



**Eman v Kamau & another (Environment & Land Miscellaneous Case E112 of 2020) [2022] KEELC 2537 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2537 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E112 OF 2020**

**MD MWANGI, J**

**JULY 14, 2022**

**BETWEEN**

**FATUMA ABDIKADIR EMAN ..... APPLICANT**

**AND**

**BRYAN KHAEMBA KAMAU KAMAU & CO. ADVOCATES . 1<sup>ST</sup> RESPONDENT**

**WESTBOUND AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

*(In respect of the Chamber Summons Application dated 8th March 2022 seeking for orders of enlargement of time for the Client/Applicant to seek reasons for the taxation and subsequently file a reference out of time, and that pending hearing and determination of the intended reference the court stays the execution of its ruling delivered on 25.11.2021)*

**RULING**

**Background**

1. The Client/Applicant in this matter by her Application dated 8<sup>th</sup> March 2022 seeks orders that:
  - a. Spent
  - b. Spent
  - c. That this Honourable court does abridge and enlarge time for the Applicant to seek reasons and subsequently file a reference out of time.
  - d. That pending hearing and determination of the intended reference a draft herein attached this honorable court does stay execution of its ruling delivered on 25/11/2021.
  - e. That the costs of this application be in the cause.



2. The Application is based on the 14 grounds on the face of the Application and on the Supporting Affidavit of Fatuma Abdikadir Eman sworn on the 8<sup>th</sup> March 2022.
3. The Client/Applicant blames her previous advocate for mis-advising her to file a fresh suit instead of a reference against the ruling of the taxing officer in this matter dated 29<sup>th</sup> April 2021. As a result, the time for filing a reference has since lapsed.
4. The Client/Applicant avers that the delay in filing the reference was not deliberate but inadvertent as it was occasioned by the mistake of her previous advocate. She pleads that the mistake of the advocate should not be visited on her.
5. The Client/Applicant opines that she has an arguable reference with high chances of success. It is her case that the taxing officer fell in error of principle when she failed to tax off the amount in excess already paid to the Advocate. The Applicant states that the Advocate/Respondent in whose favour judgement was entered has embarked on executing the resulting decree without acknowledging the amount paid by the Client. The Client alleges to have paid the Advocate in excess of Kshs. 409,000/=
6. In her supporting affidavit, the Client alleges that the Advocate/Respondent abdicated his responsibility and went to work against her in the case where she had instructed him to represent her.

**Reply by the Advocate/Respondent.**

7. The Advocate/Respondent opposes the Client's application by way of a replying affidavit sworn by Bryan Khaemba on 12<sup>th</sup> March 2022.
8. The Advocate deposes that the delay by the Client in bringing this application is inexcusably inordinate. The Advocate avers that the Client has not been diligent in her conduct choosing to file one application after another instead of filing a reference. The Advocate at paragraph 14 of the affidavit has corroborated the point by enumerating the applications filed by the Client over the period since the taxation of the bill of costs.
9. The Advocate further affirms that the explanations by the Client for the delay are not satisfactory. Her application; he reiterates, is an afterthought.
10. Further, the Advocate states that since a judgment/decree has already been entered in this matter, the only avenue available for the Client is to apply to set aside the said judgment/decree first. As it is, even if the Client was granted the orders sought, the said judgment/decree shall still remain in force.
11. The Advocate avers that the Client's application amounts to an abuse of the court process. Granting her the prayers sought would amount to a miscarriage of justice. The Advocate pleads that justice must look both ways.
12. The Advocate finally asserts that litigation must come to an end one way or the other. He urges the court to dismiss the Client's application which he states is mala fides, unmerited, ill-advised and an abuse of the court process.
13. Alongside the replying affidavit, the Advocate had filed a Preliminary Objection dated 12<sup>th</sup> March 2022 in which he states that the Client's application is res judicata, and that the court is functus officio having already entered a judgement in this matter. Finally, that the Advocate avers that the Client's application is incurably defective, vexatious and an abuse of the court process.



