



Joseph Kiarie and Co Advocates v Mwenda (Anti-corruption and Economic Crimes Miscellaneous E044 of 2024) [2025] KEHC 4091 (KLR) (Anti-Corruption and Economic Crimes) (2 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4091 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES MISCELLANEOUS E044 OF 2024
LM NJUGUNA, J
APRIL 2, 2025

BETWEEN

JOSEPH KIARIE AND CO ADVOCATES ADVOCATE

AND

ANN KANANU MWENDA RESPONDENT

RULING

1. The Applicant herein has moved the court vide a notice of motion dated the 12th day of February 2025 through which she has sought the following orders: -
 - i. The Honourable Court be pleased to extend the time allowed for the issuance of a Notice of Objection of taxation and lodging and service of the Reference.
 - ii. The Filed Notice of Objection of taxation and Reference be deemed to have been filed and served on time.
 - iii. Costs of the Application be provided for.
 - iv. Any other order as the Honourable Court may deem fit.
2. The application is expressed to be brought under Rule 11(1), (2) and (3) of the Advocate (Remuneration) Order, Section 3 and 3A of the *Civil Procedure Act*, Article 159 and 163 (4) of *the Constitution*. It is premised on the grounds on the face of it, and its supported by the affidavit of Consolata Gathira, sworn on even date.
3. The Applicant avers that the Taxing Officer delivered a ruling on the Bill of Costs dated the 28th day of August, 2024 and the application dated the 2nd October, 2024, on the 24th January 2025. That



- the ruling was communicated to the client and having been aggrieved by the same, she instructed her advocate to file a reference before the Honourable Court and on the 4th February 2025, the Notice of Objection and Reference were prepared and shared with the client for signing.
4. That unfortunately, the Counsel who was handling the matter was taken ill and was therefore unable to follow up on the signed copies and/or file the Reference until the 11th February 2025 when they resumed work. That the motion for the reference was commenced immediately upon resumption of work and that there has not been inordinate delay in making the Reference and issuing the correlated notice.
 5. The Applicant further avers that the delay is excusable and that if the time is extended, the Respondent will not suffer any prejudice or irreparable damage or injury.
 6. The application is opposed via a replying affidavit sworn by Diana Damaris Wacheke, an Advocate of the High Court of Kenya who states that she was in court with her colleague M/s Consolata Gathira, on the 24th January 2024 when the Advocate/Client bill of costs dated the 28th August, 2024 and the Respondents/Applicant's application dated 2nd October, 2024 came up for ruling.
 7. That after the ruling was delivered, M/s Consolata Gathira, the advocate for the Respondent requested the court to grant a thirty (30) days stay of execution which the court was inclined to do and therefore, they cannot revisit to seek extension on account that their client was aggrieved by the ruling, as having sought stay of execution from their client it renders the reference an afterthought and a means to defeat justice.
 8. The Applicant contended that the firm representing the respondent/Applicant herein has other able advocates apart from M/s Consolata Gathira, who could have undertaken her duties in her absence as her absence does not correlate to the firm shutting down its operations.
 9. That the Taxing Master in taxing the Bill of Costs, was guided by the applicable law and the facts, and therefore, the application is devoid of any merits, ill-intended, vexatious and should be dismissed.
 10. The court gave directions on filing of submissions and the parties complied with the directions.

Submissions By The Applicant

11. The Applicant identified one issue for determination which is:-

Whether the client/Applicant has met the threshold for grant of leave to file reference out of time. It was submitted that the illness of the Counsel is an unfortunate and unforeseen circumstance which should not be used to deny a litigant their light to be heard.
12. Further that, the delay in filing the reference is not inordinate as the reference was filed five (5) days out of time. On what amounts to inordinate delay, the Applicants cited the case of Utalii Transport company & 3 Others Vs NIC Bank Limited & Anor (2014) eKLR and that of Kanyi Vs Makau & 4 others (Misc Appl. E587 of 2024 (2024) KEHC 15942 (KLR) (Civ) (19 December 2024).
13. On his part, the Respondent isolated one issue for determination: whether the client/Applicant is entitled to the orders sought in the application dated 12th February 2025. He submitted that the delay in filing the reference is unwarranted and that the Applicant has not attached the Notice of Objection which ought to have been filed within 14 days from the date of the ruling.
14. That as such, the orders sought in the application are misguided and premature for the failure to file a notice of objection to the Taxing Master within the stipulated time. Reliance is placed on the case of Miller & Co. Advocates Vs China Roads & Bridge Corporation (Misc. application 168 of 2019) (2021)



KEHC 408 (KLR) (Commercial and Tax) (16 December 2021) which quoted the case of County Executive of Kisumu Vs County Government of Kisumu & 8 Others (2017) eKLR on the principles the court should consider in enlarging time.

15. The Respondent contended that the illness of Counsel, ought not to have halted the ordinary course of business, as the client/Applicant hired the law firm as a whole and not a specific counsel. That the bringing of this application portrays mala fides on the part of the Applicant as a way of avoiding the execution of the orders issued by the Taxing officer.
16. The court has considered the application, the replying affidavit and the submissions. The Applicant has sought for extension of time to file a Notice of Objection of taxation and a Reference, and that the Notice of Objection and Reference be deemed to have been filed and served on time.
17. Rule 11(1) and (2) of the Advocates Remuneration Order 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.”
18. In the case of Miller & Co. Advocates v China Roads & Bridge Corporation (supra), the court set out the guiding principles that the court should consider when dealing with an application to extend it 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 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 not granted.
19. In this case, the reason given for the delay is illness of the Counsel who was handling the matter. The Respondent has argued that the Respondent’s law firm has other able Advocates apart from M/s Consolota who could have undertaken her duties in her absence. In as much as that may be true, I find that the delay was explained and it was not unreasonable being for a period of only five (5) days.
20. In the case of Utalii Transport Company Limited & 3 others (supra) the court had this to say on what amounts to inordinate delay:-

“Whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to 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 on applying court's mind on the delay, caution is advised for courts not to take the word "inordinate" in its dictionary meaning, but in the sense of excessive as compared to normality."

21. Also in the case of *Kanyi v Makau & 4 others* (Misc. Application E587 of 2024 (Supra) the court stated thus: -

"Several courts have given several opinions on what amounts to 'inordinate' delay. Various factors play a major role before the court can decide the meaning of inordinate. In this case, the delay was for around 53 days and now this court must decide if this delay is "inordinate". The delay is pegged on a mistake by the Applicant's Advocate who was mistaken on the requirements before filing this appeal. To me this delay is not inordinate and it is unfortunate that the Applicant's Advocate did not follow the laid down procedures for filing appeal. Nevertheless, his client should not suffer for his mistakes".

22. In the end, this court finds that the delay has been explained and the same was not inordinate. Further, that the prejudice "if any" to the Respondent can be compensated with an award of costs.

23. The application is hereby allowed with the following orders: -

1. The Notice of Objection and the Reference are hereby deemed to have been filed upon the payment of the requisite filing fees.
2. The Respondent is awarded costs of Kshs.20,000 to be paid within fourteen days from the date of this ruling.
3. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 2ND DAY OF APRIL 2025.

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L.M. NJUGUNA

JUDGE

In the presence of

Miss Waceke holding brief Mr. Kiarie for the Advocate/Respondent

Miss Gathira holding brief for Dr. Kamotho for the Client/Applicant

Court assistant - Adan

