



Waweru v Prof. Michael Wabwile t/a Wabwile & Co. Advocates (Environment and Land Miscellaneous Application E008 of 2023) [2024] KEELC 1747 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1747 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E008 OF 2023
LA OMOLLO & AA OMOLLO, JJ
APRIL 11, 2024**

BETWEEN

DOROTHY WANJIKU WAWERU APPLICANT

AND

**PROF. MICHAEL WABWILE T/A WABWILE & CO.
ADVOCATES RESPONDENT**

RULING

1. This ruling is in respect of the Applicant's Notice of Motion application dated 27th February, 2023. The said application is expressed to be brought under Article 159(2)(d) of the Constitution of Kenya, Sections 1A, 3B, 3A and 79G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules.
2. The application is filed under certificate of urgency and seeks the following orders;
 - a. Spent
 - b. That this Honorable court be pleased to grant the Applicant herein leave to lodge a reference out of the statutory time against ruling of honorable Deputy Registrar, R. Ombata, SRM delivered on 27th October, 2022 and the certificate of costs issued on 24th November 2022 Nakuru ELC Misc. App No. E018 of 2022; Wabwile & Co. Advocates versus Dorothy Wanjiku Waweru. (Sic)
 - c. That this Honorable court be pleased to stay, set aside, vary and/or review the taxing master's decision delivered on the 27th October, 2022 as well as the Certificate of Costs issued on 24th November 2022 which relates to an award of Kshs. 2,831,861.60.
 - d. Spent
 - e. Spent



- f. That costs of this application be provided.
3. The application is based on the grounds on its face and the supporting affidavit of Dorothy Wanjiku Waweru sworn on 27th February, 2023.

Factual Background.

4. The application under consideration first came up for hearing on 2nd March, 2023 and the court directed that it be served upon the Respondent.
5. The application was subsequently mentioned on 27th March, 2023 when leave was granted to the Applicant to file and serve a Supplementary Affidavit. The court also gave directions that the application be heard by way of written submissions.
6. The application was mentioned severally before it was reserved for ruling on 20th November, 2023.

Applicant's Contention

7. It is the Applicant's contention that Hon. R. Ombata delivered a ruling on a bill of costs on 27th October, 2022 in Nakuru ELC Misc. Appl. No. E018 of 2022 *Wabwile & Co. Advocates versus Dorothy Wanjiku Waweru.*
8. It is also the Applicant's contention that a certificate of costs was issued on 24th November, 2022 against her. She contends that she was not aware of the said proceedings as she was not served.
9. It is further the Applicant's contention that she only became aware of the said ruling upon being served with the application dated 29th November, 2021.
10. The Applicant contends that upon receiving the said ruling she was aggrieved because the bill as drawn and taxed was inordinately high and so she appointed her advocates on record to challenge the decision of the taxing officer.
11. The Applicant also contends that the matter where the Respondent represented her never proceeded for hearing save for various applications that were filed. At the time of instructing her advocates, the time to lodge a reference had lapsed necessitating the filing of the present application.
12. The Applicant further contends that the delay in filing the said reference was occasioned by circumstances beyond her as she was never served with any taxation or mention notice.
13. It is her contention that she was never served with any document as alleged by counsel for the Respondent in his supporting affidavit sworn on 29th November, 2022 and that no evidence of service was produced.
14. It is also her contention that the intended reference has high chances of success as the ruling was made without the Respondent disclosing to the taxing officer that the Applicant had entered into an agreement dated 5th May, 2018 on payment of instruction fees.
15. It is further her contention that Part B of Schedule VI of the Advocates Remuneration Order provides for a formula to be followed in awarding instruction fees in cases where the parties had previously agreed and therefore the fees under item No. 1 of the bill of costs would be the agreed fees, raised by 50%.
16. The Applicant contends that the Respondent failed to disclose to the taxing officer that a consent was recorded in Nakuru ELC No. 346 of 2016 on 24th March 2021 that the rental income from land



- parcel No. Nakuru/Municipality/ Block 2/242, which was the suit property was to be remitted to the counsels on record for payment of their legal fees amounting to Kshs. 700,000/=.
17. The Applicant also contends that the Respondent took over the conduct of the matter from another counsel after pleadings had been filed and the matter certified ready for hearing.
 18. The Applicant further contends that she had already paid the previous counsel on record instruction fees to prosecute the matter and that she was being subjected to pay instruction fees again which was not economically sustainable and went against the rules of natural justice.
 19. It is the Applicant's contention that the Respondent will not suffer any prejudice if the leave to extend time to file a reference was granted.
 20. The Applicant ends her deposition by stating that it is in the interest of justice and fairness that the application be granted as prayed.