## Court's Directions

14. The Court's directions were that the application dated 8<sup>th</sup> March 2022 be canvassed by way of written submissions. The preliminary objection by the Advocate/Respondent was to be considered as part of his response to the Client's application. Both parties have complied and the court has had the opportunity to read through the said submissions.

## Submissions by the parties.

### A. Submissions by the Client/Applicant

15. The Applicant submits that the ruling of the taxing officer was wrong on the basis that after taxing the bill at Kshs. 300,208/-, she ought to have correspondingly considered the applicant's evidence that she had already paid over and above the taxed amount. The Applicant submits that there was undisputed evidence of payment of Kshs 409,000/-. That this amount ought to have been taxed off against the figure of Kshs 300,208/-
16. The Applicant identified 2 issues for determination namely: -
- i. Whether the Applicant has met the threshold for granting stay of execution &
  - ii. Whether the Applicant has met the threshold for enlargement of time to file a reference out of time.
17. On the first issue, the Applicant submits that the rule of the thumb is that an applicant ought to prove that substantial loss would result to him unless the order is made, and that the application has been made without unreasonable delay. Further that an applicant has to provide security.
18. The Applicant relies on the decision in the case of *Andrew Shisala Angalushi -vs- Zephania K. Yego & Aginga Asiligwa Chanzu* (2020) eKLR to buttress her submission on the issue. The Applicant further cites the case of *James Wangalwa & Another -vs- Agnes Naliaka Chesote* (2012) eKLR.
19. On the explanation for the unreasonable delay, the Applicant reiterates her averments in the application blaming it on her former advocate for employing what she terms as a wrong approach to the ruling of the taxing officer. The Applicant makes reference to the pronouncement in the above cited case of Andrew Shisala Angalushi -vs - Zephania K. Yego & Another (Supra) where the court quoted with approval the pronouncement in the case of *Jaber Mohsen Ali & Another -vs- Priscilla Boit & Another* (2014) eKLR to the effect that: -
- “the question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable depending on the judgment of the court and any order given thereafter.”
20. The court in the above cited case also made reference to the case of *George Kagima Kariuki & 2 others -vs- George M. Gichimu & 2 others* (2014) eKLR where Justice Mohammed stated that: -
- “the law does not set out any minimum 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.”



21. The Applicant submits that she has demonstrated her willingness to deposit the entire amount in a joint interest earning account. She therefore submits that she is compliant with all the requisite components to move the court to grant her the order of stay of execution pending filing of her reference.
22. On the 2<sup>nd</sup> issue, the Applicant submits that this court has the powers to enlarge time for a party to file a reference out of time under the provisions of paragraph 11(4) of the Advocates Remuneration Order, 2009. She submits that she has met the threshold to warrant this court to enlarge time to file a reference.
23. Finally, the Applicant beseeches the court to exercise its discretion and consider her application in the interest of justice as enjoined under article 159(b)(d) of the Constitution of Kenya.

#### **B. Submissions by the Advocate/Respondent.**

24. On his part, the Advocate/Respondent too identified the 2 issues for determination, namely: -
  - a. Whether the court should enlarge time for the Respondent to file a reference out of time; &
  - b. Whether the Applicant should be granted an order of stay of execution pending determination of the reference.
25. On the first issue, the Respondent submits that the power of the court to enlarge time is discretionary and like any other exercise of judicial discretion must be exercised judiciously and based on sound principles and grounds.
26. The Respondent cites the Supreme Court Case of County Executive of Kisumu -vs- County Government of Kisumu & others (2017) eKLR where, the Supreme Court laid down the principles of enlargement of time as follows: -

“The underlying principles that a court should consider in exercise of such discretion, are;

  - i. Extension of time is not a right of the 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 by 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 an 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.”
27. The Respondent submits that the Applicant has not advanced any justifiable reasons for the inordinate delay in filing the reference, in this case. He reiterates the averments in his replying affidavit to the effect that the applicant is not entitled to the orders sought. The delay is inordinate and has not been satisfactorily explained.



