**Gathuka Ngugi Advocates v Backlite Limited (Commercial Appeal E738 of 2023) [2025] KEHC 4415 (KLR) (Commercial and Tax) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4415 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**COMMERCIAL APPEAL E738 OF 2023**

**BM MUSYOKI, J**

**APRIL 8, 2025**

**BETWEEN**

**GATHUKA NGUGI ADVOCATES ..... APPLICANT**

**AND**

**BACKLITE LIMITED ..... RESPONDENT**

**RULING**

1. For purposes of record and clarity, I have noted that this matter has since inception been prosecuted alongside this court's miscellaneous application number E722 of 2023. The orders given in this ruling shall therefore apply in the said application with the necessary modifications.

2. This matter was an advocates/client bill of costs filed by the applicant, an advocate who represented the respondent in milimani chief magistrate's court commercial case number E5044 of 2020. The respondent raised a preliminary objection to the taxation on grounds that there was a retainer agreement between the parties and as such the court had no jurisdiction to tax the bill of costs pursuant to Section 45 of the *Advocates Act*. By a ruling delivered on 25th June 2024, the taxing officer Honourable Noelle Kyanya held that there was admission of the retainer agreement in the applicant's submissions dated 20-03-2024 and in that case she had not jurisdiction to tax the bill of costs and she proceeded to dismiss the bill of costs.

3. Following the aforesaid ruling, the applicant filed chamber summons dated 1st August 2024 to which this ruling relates. In the chamber summons the applicant prays for the following orders;

    1. The Honourable Court be pleased to enlarge the time within which the applicant can institute the proceedings herein.

2. The ruling of the taxing master delivered on 25th June 2023 in so far as the same relates to the reasoning and determination pertaining to the applicant/advocates bill of costs dated 16th August 2023 be set aside.

3. The Honourable Court be pleased to re-tax the advocate's bill of costs dated 16th August 2023.

4. In the alternative and without prejudice to the foregoing, this Honourable Court be pleased to refer the matter back for re-taxation of the advocates bill of costs dated 16th August 2023 with proper and appropriate direction thereon.

5. The costs of the application be awarded to the applicant.

4. The application is brought pursuant to paragraph 11(1), (2) and (4) of the *Advocates Remuneration Order*. the same has been supported by affidavit of George Gathuka sworn on 1st August 2024. Going by the nature of the application, the outcome of prayer 1 will determine whether the court will consider the other prayers. I will therefore deal with this prayer first.

5. It is trite that an application for enlargement of time is at the discretion of the court and is granted or denied depending on the circumstances of each case but the applicant must give reasons for failing to act in time. The parts where the applicant explains the reasons for failure to file reference in time are paragraphs 10, 11, 12 and 13 of the supporting affidavit. In these paragraphs, the applicant avers that the firm's litigation clerk obtained the ruling on 3rd of July 2024 and that the delay was compounded by sudden transition of its litigation counsel handling civil matters from engagement with the firm without comprehensive handover of litigation progress report which complicated prompt attendance to litigation matters.

6. The respondent has opposed the application through grounds of opposition dated 23rd October 2024. It urges that the applicant is guilty of laches for forty two days and does not deserve discretionary orders of the court as there are no sufficient reasons given for the delay.

7. The application was disposed of by way of written submissions which I have carefully read. In the applicant's submissions dated 26th November 2024, he has referred the court to ground 'F' of the application which states that the delay arose from staff changes within the law firm and delay in obtaining a copy of the ruling. He also submits that this court should consider and apply Article 159(2)(d) of the *Constitution* and serve justice without undue regard to procedural technicalities.

8. The respondent submits that the prayer for enlargement of time refers to proceedings and not a reference as required under paragraph 11(1) of the *Advocates Remuneration Order* and as such not grantable. It adds that the reasons given for the delay are not excusable and filing of the application is a clear afterthought.

9. I have considered the submissions and the authorities cited by the parties. I find the respondent's argument that prayer I is not grantable because it talks of proceedings rather than reference unmerited. It is clear that the application is asking the court to enlarge time within which the applicant may file a reference under paragraph 11 of the Advocates Remuneration Order. In any case, a reference is a form of proceedings the nature of which all the parties understand and appreciate. What I need to consider is whether the reasons given for the delay is excusable or justifies exercise of my discretion in favour of the applicant.