Respondent's Response

21. In response to the application, the Respondent filed grounds of opposition and a Replying Affidavit sworn by Prof. Michael Wabwile both sated and sworn on dated 17th March, 2022.
22. The Grounds of Opposition are as follows;
 - a. That the application has been overtaken by events as the certificate of costs has already been adopted as judgement of the court thus the prayers sought untenable. (Sic)
 - b. That the court is functus officio having adopted the certificate of costs as judgement against the Applicant.
 - c. That the application is an afterthought.
 - d. That the Applicant is guilty of indolence and inordinate delay in bringing forth this application.
 - e. That the application is frivolous, vexatious and otherwise a clear abuse of the court process having been struck out by this court on 28th February, 2023.
23. The Respondent in his replying Affidavit deposes that he represented the Applicant in Nakuru ELC No. 346 of 2016. The dispute was between the Applicant and her husband over land parcel No's Nakuru Municipality Block 2/242 and Kiambogo/Kiambogo Block 2/5852 which HFCK Bank wanted to auction.
24. He further deposes that despite offering legal services to the Applicant, she was hesitant to pay his fees and she frustrated his efforts to recover the same by terminating his services before a consent to recover part of his fees was adopted as an order of the court.
25. It is his deposition that he instructed the firm of Raydon Mwangi & Co. Advocates to pursue his costs against the Applicant and they drafted a demand letter and a draft bill of costs which were served on the Applicant on 16th June, 2022.
26. It is also his deposition that upon lapse of the time stipulated in the demand letter, an Advocate Client Bill of Costs was filed vide Nakuru ELC Misc. Appl. No. E018 of 2022 and a Notice of Taxation served upon the Applicant on 16th June, 2022 which was slated for hearing on 28th July, 2022.
27. It is further his deposition that on 28th July, 2022 the taxing officer taxed the said bill of costs upon being satisfied that the Applicant had been properly served.



28. He deposes that a Certificate of Costs was issued on 24th November, 2022 and served on the Applicant on 29th November, 2022.
29. He also deposes that on 5th December, 2022, his advocates on record filed an application under certificate of urgency seeking that the Certificate of Costs be adopted as Judgement of the court.
30. He further deposes that the application was served upon the Applicant for inter partes hearing on 8th December, 2022 on which date the Applicant through her Advocates filed a Notice of Appointment of Advocates.
31. It is his deposition that the Applicant's counsel sought for several adjournments of the hearing of the said application but did not file any response. On 2nd March, 2023 the court delivered its ruling and adopted the certificate of costs as a Judgement and decree of the court.
32. It is also his deposition that once the certificate of costs was adopted as judgement of the court, this court became functus officio.
33. It is further his deposition that from the record, the Applicant was properly served with all the requisite documents and therefore her allegations that she was never served are untrue.
34. He deposes that the Applicant had a chance to address the issue of service before the Certificate of Costs was adopted but she chose not to respond to the application.
35. He also deposes that the Applicant ought to explain the three-month delay in bringing the present application from 8th December, 2022 when she instructed her current advocates.
36. He further deposes that the present application is a replica of the application dated 28th February, 2023 in Nakuru ELC Misc. E018 of 2022 which was struck out for being an afterthought.
37. He ends his deposition by stating that the Applicant's application is frivolous, vexatious and an abuse of the court process that is only aimed at prolonging litigation and delay the course of justice.

Issues for Determination

38. None of the parties filed submissions to the application.

Analysis and Determination

39. I have considered the application, the affidavit in support of the application, the grounds of opposition and the Replying affidavit.
40. In my view the following issues arise for determination;
 - a. Whether this court should enlarge time within which to file a reference against the ruling delivered on 27th October, 2022 in Nakuru ELC Misc. Application No. E018 of 2022; *Wabwile & Co. Advocates versus Dorothy Wanjiku Waweru.*
 - b. Whether this court should set aside the ruling delivered on 27th October, 2023 and certificate of costs issued on 24th November, 2022.
 - c. Who shall bear the costs of this application.