28. The Respondent submits that even the averment by the Applicant that mistake of Counsel should not be visited upon the Applicant cannot stand. He cites the case of *Tana & Athi Rivers Development Authority –vs- Jeremiah Kimigbo Mwakio & 3 others* (2015) eKLR where the Court of Appeal held that courts will readily excuse a mistake of counsel only if it affords a justiciable, expeditious and holistic disposal of a matter.
29. The Respondent further relied on the case of *Water Partners International –vs- Benjamin Koyoo t/a Group of Women in Agriculture Kochieng (Gwako) Ministries* (2014) eKLR, where the court cited with approval the case of *Omwoye –vs- African Highlands & Produce Co. Ltd* (2002) eKLR where Ringera J (as he then was) held that: -
- “Time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavor. The Plaintiff should not be made to shoulder the consequences of negligence of the Defendant’s advocates. This is a proper case where the Defendant’s remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment.”
30. The Respondent submits that the alleged mistake of the advocate is not a justifiable excuse. Finally, the Respondent submits that article 159(2)(d) of *the Constitution* is not a panacea for all situations, relying on the case of *FGC –vs- PGN* (2021) eKLR which quoted with approval, the pronouncement in the case of *Ludwick Musindu –vs- Nancy Nduta* (2021) eKLR.
31. On the 2<sup>nd</sup> issue, the Respondent submits that the Applicant has not demonstrated the substantial loss she will suffer if the order of stay is not granted. The Respondent urges the court to take stock of the conduct of the Applicant and find that she is undeserving of the orders sought.

### Issues for Determination

32. Having carefully scrutinized the application herein, the response by the Advocate and the submissions by the parties, the court is of the opinion that the issues for determination in this matter are: -
- a. Whether the application has been brought under the right provisions of the law.
  - b. Whether there has been inordinate delay on the part of the Applicant in bringing the application before the court.
  - c. Whether the Applicant has sufficiently explained the delay to entitle her to an order of enlargement of time to file a reference out of time.
  - d. Whether the applicant has an arguable reference.
  - e. Subject to the finding in © and (d) above, whether judgment in this matter should be stayed pending the hearing of the intended reference.

### Analysis and Determination

A. Whether the application has been brought under the right provisions of the Law

33. The application herein has been brought under the provisions of articles 50 and 159 of *the Constitution*, Part 11(4) of the Advocates Remuneration Order, 2009, Sections 3, 3A of the *Civil Procedure Act* and Order 40 and 51 of the Civil Procedure Rules.



34. The legal framework on extension of time in matters of advocate-clients bills of costs is clearly stipulated under Part 1 paragraph 11 of the Advocates Remuneration Order which provides:
- (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 subparagraph (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.”
34. That is the only legal provision that the Client/Applicant herein needed to have based her application on without invoking the provisions of the *Civil Procedure Act* and the Rules. In the case of *Hezekiel Oira t/a Oira Advocate -vs- Kenya Broadcasting Corporation* (2015) eKLR, the court stated as follows: -
- “...the applicant cannot invoke the *Civil Procedure Act* and Rules made thereunder to circumvent the procedure provided under the *Advocates Act* and the Advocates Remuneration Order in regard to review of a decision of the taxing officer in an advocate/Client bill of costs where the taxing officer exercises the special jurisdiction conferred upon him or her under the Advocates Remuneration Order and NOT in his capacity as the Deputy Registrar of this court.”
35. Similarly, the Court of Appeal in *Machira & Company Advocate vs Arthur K. Magugu* (2012) eKLR in this regard stated that:
- “Appeals require the typing of proceedings compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those of Section 80 of the *Civil Procedure Act*, of discovery of new and important matters, errors on the face of the record and so on. In our view, the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with the decisions on advocates bill of costs through references under Rule 11 to a judge in chambers.”
36. The Court further held that:
- “The appellate jurisdiction of any court is a creature of the statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to the advocates bills of costs, we agree with the decision of Ringera J (as he then



was) in *Machira vs Magugu* that the Advocates Remuneration Order is a complete code which does not provide for appeals from the taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used....”

