



Gathinji v James Aggrey Mwamu t/a Mwamu & Company Advocates (Miscellaneous Civil Application 18 of 2024) [2025] KEHC 3456 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION 18 OF 2024
AB MWAMUYE, J
MARCH 13, 2025**

BETWEEN

NDUNG’U GATHINJI APPLICANT

AND

**JAMES AGGREY MWAMU T/A MWAMU & COMPANY
ADVOCATES RESPONDENT**

(On the Chamber Summons Application dated 16th February, 2024)

RULING

1. The Applicant filed an application dated 16th February, 2024 seeking the following orders inter- alia:
 - a. That this Court be pleased to extend the time for filing the Taxation Reference application herein and the application herein be deemed as duly filed and served.
 - b. That pending hearing and determination of the Reference Application herein, this Honourable Court be pleased to stay any further proceedings and/or execution of the Certificate of Costs resulting from the taxation ruling delivered by this Honourable Court (Hon. Gloriah Nasimiyu Barasah) on 29th January 2024 with respect to the Respondent’s Bill of Costs dated 24th January, 2020.
 - c. That this Honourable Court be pleased to set aside, review, revise and/or vary in entirety the taxation decision made by the Deputy Registrar of this Honourable Court vide the Ruling delivered on 29th January 2024, being the award of Kes. 3,741, 129.92 to the Respondents as the total taxed costs with respect to the Respondents Bill of Costs dated 24th January 2020.
 - d. That this Honourable Court be pleased to order that the Respondent’s Bill of Costs dated 24th January 2024 be placed before a different taxing officer for fresh determination of the Applicant’s Preliminary Objection and taxation of the Bill of Costs.



2. The Application is premised on allegations that on 29th January 2024, the Deputy Registrar of this court (Hon. Gloriam Nasimiyu Barasah) delivered a ruling dated 29th January 2024 to the effect that the Respondents Bill of Costs dated 24th January 2020 was taxed at Kes. 3, 741, 129.92.
3. The Applicant claims that he was dissatisfied with the Deputy Registrar's decision to proceed to tax the Bill of Costs yet the Applicant had filed a Notice of Preliminary Objection dated 10th November 2023 challenging the Jurisdiction of the Court to tax the Bill of Costs that was statute barred.
4. The Applicant indicated that the Preliminary Objection was submitted upon and was pending determination when instead an unexpected ruling on taxation of costs was delivered.
5. The Applicant further claims that the Deputy Registrar proceeded to Tax the Bill of Costs before giving the parties an opportunity to make submissions on it in the presumption that the preliminary issue of jurisdiction would be determined first and parties given directions on filing submissions on the Bill of Costs.
6. He also avers that the Deputy Registrar erred in principle by taxing the instruction fees at Kes. 2,529, 500.00 by using the figure of Kes. 100 million as the subject matter yet there was no evidence on record that the Respondent acted for the Applicant in any matter where the subject matter was Kes. 100 million thus the Deputy Registrar erred in principle by failing to use the appropriate scale in the taxation of the Respondent's Bill of Costs dated 24th January 2024.
7. The Respondents opposed the application, arguing that the application is misconceived, bad in law and tainted with false statements and meant to deny the Respondent justice as the legal fees for representing the applicant in a case between himself and Kenya Anti-Corruption Commission.
8. They argued that the issue of limitation of time was never raised at the time the Applicant was seeking to strike out the pleadings on the ground that there was no retainer and also when filing their application to set aside the Bill of Costs.
9. The Respondent claims that the issue of retainer, the authenticity, the veracity and competence of the Bill was settled by Justice Ochieng thus the period of the retainer began to run from the time the judge found that there was a retainer.
10. The Respondent contends that the time for filing a Reference has lapsed and the Applicant has not given convincing reasons for his delay in filing a reference therefore this application was brought as an afterthought and in bid to delay the execution process.
11. The Respondent states that they will suffer prejudice if the vain allegations are allowed.
12. Parties filed written submissions to support their respective positions and relied on various authorities which I have read and considered in reaching my decision.
13. The Applicant in their submissions dated 28th March, 2024 reiterated payers and grounds and supporting affidavit sworn by the Applicant. Counsel submitted that under Paragraph 11 (4) of the Advocates Remuneration Order allows this Court power in its discretion to enlarge time for filing a reference application or for the taking of any step.
14. Reliance was placed on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR and that of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* (2018) eKLR on court's discretion to extend time once a reasonable reason for delay has been explained by a party.



