



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 106 OF 2013**

**PATRICK MUGURO MWANGI .....1<sup>ST</sup>**  
**PETITIONER**

**FRANCIS MBAU MUIRURI .....2<sup>ND</sup>**  
**PETITIONER**

**VERSUS**

**PATRICK ELIUD GICHOHI .....1<sup>ST</sup>**  
**RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2<sup>ND</sup>**  
**RESPONDENT**

**FRANCIS MWANGI .....3<sup>RD</sup>**  
**RESPONDENT**

**RULING**

1. The applicant had filed this petition seeking to have the 3<sup>rd</sup> respondent's name removed from the ballot for the Murang'a County Governor's seat in the 2013 general elections. Upon hearing the matter, the Court dismissed the petition with costs to the respondents.
2. The 3<sup>rd</sup> respondent filed a bill of costs which was taxed by the Deputy Registrar, Hon. Wanjala, and a ruling delivered on 17<sup>th</sup> October 2013. On the date fixed for the taxation, there was no appearance for the petitioner, even though there was an Advocate on record. I note from the record that on 7<sup>th</sup> August 2013, the court had given the Advocate for the petitioners, Mr Haron Nduti, who wished to cease from acting, twenty one (21) days within which to file and prosecute his application for leave to cease from acting. The court also directed that the petitioners be served by registered post by their then Advocate on the address shown in their affidavits on record with both the bill of costs and the taxation notice for 12<sup>th</sup> September 2013. It appears that the application to cease from acting was not filed, and the court proceeded with the taxation.
3. The current Advocates for the petitioners came on record on 24<sup>th</sup> October 2014 pursuant to an application to come on record dated 13<sup>th</sup> October 2014. On 27<sup>th</sup> October 2014, Counsel for the

petitioner indicated that the petitioner was willing to pay the taxed costs by way of instalments of Kshs 10,000 per month. The court allowed the petitioner to pay Ksh10,000/- on that day and directed that he should pay a further Ksh20,000/- by 31<sup>st</sup> October 2014, with the matter being mentioned on 11<sup>th</sup> November 2014 for the petitioner to give a proposal on how to settle the balance. It is subsequent to this last court appearance that the petitioner filed the application dated 7<sup>th</sup> November 2014 in which he seeks the following orders:

- 1. That this application be certified as urgent and service thereof be dispensed with in the first instance*
  - 2. That this Honourable court be pleased to enlarge time for filing an objection to the taxing officer's decision dated 17th October 2013.*
  - 3. That in addition, this Honourable court be pleased to stay the Notice to show cause proceedings scheduled for hearing on 11th November 2014 pending the hearing and determination of this application*
  - 4. That costs be in the cause.*
4. The application, which is supported by the affidavit of the 1<sup>st</sup> petitioner, Mr. **Patrick Muguro Mwangi**, sworn on 7<sup>th</sup> November 2014 is based on the grounds that the court entered judgment in favour of the respondents on 26<sup>th</sup> February 2013 and the 3<sup>rd</sup> respondent's bill of costs was taxed and a ruling thereon delivered on 17<sup>th</sup> Day of October 2013 in which the bill of costs was taxed at Kshs 566,017. A notice to show cause was scheduled for hearing on 11<sup>th</sup> November 2014. The 1<sup>st</sup> petitioner avers that he was never privy to the taxation proceedings against them as the Advocate then on record did not apprise him of the taxation. It is his case that he is desirous of setting aside the ruling delivered on 17<sup>th</sup> October 2013 as the taxing master, amongst other reasons, erroneously determined the constitutional petition as an election petition; and that the 1<sup>st</sup> petitioner is at risk of being condemned to civil jail despite not having been heard contrary to the principles of natural justice.
  5. The applicants argue that the delay in filing this application is not inordinate as they had never been informed of the taxation proceedings and the ruling delivered thereafter prior to being served with a notice to show cause.
  6. In presenting the applicants' case, Mr. Wilson submitted, in his written and oral submissions, that the applicant was seeking to enlarge time to object to the taxing master's order. It was his submission that the petitioners were not aware of the proceedings leading to the ruling, and that they were served with a notice to show cause after which they instructed the firm of Lusweti and Nabutola Advocates to come on record and thereafter filed the present application. He submitted further that they had made some payments to the respondent on a without prejudice basis. He relied on the decisions in **Amuga & Co Advocates-vs- Arthur Githinji Maina Misc. Appl. NO. 265 of 2012 (2013) eKLR** and **Eres N.V. & Another -vs- Maina Murage & Co. Advocates, Court of Appeal At Mombasa Civil Application No.16 of 2013** and urged the court to exercise discretion in favour of the applicants and give the orders that they were seeking.
  7. Counsel distinguished the authorities relied on by the respondent on the basis that in the first case, there was a delay of more than twelve years, and in the second, that the applicants were misadvised.
  8. Mr. Nganga, learned Counsel for the 3<sup>rd</sup> respondent, opposed the application on behalf of the 3<sup>rd</sup> respondent. It was his submission that the delay of one year since the taxation is inordinate, and the explanation given for the delay lame. It was his contention that the petitioners were represented by Counsel; that the court is not told what steps the petitioners took for more than one

