



**George Miyare t/a Miyare & Company Advocates v Elsek &
Elsek Kenya Limited (Miscellaneous Application E1007 of 2020)
[2021] KEHC 120 (KLR) (Commercial and Tax) (30 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E1007 OF 2020
WA OKWANY, J
SEPTEMBER 30, 2021**

**BETWEEN
GEORGE MIYARE T/A MIYARE & COMPANY ADVOCATES APPLICANT
AND
ELSEK & ELSEK KENYA LIMITED RESPONDENT**

RULING

1. The applicant seeks the following orders in the application dated 8th December 2020: -
 - a. That the Honourable Court be pleased to grant leave to the Advocate/applicant to file objection and reference out of time against the ruling of the Honourable Taxing Master (Hon. Stephanny Githongori (DR) delivered on 16th November 2020
 - b. Coasts be in the cause.
2. The application is supported by the affidavit of Ester Mwikali and is based on the following grounds: -
 1. On 16th November 2020 the Honourable Deputy Registrar (Hon. Stephanny Githongori) delivered a ruling on the Advocates/Applicants Bill of costs dated 24th August 2020.
 2. Even though the said 16th November 2020 the Advocate/applicant was represented, the learned Deputy Registrar only read out the final figure of fees assessed and/or awarded to the advocate/Applicant.



3. The advocate /applicant immediately requested for a copy of the said ruling dated 16th November 2020 and paid the requisite fees
 4. It was only on 8th December 2020 when the advocate/applicant received and perused a copy of the aforesaid ruling
 5. Upon perusal of the ruling the Advocate/applicant noticed that the learned taxing master had arbitrarily decreased the instruction fees awarded and/or grossly undercompensated the Advocate/applicant for services rendered to the Client/respondent
 6. The Advocate/applicant is aggrieved by the above said ruling as the assessed fees is too low contrary to the Advocates Remuneration Order and the Advocate/applicant is desirous of filing a reference out of time against the ruling
 7. The intended reference is arguable and has high chances of success
 8. It is only fair that the Advocate/applicant be given an opportunity to effectively canvass his reference without any undue difficulties/technicalities
 9. The delay was inadvertent and thus excusable to allow the advocate/applicant prosecute his reference
 10. The client/reference will not suffer any prejudice if the application is allowed. On the contrary the advocate/applicant will be greatly prejudiced as he will be grossly under compensated for the services rendered to the client/respondent
 11. This application has been brought in good faith with reasonable promptitude
 12. It is in the interest of justice that this application be allowed and the orders sought issued to obviate imminent difficulties and injustice
3. The respondent opposed the application through Grounds of Opposition dated 8th January 2021 wherein it lists the following grounds: -
1. THAT the application is frivolous, vexatious and abuse of the court process
 2. THAT ruling on the applicants bill of costs was delivered on 16th November 2020 and the delay in filing the application is therefore inordinate and inexcusable
 3. THAT no sufficient grounds exist to warrant the orders sought by the applicant
 4. THAT the ruling by the taxing officer was proper and just
 5. THAT the applicant had an opportunity defend its bill of costs before the Taxing officer but failed to do so
 6. THAT the application lacks merit, is misconceived is incompetent and should be dismissed
 7. THAT in view of the foregoing the orders sought by the applicant are untenable and incapable of being granted.



8. THAT the Application is meant to circumvent the cause of justice and should be dismissed.
4. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of the orders for enlargement of time within which to file a reference.
5. Paragraph 11 (4) of the *Advocates Remuneration Order* (ARO) stipulates as follows on extension of time; -
 - 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 expired.
6. In the instant case, it was not disputed that the applicant did not file the reference within the stipulated timelines. Indeed, the applicant concedes that it did not comply with the provisions of the above paragraph but explains the delay by stating that its representative was not present in court when the Honourable Taxing Master delivered the ruling. The applicant further states that it managed to get a copy of the impugned ruling on 8th December 2020 and that it is upon the receipt of the ruling that it proceeded to file the instant application.
7. On its part, the respondent argued that the delay in filing the application is not excusable as he application was filed more than 20 days after the delivery of the ruling.
8. In *Fahim Yasin Twaba vs Timamy Issa Abdalla & 2 Others* [2015] eKLR the Supreme Court laid out the general principles governing extension of time thus: -

“As regards extension of time, this Court has already laid down certain guiding principles. In the *Nick Salat case*, it was thus held:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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”.
9. In *George Kagima Kariuki & 2 Others vs George M. Gichimu & 2 Others* [2014] eKLR the court had the following to say with regard to 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.”

10. The same position was adopted in *Stanley Kaboro Mwangi & 2 Others vs 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.”

11. Guided by the above cited cases, I find that the court has the discretion to extend time within which to file a reference where the applicant demonstrates that there was sufficient cause for the delay.
12. A perusal of the court record reveals that the applicant wrote to the Deputy Registrar requesting for a copy of the ruling delivered on 16th November 2020. I note that the 14 days’ period within which to file the reference lapsed on 30th November 2020 and the present application was filed on 8th December 2020. My finding is that the delay in filing the reference is not inordinate and does not prejudice the respondent. In sum I find that the applicant has satisfactorily explained the delay. I therefore allow the application and grant leave to the applicant to file the reference within 14 days from the date of this ruling failure of which these orders shall stand vacated.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Mutuku for the Advocate/Applicant.

Mr. Musya for Respondent.

Court Assistant: Sylvia.