15. Further reliance was placed on the following cases; *Mwangangi & Company Advocates v Machakos County* [2018] eKLR, *Patrick Maina Mwangi v Waweru Peter* [2015] eKLR and *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR to implore this Court to find that the delay in filing the Reference was neither inordinate nor unreasonable but the same was occasioned by circumstances beyond the control of the Applicant or their Advocates.
16. The Applicant further submitted that this Honourable Court can interfere with the discretion of the taxing officer in a taxation ruling where there is an error of principle and where the fee awarded was manifestly excessive or manifestly low to justify interference. They relied on the following cases; *Premchand Raichand Limited and Another v Quarry Services of East Africa Limited* [1972] E.A. 162, *Kenindia Assurance Co. Ltd v Otieno Ragot & Co. Advocates* [2017] eKLR, *P.M. Wamae & Company Advocates v Ntoitha M'mithiaru* [2016] eKLR among others.
17. The Applicant submitted that this Honourable Court should be guided by the decisions of the following cases in finding that the taxing officer had made an error in principle by taxing the impugned Bill of Costs therefore it should be placed before a different taxing officer. This was determined in the case of *High Flyer Services and Publishers Limited & Another v Mwangi & 4 others* [2023] KEHC 19410 (KLR) and the case of *Republic v Ministry of Agriculture & 2 others ex-parte Muchiri W'njuguna & 6 others* [2006] eKLR.
18. The Applicant urged this Court to allow the Bill of Costs be taxed afresh by a different taxing officer or in the alternative, this Honorable Court exercises its inherent jurisdiction and taxes the Bill.
19. On the part of the Respondent, it was submitted that this is the third Reference filed by the Applicant having participated in Miscellaneous No. 29 of 2020, *Mwamu & Company Advocates v Ndung'u Gitbinji* where the Applicant proceeded to appeal the decision to the Court of Appeal on 21st November 2022. The Applicant then filed Miscellaneous Application No. 59 of 2023, *Ndung'u Gitbinji vs Mwamu & Company Advocates* and have now filed the present application.
20. The Respondent indicated that the multiplicity of applications by the Applicant is an abuse of the court therefore the Applicant does not deserve any orders.
21. The Respondent further submitted that the delay is massive that has not been explained and placed reliance on the case of *Kenya Ports Authority vs Silas Obengele* Civil Application No. 297 of 2004 which states that the court should only interfere with the award of the Taxing Officer if it thinks the award was too high or so low as to amount to an injustice to one party or the other.
22. They stated that on 29th September 2023, Justice Roselyn Aburili gave orders that the taxation of the Bill of costs dated 28th March 2023 be set aside and vacated together with the Certificate of Costs and also that the Bill of Costs dated 24th January 2020 be remitted back to the Deputy Registrar, Hon. Gloria N. Barasah for taxation afresh. The orders were complied to by the Deputy Registrar. Reliance was placed on the case of *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited* [2017] eKLR.
23. On the issue of Retainer, the Respondent argues that the issue was settled by Justice Fred Ochieng in his Ruling dated 8th November 2022 where the court held that there was a retainer whose time began to run from the date of the ruling being, 8th November, 2022. The Respondent relied on the case of *Santowels Limited vs Stanbic Bank Kenya Limited* [2018] eKLR where the court discussed limitation period and when time begins to run. They also relied on the Indian case of *Shankar v Chandrakant* AIR 1995 SC 1211 and the Supreme Court decision in *Mawathe Julius Musili vs Irshadali Sumra & others* Petition No. 16 of 2018.



24. The Respondent further stated that no evidence has been presented on the termination of retainer of the parties and the same should be upheld. Reliance was placed on the case of *Wakini Kiarie and Company Advocates v Kenya Orient Insurance Co. Ltd* [2021] eKLR and the case of *Mercy Nduta Mwangi t/a Mwangi Kengara & Company Advocates v Invesco Assurance Company Limited* [2016] eKLR.
25. The Applicant filed further supplementary submissions dated 10th June 2024 in response to the Respondent's written submissions. They cited several cases including *Kapu (K) Limited & Others vs Prime Bank Limited & others* [2024] where the Court of Appeal allowed an application for extension of time to file a Notice of Appeal.
26. The Applicant relied on the case of *Kalpana Rawal & 2 others v Judicial Service Commission & 6 others* [2016] eKLR in making a case for upholding of the Preliminary Objection. They also relied on the Supreme Court case of *Independent Electoral and Boundaries Commission v Jane Chepkiner & 2 others* [2015] eKLR that extended the nature and scope of Preliminary Objections.
27. They further relied on the case of *Otieno Ragot & Co. Advocates vs Kenindia Assurance Co. Ltd* (2013) eKLR which quoted with approval the case of *Abincha & Company Advocates vs Trident Insurance Co. Ltd* (2013) eKLR where the court while discussing when limitation begins to run in respect of Advocate's fees, held that time begins running from the date of completion of the work or lawful cessation of the employment of the Advocate.
28. From the foregoing, the key issues for determination by this court are whether this honorable court should extend time for filing the Tax Reference application herein and whether this Honourable Court should set aside, review and/or vary in entirety the taxation decision made by the Deputy Registrar vide Ruling dated 29th January 2024.