37. The court in *Carolyn K. Mumbo & Co. Advocates -vs- Mulu Mbuvi* [2019] eKLR, stated that;

“Guided by the above, this Court is therefore inclined to reach a finding that indeed there is a specific procedure under the Advocates Remuneration Order, which provides for the specific mechanism in the form of a reference to this Court for purposes of review and or challenging of the taxing master decision, therefore in my view paragraph 11 of the Advocates Remuneration Order cannot be short circuited by filing for review under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules as undertaken by the Respondent herein.”

38. It would have been sufficient therefore for the Applicant to have based her application only on the provisions of the Advocates Remuneration Order, 2009. The Advocates Remuneration Order is a complete code on matters of Advocate-Client bill of costs. It is not fatal for the Applicant to cite other provisions of the law like the *Civil Procedure Act* and Rules; however, they add no value to the application.

B. Whether there has been inordinate delay on the part of the Applicant in bringing the application before the court

39. Justice F. Gikonyo in the case of *Mwangi S. Kimenyi -vs- Attorney General and another* [2014] eKLR correctly observed that what constitutes ‘inordinate delay’ is dependent on the particular circumstances of each case. He stated that:

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however advised (sic) for the courts not to take the word “inordinate” in its ordinary dictionary meaning but to apply it in the sense of excessive as compared to normality.....see case of *Allen -vs- Alfred McAlphine & Sons* [1968] 1 All ER 543 where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of *Agip (Kenya) Limited -vs- Highlands Tyres Limited* [2001] KLR 630 and *Sagoo -vs- Bahari* [1990] KLR 456 where delays of eight months and five months respectively was not considered to be inordinate and also ELC Case No. 2058 of 2007 where delay of about 1½ years was considered not to be inordinate.”



40. I agree, the learned judge was spot on. It all depends on the circumstances of each case. In this particular case, the Advocate-Client bill of costs was taxed on 29<sup>th</sup> April 2021. This application was brought on 8<sup>th</sup> March 2022, 11 months thereafter. This by all standards, is inordinate delay.

C. Whether the Applicant has sufficiently explained the delay to entitle her to an order of enlargement of time to file the intended reference out of time

41. In the case of *County Executive of Kisumu vs County Government of Kisumu & 8 others* [2017] eKLR the Supreme Court defined the principles that a Court should consider in exercising its discretion to extend time as follows:

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;”

42. The earlier case of *Mugo and others v Wanjiru and another* [1970] EA 484 had also discussed the considerations to be made in extension of time where President Duff stated that:

“Each application must be decided in the particular circumstances of each case but as a general rule, the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal of granting the application.”

43. The Court of Appeal of Tanzania on the other hand had considered what would constitute ‘sufficient cause’ when it rendered its decision in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam -vs- The Chairman Bunju Village Government & Others*:

“It is difficult to attempt to define the meaning of words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice when no negligence or inaction or want of bona fides is imputed to the appellant.”

44. In this case, the Applicant merely blamed her former Advocate for allegedly opting to file a fresh suit altogether rather than pursuing the filing of a reference. That in my view and considering the circumstances of this case is not a reasonable explanation. I strongly associate with the holding in the case of *Habo Agencies limited -vs- Wilfred Odhiambo Musingo* (2015) eKLR to the effect that;