10. It is my position that a party who wishes to benefit from discretionary powers of the court must approach the court candidly and with full disclosure, sincerity, and genuineness. The applicant has stated that its litigation clerk obtained a copy of the ruling on 3rd July 2024. I do not see how this

may have caused the delay as it was only eight days after the ruling was delivered. Paragraph 11(1) of the *Advocates Remuneration Order* grants the aggrieved party fourteen days within which they should write to the taxing officer asking for reasons for his decision. This means that at the time the ruling was obtained, the applicant was still within time to commence reference proceedings.

11. The applicant has not explained why he did not take action after receiving the ruling on 3-07-2024. All that he needed to do was to either give notice of objection to the taxing officer then file an application within further fourteen days or if he considered the ruling containing sufficient reasons, draw the application within fourteen days of the date of the ruling. At the time the applicant received a copy of the ruling, he had further six days to act. Judging by the nature of the application, the six days were in my view sufficient to draw and file the application unless there were other intervening events which have not been explained. The delay in getting the ruling could not in the circumstances of this case be a sufficient reason for failing to file application for reference in time.

12. The other reason given by the applicant is that the advocate who was handling litigation matters left suddenly and without handing over. The applicant has neither disclosed the name of the said advocate neither the date which said advocate left the firm. The applicant should not expect the court to make assumptions or fill in gaps in his explanation. Change of guards or staff does not per se translate to delays in internal operations of a firm. The applicant should have given a detailed explanation why the timely action was affected by the change of staff. A casual mention of the transition as the reason gives this court an impression that the applicant is either not being candid or is not treating these proceedings with the seriousness they deserve. I am persuaded by the holding of Honourable Justice Patrick J.O. Otieno as cited by the respondent in *Monyo & 2 others v Ngige* (2023) KEHC 817 (KLR) thus;

> 'The principles for consideration in every application for enlargement of time are now well crystalised. crystalised that it is discretionary matter calling for the court's judicious mind based upon reasons and settled criteria. The applicant must demonstrate and account for the period of delay to the satisfaction of the court. Where no plausible reason is offered for the delay even if the delay is not inordinate the court would be hard pressed to find a judicious reason to extend time.'

13. The applicant has argued that the court should exercise its discretion and grant orders sought as required under Article 159(2)(d) of the *Constitution*. It has been held in various judicial pronouncements that this Article which is often cited by parties when they present cases which seek to remedy gaps in their matters is not a panacea for all manner of inactions by parties. The Court of Appeal in *Kakuta Maimai Hamisi v Peris Pesi Tobiko, Independent Electoral And Boundary Commission (IEBC) & Returning Officer Kajiado East Constituency* (2013) KECA 279 (KLR) held that;

> 'We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation.

14. A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu vs. Trusted Society Of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012 as follows;

> In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

> Having already found that jurisdiction stands on a higher, firmer and more peremptory position than procedural rules, we can only reiterate that it goes to the very heart of substantive validity of court processes and determinations and certainly does not run afoul the substance-procedure dichotomy of Article 159 of the *Constitution*.'

15. Statutory timelines are not matters of procedural technicalities but they go to the core of the jurisdiction of the court. Matters touching on jurisdiction of the court cannot be discussed as matters of procedural technicalities. They are substantive and must be approached as such as without jurisdiction the court cannot act on any matter. Where a party fails to take action or file documents within time prescribed by the law, it cannot turn to rely on Article 159(2)(d) of the *Constitution*. In *Kikenni Properties Limited v APA Insurance Limited & another* (2023) KEHC 22180 (KLR), it was held that;

> 'Article 159 2(d) mandates courts and tribunals to ensure that justice shall be administered without undue regard to procedural technicalities. Does this oust the rules of procedure? I am afraid, they do not. Without the rules of procedure, there will be chaos in the administration of justice. As was held in Nicholas Kiptoo Arap Korir (supra) as cited by the 2nd Respondent, Article 159 was never meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free for all in the administration of justice.'

16. Flowing from the above analysis, it is my finding that the applicant has not presented sufficient reasons for failing to challenge the decision of the taxing officer dated 25th June 2024 in time. The prayer for enlargement of time is declined. Since the court has declined to extend time, the other prayers must fall on the wayside. In the premises, the application dated 1st August 2024 is dismissed with no orders as to costs.

17. As indicated at the beginning of this ruling, the same orders shall apply in miscellaneous application number E722 of 2023.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of Miss Purity Ochiel holding brief for Mr. Gathuka for the applicant and Mr. Mbichire for the respondent.