year to find out the status of their case, and submitted that the responsibility is on the client to find out the status of their case. Counsel relied on, among others, the decision in **Eres N.V. & Another –vs- Maina Murage & Co. Advocates (supra)** and **Bi-Mach Engineers Limited –vs-James Kahoro Mwangi Civil Application No Nai 15 of 2011(UR . 10/2011**

9. With regard to the authorities relied on by the applicants, it was his submission that the application for enlargement of time in the case of **Amuga & Co Advocates-vs- Arthur Githinji Maina Misc. Appl. NO. 265 of 2012 (2013) eKLR** was rejected, while in the second case, **Eres N.V. & Another –vs- Maina Murage & Co. Advocates (supra)**, there was a genuine mistake of Counsel and as a result the court granted the orders sought. It was his submission that in this case, no explanation from the Counsel being blamed had been given.
10. Mr Nganga further pointed out that there had been part payment and a consent on payment recorded before the Deputy Registrar. He submitted that litigation should come to an end, and that the petitioner had a cause of action against his Counsel. He prayed that the application should be rejected.
11. The question before me is whether there is any merit in the petitioners' application to extend time to file a challenge to the decision of the taxing master in this matter. The petitioners have relied on the decisions of the court in **Amuga & Co Advocates-vs- Arthur Githinji Maina** and **Eres N.V. & Another –vs- Maina Murage & Co. Advocates**. In the **Amuga** case, the court declined to grant the application for extension of time on the basis that the applicant had not explained his failure to lodge the objection to the taxation in the matter. In the case of **Eres N.V. & Another –vs- Maina Murage & Co. Advocates**, I agree with the 3<sup>rd</sup> respondent that there were good grounds for extending the time to file an appeal. As **Sichale, JA**, observed:

*“In my view, it is apparent that the applicant did not go to sleep over since the judgment of Ibrahim, J. (as he then was) was delivered on 20<sup>th</sup> September, 2013. He has been 'busy' engaging the court, although in the process, he made wrong turns at every stage. His problems were compounded by the ruling of Muya, J. delivered on 29<sup>th</sup> May, 2013 that permitted him to lodge a Notice of Appeal within the “prescribed time.” It was unfortunate that the High Court failed to acknowledge that the 14 days period of lodging a Notice of Appeal was long past. The problem was further compounded as submitted by Mr. Mogaka that the applicant had failed to seek for enlargement of time. I find that the delay on the part of the applicant has been sufficiently explained...”*

12. What is the situation in the current case? In my view, there was no explanation for the failure to file an objection to the taxation, or for the delay in coming to court until the 1<sup>st</sup> petitioner was served with a notice to show cause.
13. I have read the proceedings before the Deputy Registrar, and it appears to me that in this case, the failure to file an application for extension of time cannot be blamed on a 'mistake' on the part of Counsel for the petitioners. From the proceedings, part of which I have set out above, the petitioners' advocates did not participate in the taxation of the 3<sup>rd</sup> respondent's bill of costs. Indeed, he indicated his unwillingness even to contact his clients and let them know that there was such a bill coming up and that he was no longer willing to act for them when the bill first came up before the Deputy Registrar on 7<sup>th</sup> August 2013. He also indicated that he had disagreed with his clients on the issue of costs. He did not file an application to cease from acting despite being given time to do so.
14. The petitioners have not explained why, in the circumstances, knowing that their suit had been dismissed with costs, and that they had disagreed with their Counsel on record, they still did not take any action with regard to the matter until long after the taxation was over and a notice to show cause issued.

15. I agree with the 3<sup>rd</sup> respondent that there is an obligation on a party to follow up on his matter and find out its status, particularly in circumstances such as this. It is my view that this matter is more in line with the decision of Waki J in **Bi-Mach Engineers Limited –vs- James Kahoro Mwangi (supra)** in which he stated as follows while dismissing an application for leave to file an appeal out of time:

*“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy.”*

16. In the circumstances, I find no merit in the application. It is hereby dismissed with costs the 3<sup>rd</sup> respondent.

**Dated, Delivered and Signed at Nairobi this 16<sup>th</sup> day of January 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr Lusweti instructed by the firm of Lusweti & Nabutola & Co. Advocates for the petitioner**

**Mr Nganga instructed by the firm of Mbugua Ng’ang’a & Co. Advocates for 3<sup>rd</sup> respondent**