



Jelani (Suing on Their Own Behalf and on Behalf of All other Affected Members in the Area - PAPS) & 5 others v Attorney General & 4 others (Constitutional Petition 10 of 2014) [2025] KEELC 2875 (KLR) (12 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2875 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CONSTITUTIONAL PETITION 10 OF 2014

EK MAKORI, J

MARCH 12, 2025

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 27, 28, 30, 31, 32, 35, 40, 47, 60 AND 62 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF BILL OF RIGHTS UNDER CHAPTER FOUR OF THE CONSTITUTION OF KENYA 2010, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948) AND AFRICAN CHARTER OF HUMAN RIGHTS

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOM OF INDIVIDUAL (SUPERVISORY JURISDICTION) PRACTICE AND PROCEDURE RULES 2006 AND PART 5 RULE 19 OF SIX SCHEDULE OF THE CONSTITUTION OF KENYA

2010

BETWEEN

OMAR ABDALLA JELANI (SUING ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER AFFECTED MEMBERS IN THE AREA (PAPS) 1ST PETITIONER

KASSIM SHAHALI ALI 2ND PETITIONER

SHUMI BAMKUU 3RD PETITIONER

KHAIRU OMAR 4TH PETITIONER

SWALEH MOHAMED ATIK 5TH PETITIONER

MOHAMED RAJAB 6TH PETITIONER

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT



MINISTRY OF LANDS AND HOUSING AND URBAN DEVELOPMENT	2ND RESPONDENT
KENYA PORTS AUTHORITY	3RD RESPONDENT
LAPSET CORRIDOR DEV. AUTHORITY	4TH RESPONDENT
NATIONAL LAND COMMISSION	5TH RESPONDENT

RULING

1. The petitioners/ applicants brought forth an application dated 22nd August, 2024 for enlargement of time for filing a reference at the ELC in respect to a taxation ruling on the following grounds:
 - a. It is imperative that these weighty matters and matters articulated in the Affidavit, Applicant’s application annexed hereto, be brought before the presence of the duty/ vacation judge.
 - b. The entire decision of the taxing master is fit for the learned judge’s exercise of the statutory powers to review and set it aside as prayed in the chamber summons application dated 12th August 2024.
 - c. This application for an extension of time for filing the reference at the ELC is in the interest of justice and without unreasonable delay, as the impugned ruling was made barely three months ago.
 - d. If this application is not certified urgent, heard, and leave granted forthwith, the reference to the ELC in respect to taxation shall be rendered nugatory, and the applicant shall suffer irreparable loss because the doors of justice will be forever closed to the petitioners/applicants. Therefore, it is in the interest of justice that the application be allowed as prayed.
2. The respondents oppose the motion by filing grounds of opposition dated 13th November 2024.
3. The application was canvassed by way of written submissions.
4. I frame the single dominant issue for the court’s determination as to whether to enlarge the time to file a reference to this court.
5. Mr. Mogaka Cyrus Nyandegge, for the applicant, avers that he was instructed by the firm of George Wakahiu & Njenga Advocates to represent the firm and take the ruling in the taxation cause that was coming up on 6th May 2023. While the verdict was being delivered, he was taken ill and admitted to St John Havillah Medical Clinic, where he remained until 21st August 2024 (annexure CM 1 & 2).
6. By the time he was discharged, the 14-day window to file a reference to this court had lapsed.
7. He quickly filed this application to allow time to file the reference. Among the issues to be reviewed will be the value of the subject matter, which he believes should have been 1,311,586,674.55/—for reckoning instruction fees.
8. The taxing master failed to apply that figure and awarded instruction fees at Kshs. 200,000/—, according to counsel, is inordinately low and does not accord with judicial precedents – he cited - in this realm regarding the award of instruction fees.
9. Ms. Lutta, appearing for the respondents, states that the issue before this court is whether the applicant should be allowed to file a notice of reference out of time. She submitted that there was an inordinate



delay, 109 days to be precise, which rendered the entire application fatally defective and procedurally flawed as the Ruling was made on 6th May 2024 while this application was made on 22nd August 2024. While this court under Paragraph 11(3) has the discretionary power to grant extension of time, it should be confined to the rules of reason and justice.