A. Whether this court should enlarge time within which to file a reference against the ruling delivered on 27th October, 2022 in Nakuru ELC Misc. Application No. E018 of 2022; Wabwile & Co. Advocates versus Dorothy Wanjiku Waweru.

41. Paragraph 11 of the Advocates Remuneration Order provides as follows;

- 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 which he objects.
- 2) The Taxing Officer shall forthwith record and forward to the objector the reasons or 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 expired.”

42. In *County Government of Tana River v Miller and Company Advocates* [2021] eKLR the court held as follows;

“It is noted that paragraph 11 (1) (2) of the *Advocates Remuneration Order* do not speak to the relevant factors that the Court should consider when exercising its discretion on whether or not an extension of time should be granted. Guidance must therefore be solved from case law in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR the Court of Appeal while referring to other authorities observed; -

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.

In *Henry Mukora Mwangi v Charles Gichina Mwangi* – Civil Application No. Nai 26 of 2004, this Court held; -

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi v Kenya Airways Ltd* [2003] KLR 486 in which this Court stated; - ‘Over the years, the Court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules.



For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* – Civil Application No Nai 255 of 1997(unreported), the Court expressed itself thus; -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reasons for delay; thirdly(possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

43. In the present matter, the Applicant is seeking leave to lodge a reference out of time against the taxing officer’s ruling delivered on 27th October, 2022.
44. The Applicant had fourteen days within which to file a reference and she ought to have filed it by 10th November, 2022.
45. In *County Government of Tana River v Miller and Company Advocates (Supra)* the court further held as follows;

“As stated in the above cases the length of the delay and reasons for non-compliance of the time lines are important factors to influence the exercise of discretion of the Court. In calculating the length of delay in making the application for an extension of time the period will start running from 14th day of April, 2021 when the bill of cost was taxed by the taxing master to the 7th day of May, 2021 which time the aggrieved Applicant lodged the chambers summons for extension of time. The delay in filing the application was on or about an overreach of 8 days. In seeking to balance the interest of the respective parties the failure to comply was not inordinate. In addition, the Applicant in his affidavit has explained the reasons which let time to lapse. That hurdle has therefore been satisfied as a sufficient cause for this Court to extend time in favour of the Applicant to file a Reference under paragraph 11 (1) (2) of the *Advocates Remuneration Order*.”

46. The Applicant filed the application under consideration on 1st March, 2023 which was one hundred and twenty-four days after the taxing officer delivered her ruling.
47. The Applicant alleges that she became aware of the delivery of the said ruling after she was served with the application dated 29th November, 2022.
48. The application dated 29th November, 2022 was filed in Nakuru ELC Misc. Application No. E018 of 2022 *Prof Michael Wabwile T/A Wabwile & Co. Advocates vs Dorothy Wanjiku Waweru*.
49. The Respondent has annexed the said application to his replying affidavit together with an affidavit of service sworn by Violet Makori.
50. The affidavit of service was sworn on 7th December, 2022 and Violet Makori deposed that she served the Applicant herein with the application dated 29th November, 2022 on 5th December, 2022.
51. It is therefore evident and as admitted by the Applicant, that she became aware of the taxing officer’s decision on 5th December, 2022. But then she only filed the application for extension of time eighty-five days after she became aware of the taxing officer’s decision.



52. As was held in *County Government of Tana River v Miller and Company Advocates (Supra)*, the length of the delay and the reasons for non-compliance of the time lines are important factors that influence the exercise of discretion of the court in extending time.
53. It is my view that in the present matter, the Applicant has not given any sufficient reasons for non-compliance with the timelines provided for under Paragraph 11(a) and (b) of the Advocates Remuneration Order.
54. No explanation has been given for the delay of eighty-five days from when the Applicant became aware of the taxing officer's decision to 1st March, 2023 when she filed the application under consideration.
55. Consequently, I decline to grant an extension of time to file a reference against the taxing officer's decision delivered on 27th October, 2022.

B. Whether this court should set aside the ruling delivered on 27th October, 2023 and certificate of costs issued on 24th November, 2022.

56. Given my finding on issue (a) above, It shall not be necessary to pronounce myself on this issue.

C. Who shall bear the costs of this application

57. It is now settled that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition

58. Consequently, the application dated 27th February, 2023 is hereby dismissed with costs to the Respondent.
59. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 11TH DAY OF APRIL, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Komoriot for the Applicant.

No appearance for the Respondent.

Court Assistant; Mr. Joseph Makori