Whether this Honourable Court should extend time for filing the Tax Reference application herein

29. The genesis of this matter is that the Applicant was represented by the Respondent in a criminal matter but did not settle the Advocate's fees thus the Advocate filed his advocate/ client Bill of Costs vide HC Misc. Application No. 29 of 2020.
30. The Client objected to the taxation of the Bill of costs dated 24th January 2020 on the grounds that there was no retainer.
31. Vide a Ruling delivered on 8th November 2022 by Justice F.A Ochieng, the court held that there was a retainer and proceeded to dismiss the Applicant's application dated 11th December 2020 with costs.
32. The Respondent then set down the said bill of costs dated 24th January 2020 for taxation and the same was fully taxed on 24th January 2023 and a ruling delivered on 28th March 2023 by the Deputy Registrar, Hon. Gloria Barasah.
33. It is on that Ruling that gave rise to the application dated 17th May 2023 where the Applicant sought orders for setting aside of the taxation and certificate of costs dated 5th April 2023.
34. Vide a ruling delivered by Justice Roslyn Aburili, the Taxation of the Advocate/ Client Bill of Costs dated 24th January 2020 and the Ruling of 28th March 2023 was set aside and vacated. The Certificate of Costs dated 5th April 2023 was equally vacated and set aside and the Bill of Costs dated 24th January 2020 was remitted back to the Deputy Registrar, Hon. Gloria N. Barasah for taxation afresh.
35. The Deputy Registrar complied with the orders of the Judge and taxed the Bill of Costs dated 24th January 2020 afresh and a Ruling was delivered on 29th January 2024. The Applicant was dissatisfied



with the decision and yet again filed the present application seeking to set aside the decision made by the Deputy Registrar seeking that the Bill of costs be placed before a different taxing officer.

36. The Applicant states that the typed ruling containing the reasons for taxation, though dated 29th January, 2024 was prepared by court and supplied to the Applicant on 7th February 2024 which was 9 days after the Ruling was delivered.
37. The Applicant contends that it is due to the shortened period that he was unable to comply with the required timelines.
38. Rule 11(1) of the *Advocates (Remuneration) Order* made under the *Advocates Act*; Cap 16 Laws of Kenya makes the following provision on timelines required to put in an objection:

“ 11.

- (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 tax 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.”

39. It is noted that paragraph 11(1) and (2) of the *Advocates Remuneration Order* do not speak to the relevant factors that the court should consider when exercising discretion on whether or not an extension of time should be granted.
40. The Court however enjoys discretionary powers under the *Civil Procedure Act* and Rules more specifically as stipulated in Section 1(A), 1(B), 3(A), and Section 79(G) on overriding objective, the inherent jurisdiction and on sufficient cause to exercise jurisdiction in matters of this nature for the interest of justice.
41. I am guided by the Supreme Court Case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR where the court held:

“ A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondents if the extension is granted and whether the application has been brought without undue delay.”

42. Similarly, the Court of Appeal in the case of *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR while making reference 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 the 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 Musila 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 the 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. As stated in the above cases, the length of delay and the reasons for non-compliance of the timelines are important factors to influence the exercise of discretion of the Court.
44. The delay in filing the Reference Application was an overreach of just 4 days thus 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 lapse.
45. The Respondent has also in no way shown this court of the prejudice they will suffer once this application is allowed. If we take the date when certified copies of the ruling were ready for collection as the last day of the excluded time, then the tax reference is deemed to be filed on time.
46. 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) and (2) of the [Advocates Remuneration Order](#).

