impugned Ruling was delivered on September 15, 2021. The instant application was filed on November 3, 2021 after the expiry of 48 days.
18. Paragraph 11 of the *Advocates Remuneration Order* provides for References in respect to the taxing officers' decisions in the following words: -
  - 1) Any party who objects to the decision of the taxing officer may within 14 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 the decision on those items and the objector may within 14 days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all 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 Sub paragraph (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 for in Sub paragraph (1) or Sub paragraph (2) for taking of any step: Application for such order may be made by chamber summons upon giving to every other interested party not less than 3 clear

<sup>10</sup> Miscellaneous Civil Application No. 241 of 2019.

<sup>11</sup> (1943-4) 68 C.L.R. at p. 590.



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

19. The instant application was filed after a lapse of 48 days. No leave was sought from this court to file the reference out of time. On this ground alone, the application seeking to set aside the taxation is unsustainable. The argument that the applicant only got to learn about the reasons late is of no help. That is the more reason why leave ought to have been sought and obtained. The hand written notes on the applicants letter only clarify the date the ruling was delivered. The reasons for the taxation are in the ruling. Where a taxing master delivers a reasoned ruling, it is not necessary for reasons to be provided. Our decisional law is awash with case law upholding the said position. On this ground alone the prayer seeking to set aside the taxation collapses.

20. Notwithstanding my above finding, I will address the application on merit. A useful starting point is to rehash the guiding principles while determining applications to set aside a taxation. Before interfering with a decision of a Taxing Master, the court must be satisfied that the Taxing Master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the Taxing Master was wrong. The court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the Taxing Master. The court only interferes when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate the ruling.<sup>12</sup> When a court reviews a taxation it is vested with the power to exercise the wider degree of supervision.<sup>13</sup> This means: -

“ . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling.<sup>14</sup>

21. It is accepted that the Taxing Master is required to consider the time taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The definitive question is whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this particular case. This requires this court to be satisfied that the Taxing Master was clearly wrong before interfering with the decision.<sup>15</sup> The quantum of such costs is to be what was reasonable fees and must be within the remuneration order. The determination of such quantum is determined by the Taxing Master and is an exercise of judicial power guided by the applicable principles. However, the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others

<sup>12</sup> See *Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* [1984] ZASCA 2; 1984 (3) SA 15 (A) and *Legal and General Insurance Society Ltd vs Lieberum NO and Another* 1968 (1) SA 473 (A) at 478G.

<sup>13</sup> *Johannesburg Consolidated Investment Co. vs Johannesburg Town Council* 1903 TS 111.

<sup>14</sup> *Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) at 18F C G.

See also the discussion by Botha J in *Noel Lancaster Sands (Pty.) Ltd. vs Theron and Others* 1975 (2) SA 280 (T) at 282D C 283D for a discussion of the nature and limits of the judicial function in this context.

<sup>15</sup> (See: *Ocean Commodities Inc vs Standard Bank of SA Ltd* [1984] ZASCA 2; 1984 (3) SA 15 (A) at 18E-G).



which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.<sup>16</sup>

22. In principle, costs are awarded, having regard to such factors as:- (a) the difficulty and complexity of the issues; (b) the length of the trial; (c) value of the subject matter and (d) other factors which may affect the fairness of an award of costs. The law obligates the Taxing Master to take into account these principles. As was held by the Ugandan Supreme court: -<sup>17</sup>

“Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.”

23. The court in *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others*<sup>18</sup> it was held :-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the *Advocates (Remuneration) Order* itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment... A taxing officer does not arrive at a figure by multiplying

<sup>16</sup> Per SMIT AJP in *Preller vs S Jordaan and Another* 1957 (3) SA 201 (O) at 203C - E.

<sup>17</sup> *Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC)*.

<sup>18</sup> {2006} eKLR).



the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for....The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs...”

24. Perhaps I should add that the taxing master is enjoined to adopt a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the case. The discretion vested in Taxing Master is to allow fees, costs, charges and expenses as appears to him to have been necessary or proper, and not those which may objectively attain such qualities, and that such opinion must relate to fees and all costs reasonably incurred, but also imports a value judgment as to what is reasonable. The discretion to decide is given to the Taxing Master and not to this court. This discretion must be exercised judicially in the sense that the Taxing Master must act reasonably, justly and on the basis of sound principles with due regard to the circumstances of the case.
25. As was held in *Phemchand Raichand Ltd Another v Quarry services of East Africa Ltd and Another*<sup>19</sup> thus: -
- i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.
  - ii. The taxing master was expected to tax each bill on its merits;
  - iii. The value of the subject matter had to be taken into account;
  - iv. The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;
  - v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.
  - vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected

<sup>19</sup> {1972} EA 162. Their lordships also cited with approval the decisions in the cases of *Attorney General vs Uganda blanket Manufacturers* CA No. 17 of 1993 (SCU); *Bashiri vs Vitafoam (u) Ltd* civil application No. 13 of 1995.



himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.<sup>20</sup>

26. The court can interfere if it is proved that the amount taxed was manifestly excessive or low, or if there is proof that the taxing officer followed a wrong principle in reaching his decision. The applicant argues that the amount taxed is manifestly excessive. This argument was not elaborated. In determining the reasonableness or otherwise of items in the bill, the taxing master must give consideration to factors such as the importance and complexity of the matter, the value of the subject matter, the work actually done by counsel and the fact that counsel must be fairly compensated for preparation and presentation of the case. The court will only interfere with an award of costs by the Taxing Master if such costs are so low or so high that they amount to an injustice to one of the parties. Costs must not be allowed to escalate to such levels so as to restrict access to justice.
27. As was held in *Joreth Limited v Kigano & Associates* (supra) and *First American Bank of Kenya v Shab and Others*<sup>21</sup> instruction fees is static such that it does not depend on such circumstances as the applicant may suggest. Further, the value of the subject matter of a suit, for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case), but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any directions by the trial Judge and all other relevant circumstance. A reading of the impugned ruling shows that Taxing Master properly arrived at the impugned taxation guided by the applicable provisions of the Remuneration order and that he did not depart from these established principles. Guided by the foregoing considerations, I find no basis to fault the taxing master.
28. I now turn to the plea for stay of execution pending filing an appeal against the judgment. It has been argued that execution is complete. This position was not contested. That being the position, then the plea for stay is an academic exercise and, on this ground, alone, the prayer for stay collapses.
29. Notwithstanding my above finding, I will address the prayer for stay on merit. I find useful guidance in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*<sup>22</sup> in which the Supreme Court laid down the principles to guide courts while considering extension of time. It stated: --
- 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;

<sup>20</sup> See *Steel construction and Petroleum Engineering (EA) Ltd versus Uganda Sugar Factory Limited* [EA] 141; *Kabanda versus Kananura Melvin Consulting Engineers*, supreme court civil application No. 24 of 1993; *Makumbi and Another versus sole electricians (U) Ltd* [1990-1994] 1 EA 306 (SCU).

<sup>21</sup> {2002} I EA 64

<sup>22</sup> {2014} e KLR.



- 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."
30. From the above decision, several principles are discernible. One, 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. A common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e., statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under the circumstances and the law.
31. As was held in *Smith v Middleton*,<sup>23</sup> the discretion is to be exercised in a selective and discriminatory manner, not arbitrarily or idiosyncratically otherwise as Lord Diplock said in *Cookson v Knowles*<sup>24</sup> the parties would become dependent on judicial whim. Discretion must be exercised in accordance with sound and reasonable judicial principles. Here the order is discretionary because it depends on the application of a very general standard— what is ‘just and equitable.’ The exercise of the court’s discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit.
32. The judgment was delivered on May 4, 2021. Annexed to the applicant’s application are two letters requesting for proceedings dated 17<sup>th</sup> May 2021 and September 22, 2021. Notably, the two letters do not have a court stamp to show that they were ever filed in court. Unexpectedly, the letters are not in the court file casting doubts as to whether they were ever filed in court. Additionally, even though the applicant states that he filed a Notice of Appeal, there is none in the court file, casting doubts on its existence. No draft appeal has been annexed. All these omissions cast serious doubts on the alleged intention to appeal. It suggests that the instant application was only an afterthought and that it was triggered by the attachment.
33. The applicant faults the learned taxing master for the confusion in the date in the ruling, The Taxing Master did clarify the correct date and mentioned that the error was such that it could be corrected by the court under the slip rule. This extinguishes the assault on the alleged wrong date. The decision in *Musa Hassan Bulhan v Kenya Airways Limited & another*<sup>25</sup> relied upon by the applicant held that a judgment was a nullity for wrong dating and non-signing. This distinguishable from the instant case because the ruling was signed and dated. The error on the delivery date was corrected was corrected under the slip rule provided under section 99 of the *Civil Procedure Act*.<sup>26</sup> Also, Order 21 Rule 3 (1) of the *Civil Procedure Rules*, 2010, provides that a judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it. The ruling met this statutory edict.

<sup>23</sup> {1972} SC 30.

<sup>24</sup> {1979} AC 556.

<sup>25</sup> [2006] e KLR.

<sup>26</sup> Cap 21, Laws of Kenya.



34. In view of my analysis of the facts and the law herein above, and the conclusions arrived at, it is my finding that the applicant's application is unmerited. Accordingly, I dismiss the applicant's Notice of Motion dated November 3, 2021 with costs to the Respondent/Petitioner.

Orders accordingly

**SIGNED AND DATED AT MOMBASA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2022**

**JOHN M. MATIVO**

**JUDGE**

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2022**

**OLGA SEWE**

**JUDGE**