“It is not enough for a party in litigation to simply blame the Advocate(s) on record for all manner of transgressions in the conduct of the litigation. Courts have always



emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

#### **D. Whether the Applicant has an arguable reference**

45. The second aspect that the court needs to consider in addition to the explanation for inordinate delay is whether the Applicant has an arguable reference.
46. The basis of the application by the Client/Applicant herein is that ‘the taxing officer failed to take into consideration moneys initially paid to the Advocate by the Client and tax it off the bill of costs.’
47. A challenge to the decision of the Taxing Master properly takes the form of a reference under paragraph 11 of the Advocates Remuneration Order. In making such reference, a party is required to show that his/her case meets the well settled principles to justify the court’s interference with the discretion by the Taxing Master. The principles were stated in the case of *First American Bank of Kenya -vs- Shah and Others* [2002] E.A.L.R 64 at 69 in which Ringera J (as he then was) observed as follows:

“This 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 so manifestly excessive as to justify an inference that it was based on an error of principle... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...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...”

48. In the case of *NW Amolo & Another -vs- Samson Keengu Nyamweya* [2019] eKLR, Justice L. Njuguna faced with a similar case stated that;

“On the issue concerning the reconciliation of the accounts, it is noted that the application before me is limited to the entry of judgment pursuant to the certificate of taxation. In that case, I am of the view that this is not the proper forum for me to consider the payments made by the respondent, if any. The respondent is at liberty to move the court appropriately should he wish to address this issue.”

49. In the case of *Nyangito and Co. Advocates -vs- Doinyo Lessos Creamaries Ltd* (2014) eKLR, Justice Odunga restated the principles to be considered in making a determination on a reference to set aside the decision of the taxing officer in the following terms: -
  - a. 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 inference that it was based on an error of principle.
  - b. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration order itself, some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interests of the parties, the general conduct of the proceedings and any direction by the trial Judge.



- c. 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 and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high.
  - d. It is within the discretion of the taxing officer to increase or reduce the instruction fees and amount of the increase or reduction is discretionary.
  - e. The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it.
  - f. The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees.
50. The Court of Appeal in *Kamunyori & Co. Advocates vs Development Bank of Kenya Ltd* (2015) eKLR affirmed the position that only an “error of principle” can justify the court’s interference with the decision of the taxing officer.
51. The Court of Appeal elaborated on the meaning of an error of principle as follows: -
- “ Failure to ascertain the correct subject matter in a suit is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instruction fees is arrived at on the wrong principle, it will be set aside.”
52. The Client/Applicant’s application is solely premised on the alleged failure by the taxing officer to take into account the monies supposedly paid to the Advocate prior to the taxation. In her replying affidavit sworn on 5<sup>th</sup> March 2021, in response to the Advocate’s bill of costs, the Client urged the taxing officer to deduct the sum of Kshs. 409,000/- from the bill of costs.
53. In her ruling, the taxing officer who is the Deputy Registrar of this court actually took into consideration the sum of Kshs. 130,000/- being the amount that the Client was able to prove by way of a receipt hence the sum of Kshs. 300,208/-, after the deduction.
54. From the foregoing, the court finds that the Client/Applicant has not established that she has an arguable reference. She has not demonstrated on the face of it that there is an error of principle to justify the filing of a reference against the decision of the taxing officer in this matter. An arguable reference would be one that discloses an error of principle (on the face of it) in the decision of the taxing officer intended to be challenged by way of a reference.
- E. Whether judgement in this matter should be stayed pending the hearing of the reference
55. This last issue was dependent on the outcomes of the other issues raised above. The totality of the court’s finding is that the Applicant’s application herein must fail. Hence there will be no justification whatsoever for a stay of the judgement in this matter.
56. The upshot is that the Client’s chamber summons application dated 8<sup>th</sup> March 2022 is hereby dismissed with costs to the Advocate/Respondent.



57. Accordingly, the court orders that the decretal amount deposited in an interest earning account as per the directions of this court be released to the Advocate forthwith.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JULY 2022**

**M.D MWANGI**

**JUDGE**

In the Virtual Presence of:-

Mr. Kefa h/b for Mr. Nyaribo for the Client/Applicant

Mr. Wafula for the Advocate/Respondent

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**