Whether this Honourable Court should set aside, review and/or vary in entirety the taxation decision made by the Deputy Registrar vide Ruling dated 29th January 2024

47. It is trite law that the High Court should not upset a taxation by the taxing master merely because it would have awarded a higher or lower amount unless the taxing master’s decision was based on an error of principle.
48. In the case of [Republic vs Minister for Agriculture & 2 others ex parte Samuel Muchiri W’njugna & 6 others](#) (2006) eKLR Ojwang J (as he then was) expressed himself inter alia as follows:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not therefore, interfere with the award of a taxing officer, particularly he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other... 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 award was manifestly excessive as to justify an interference that it was based on an error of principles. Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to



the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge... 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...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in law, or a particularized justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time- consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated- apart of course, from the need to show if such works have not already been provided for under a different head of costs..."

49. On this issue, once a Judge comes to the conclusion that the taxing master has erred in principle, he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done.
50. In the case of *Steel Construction & Petroleum Engineering (E.A) Ltd vs Uganda Sugar Factory Ltd* (1970) EA 141 the court held:

“Counsel for the appellant submitted, relying on *D’Souza v Ferao* [1960] EA 602 and *Arthur v Nyeri Electricity Undertaking* [1961] EA 492 that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re- assessed on different principles, the proper course is to remit to the same or another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion.”
51. As a judicial officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must first determine whether he/ she has jurisdiction to tax a bill.
52. The Applicant challenged the jurisdiction of the Taxing Officer to proceed and tax the Bill of Costs since he had filed a Notice of Preliminary Objection challenging the taxation of the bill of costs on the basis that the court had no jurisdiction to determine the same as the Bill of costs was statute barred. He proceeded to state that the Taxing officer erred in proceeding to tax the Bill of Costs before dealing with the pertinent issue of whether the court had jurisdiction to proceed.
53. I agree with the Applicant that the preliminary issues such as jurisdiction ought to be determined first before the substantial hearing and determination of the matter. I must emphasize that the issue in question was perfectly within the jurisdiction of the taxing master because it was a jurisdictional issue.



54. It is trite law that jurisdiction is everything and without it the court should down its tools. In the case of *Owners of Motor Vessel 'Lilian S' v Caltex Oil Kenya Limited* [1989] KLR 1 Nyarangi J. (as he then was) held:
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matters then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
55. On a source of a court’s jurisdiction, the Supreme Court of Kenya in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* (2012) eKLR stated as follows: -
- “A Court’s Jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred upon it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”
56. The question as to whether or not a trial Court is seized of jurisdiction in a matter before it is usually taken up at the first instance as a Preliminary Objection although it can still be raised at any time when the suit is still alive.
57. The Deputy Registrar ought to have determined the issue of jurisdiction first the moment it was raised by the Applicant before proceeding to Tax the Bill of Costs. I find that the Deputy Registrar erred on principle and this court is therefore allowed to interfere with the ruling on the Bill of Costs dated 29th January 2024.
58. The taxing master is well placed to determine whether she had jurisdiction to proceed and tax the bill of costs or it was statute barred thus she had no jurisdiction to tax the same. Should it be found that she had jurisdiction then she shall proceed to tax the bill. On the other hand, if there is sufficient proof that indicates the application is statute barred then the taxing master would decline to tax the bill of costs and down her tools.
59. The upshot of this is that the matter was filed before a court whose jurisdiction was in question and which court ought to have determined the issue first before proceeding to any other issue. Having failed to do so, the determination of the Bill of Costs by the Deputy Registrar was a nullity ab initio. This court is therefore not expected to shut its eyes to the glaring irregularities pointed out above.
60. Considering the Reference Application herein and going by the above arguments and examining the disputes herein keenly, it is my view that the Bill of Costs ought to be set aside and/or vacated until



the determination of the Notice of Preliminary Objection application filed by the Applicant dated 10th November 2023.

61. The file is hereby sent back to the taxing master to determine the preliminary issue.
62. In the end I make the following orders: -
 - a. The Taxation of the Bill of costs dated 29th January 2024 is hereby set aside and vacated pending the determination of the Notice of Preliminary Objection dated 10th November 2023.
 - b. The Certificate of Costs is hereby vacated and set aside.
 - c. Upon determination of the Preliminary Objection dated 10th November 2023, the Deputy Registrar to give further directions as appropriate.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF MARCH 2025.

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Applicants – Mr. Bildad Khatete h/b Mr. Charles Kanjama SC

Counsel for the Respondent – Mr. Mwamu

Court Assistant – Ms. Neema