10. She cited the case of Njoroge v Kimani (Civil Application Nai. E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) which quotes The Supreme Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR. This case sets out the considerations to guide the court in exercising its discretion in cases of this nature, which are directly relevant to the current case:
 - 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 an 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;
 - 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."
11. Ms. Lutta further relied on Gori, Ombongi & Co Advocates v Mary Wangechi Kamara [2022]eKLR, which quotes the case of Aviation & Allied Workers Union (K) v KQ &3 others [2015] eKLR where the Court of Appeal made it clear that extension of time is not a right; that there must be prove why a party seeks such extension; that there should be no extension where the respondent will be adversely affected; and that the application must have been brought timeously.
12. Ms. Lutta opines that considering the above, this application is fatally flawed and the reasons for the delay are unsatisfactory.
13. Ms. Lutta raised one significant point: Paragraph 11(1) of the Advocates Remuneration Order states that an objector to a Taxation order should give notice in writing to the taxing officer within 14 days. The taxing master, as per the Advocates Remuneration Order, is the officer responsible for assessing and determining the costs and fees payable to advocates. Under Paragraph 11(2) of the Advocates Remuneration Order, it is a requirement that after a taxing master has received an objection from any party, he/she is mandated to respond to the objector and thereafter the objector may file a reference before a judge.
14. She contends that the applicant seeks to camouflage this application as a Reference contrary to Paragraph 11 of the Advocates Remuneration Order. Reliance is placed in the case of John Muturi



Mbijiwe t/a Bealine Kenya Auctioneers *v* [ABSA Bank Kenya PLC \(Miscellaneous Application E066 of 2022\)](#) [2023] KEHC 17408 (KLR) (Commercial and Tax) (15 May 2023), the court stated:

“There is no draft reference filed herein to be deemed to have been properly filed within time. Further, by asking this court to vary and/or set aside the ruling delivered by the taxing officer on August 11, 2022, the Applicant is going to the merits of the application trying to convert the Chamber Summons into a reference which cannot be done.”

15. The main reason proposed why the reference was not filed within time is because counsel who was instructed to take up the matter could not do so since he deposes that he was taken ill with acute pneumonia which resulted in hospitalization from 6th May 2024 to 21st of August 2024. The medical note from Havillah Medical Clinic, Kimunyu indicates:

“The above patient was treated in our facility on 6/05/2024 and was diagnosed with severe pneumonia. Therefore, he was admitted up to date. Today he was discharged with oral medication. Attached below is the treatment plan.”

16. The said Medical Report(sic), written as a prescription note, is meant for information only, and the treatment plan attached is not available. Counsel was not gracious enough to attach a discharge summary or a proper Medical Report from the facility to show that he was indeed admitted to such a facility. It is startling that counsel was admitted on 6th May 2024 when the ruling was to be delivered by the taxing master and discharged on 21st August 2024, a day before the current application was filed. Counsel was not candid to this court.

17. Arising from the foregoing, the reasons for the delay in filing the reference have not been explained to the satisfaction of this court. The test laid by the judicial authorities cited by Ms. Lutta for the respondents has not been surmounted. Counsel should have brought a proper Medical Report to support the sickness and/or hospital admission. As highlighted by the authorities, the burden was on the applicant to explain the reasons for the delay to the court's satisfaction. Given the doubt cast on the Medical Report(sic), this court is not satisfied with the reasons given.

18. I will also agree with Ms Lutta for the respondents that the chamber summons herein cannot be turned as a reference to challenge the taxing master's decision. I will not go to the merits of what grievance the reference could have brought. Still, a glance at the issue of the instruction fees shows that the taxing master reached her verdict based on the award disclosed by the consent of the parties, which formed the basis of the court's final decision.

19. The upshot is that the application dated 22nd August 2024 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 12TH DAY OF MARCH 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr.Otara, for the Applicant

Happy: Court Assistant

In the Absence of:

