



Guchu & another v Andrew & Steve Advocates (Miscellaneous Criminal Application E331 of 2022) [2025] KEHC 12872 (KLR) (Crim) (10 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12872 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E331 OF 2022
AB MWAMUYE, J
SEPTEMBER 10, 2025**

BETWEEN

CATHERINE WAMBUI GUCHU 1ST APPLICANT

CECILIA BRIDGE NAFULA RAQUE 2ND APPLICANT

AND

ANDREW & STEVE ADVOCATES RESPONDENT

RULING

1. This ruling is on the Chamber Summons application dated 12th May 2025 seeking leave to file a reference out of time against the taxation of an Advocate–Client Bill of Costs. The Respondent had their Bill of Costs dated 9th December 2022 taxed on 25th July 2023 at KES 802,203 by the Taxing Officer.
2. Following that taxation, on 20th November 2023 the Respondent filed an application to enter judgment for the taxed costs with interest. In response, the Applicants (clients) attempted to challenge the taxation by filing a Reference dated 17th January 2024 under Rule 11 of the Advocates (Remuneration) Order. However, on 30th April 2025 this Court struck out the Reference on the ground that it had been filed out of time and without leave, in contravention of Rule 11. In its ruling of that date, the Court held:

“I am satisfied that the instant application is in violation of the provisions of Rule 11 of the Advocates Remuneration Order, as the same was filed out of time and without leave... the present application is therefore incurably defective, improper and... an abuse of the court’s process. This court is thus not in a position to address the outstanding issues...



Consequently, this court finds that the application dated 17th January 2024 lacks merit. The same is dismissed for failure to comply with Rule 11...”.

3. The Court further ordered the Applicants to pay KES 30,000/= to the Respondent as costs of that struck-out Reference.
4. Undeterred by the dismissal of the earlier Reference, the Applicants have now moved this Court via the present Chamber Summons. They principally pray for an order of leave to file a Reference out of time in respect of the taxing officer’s decision embodied in the Certificate of Taxation dated 2nd August 2023. They also seek consequential orders that the draft Reference attached to their application be deemed duly filed. (The application as drawn had additionally sought interim stay of execution of the Certificate of Taxation and stay of proceedings pending determination of this application, but those interim prayers were spent or addressed at an earlier stage and are not the subject of this ruling.)
5. The application is expressed to be brought under Rule 11(4) of the Advocates (Remuneration) Order, Article 159(2)(b) & (d) of *the Constitution*. Rule 11(4) vests this Court with discretion to enlarge the time fixed for lodging an objection or reference under Rule 11(1) and (2) of the Advocates Remuneration Order. The Applicants urge that the Court should exercise this discretion in their favor so that their Reference challenging the taxed costs may be heard on its merits. The Respondent opposes the application, contending that it is procedurally barred and lacking in merit.
6. I have carefully considered the application, the affidavits on record, the parties’ submissions, and the authorities cited. The issue for determination is whether the present application is barred by the doctrine of res judicata or the principle of functus officio, given the Court’s earlier ruling of 30th April 2025 striking out the prior Reference.

Res Judicata and Functus Officio

7. The first question is whether the doctrine of res judicata or the principle of functus officio precludes this Court from entertaining the present application. The Respondent contends that the Court’s ruling of 30th April 2025 dismissing the earlier Reference was a final determination on the matter, thereby barring any subsequent application related to the same subject. The Applicants, on the other hand, argue that their quest for leave to file a reference out of time was never adjudicated previously, and that the substantive issues remain untested on the merits.
8. Res judicata is codified in Section 7 of the *Civil Procedure Act*. It provides that no court shall try any issue or suit that has been directly and substantially in issue in a former suit between the same parties, where that issue was heard and finally decided by a court of competent jurisdiction. The underlying rationale is to bring litigation to an end and protect parties from being harassed by the same matter being litigated multiple times. However, for res judicata to apply, the prior decision must have been made on the merits of the dispute after an opportunity for the parties to be heard. The doctrine is not meant to obstruct genuine claims or applications that were not, in substance, resolved previously.
9. In the present case, the “former proceeding” in question was the Reference dated 17th January 2024 that the Applicants filed (without leave) to challenge the taxation. That Reference was not heard on its substantive merits; it was struck out at the threshold for failure to comply with procedural prerequisites under Rule 11. The Court, in its ruling of 30th April 2025, expressly stated that it could not address the merits of the reference because the application was incompetently before it. The dismissal was grounded on a procedural default for lack of the requisite notice and leave rather than an adjudication of the points of objection to the taxation. Indeed, the Court underscored that the lack of leave was “not a mere technicality” but a jurisdictional and procedural bar. Thus, while that ruling is certainly final



and binding in respect of the improperly filed Reference, it did not decide the substantive correctness of the taxed amount or the existence of a fee agreement. It follows that the substantive issues the Applicants wish to raise have never been judicially determined.

10. Furthermore, the present application invokes a distinct facet of this Court's jurisdiction namely, its discretionary authority to enlarge time pursuant to Rule 11(4) of the Advocates (Remuneration) Order. The specific relief currently sought, being leave to file a reference out of time, was neither pleaded nor determined in the earlier application. It is therefore evident that the prior dismissal did not address the merits of the reference itself, nor did it entail a consideration of whether an extension of time ought to be granted. Consequently, the issue presently before the Court is not identical to that previously adjudicated and does not fall within the doctrine of *res judicata*.
11. The Respondent argues that because costs were awarded, the dismissal should be treated as a decision on merits. It is true the Court awarded costs to the Advocate, which is customary even for a technical or procedural dismissal (costs generally follow the event). But awarding costs is not by itself proof that the substantive controversy was determined; it only signifies that the Respondent was the successful party in that application. In my view, labeling the prior dismissal as "on merits" is misconceived. The court did not engage with the merits of whether the taxation was correct or not it left those questions untouched. Therefore, I am persuaded that *res judicata* does not apply to bar the present application. The situation here fits the principle that "the doctrine of *res judicata* operates to prevent issues from being re-litigated once they have been determined on the merits". Since no merits were reached in the first reference, the door is not closed on a properly instituted challenge.
12. Turning to *functus officio*, this principle holds that once a court has finally pronounced judgment or a final decision on a matter, it has exhausted its jurisdiction on that matter and cannot revisit it except as provided by law. The Respondent's *functus officio* argument is essentially that this Court, having delivered a final ruling on the reference, cannot now entertain any further proceedings touching on the same subject. It is a weighty argument, but again it must be understood in context. The Court is not being asked to reconsider or alter its ruling of 30th April 2025; that ruling stands. This is a new application that addresses a procedural step that was previously omitted. The relief sought now (leave to extend time) is not something the Court granted or refused earlier it was never seized for consideration.
13. Granting this application would not amount to reversing or reviewing the earlier decision; it would rather pave the way for a fresh reference to be filed properly. It bears emphasis that *functus officio* is not an absolute bar to any subsequent proceedings between the same parties it applies to prevent a judge from revisiting the same decision. Here, the Court is not *functus officio* in respect of the power to extend time, because that power was not exercised or spent in the prior ruling.
14. In *Reef Building Systems Ltd v Nairobi City Council* [2011] eKLR, the Court of Appeal emphasized that the doctrine of *functus officio* ought not to be applied in a manner that occasions injustice or a failure of justice. The Court further affirmed that a trial court may retain residual jurisdiction to address matters that were not previously determined, provided that such intervention does not contradict an earlier express decision. In the present instance, the application for leave merely seeks to cure the procedural deficiency highlighted in the earlier ruling, and does not, in any way, negate or vary the substance of that decision. Accordingly, I find that this Court is not *functus officio* in so far as the Applicants now properly invoke its jurisdiction under Rule 11(4) of the Advocates (Remuneration) Order.
15. In the result, I find that neither the doctrine of *res judicata* nor the principle of *functus officio* precludes this Court from entertaining the present application on its merits. Accordingly, the Respondent's



objections founded on these grounds are not upheld. In reaching this conclusion, I am guided by the well-established judicial approach that procedural or technical lapses where they do not occasion prejudice, ought, where appropriate, to be addressed in the interest of substantive justice, rather than being invoked as rigid barriers to shut out a deserving party. This is not to suggest that the rules of procedure may be disregarded with impunity; far from it. Rather, it is to affirm that where the ends of justice would be better served by allowing a matter to be heard on its merits, and where no express provision of the law prohibits such course, the Court should incline toward that path. Having found that the application is properly before this Honourable Court, I now proceed to consider the substantive question whether sufficient cause has been shown to warrant the extension of time for filing the reference.

Leave to file Reference out of time

16. This Court is vested with discretionary power to enlarge the time for filing a reference under Rule 11(4) of the Advocates (Remuneration) Order. The Rule provides, in part, that: “The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or (2) for the taking of any step; such application for enlargement may be made notwithstanding that the time sought to be enlarged may have already expired.” The applicable threshold for the exercise of such discretion is the demonstration of “sufficient reason” or “sufficient cause.” Our superior courts have articulated clear guiding principles governing the exercise of this discretion, which the Court must consider in determining whether to grant the relief sought.
17. The Supreme Court in *Nicholas K. Salat v IEBC & 7 others* stated that extension of time is not a right of a litigant, but an equitable remedy available only to a deserving party at the court’s discretion. The court must consider the circumstances of each case, bearing in mind factors such as:
 - (i) the length of delay;
 - (ii) the reason for the delay, whether the delay is explained and if the explanation is plausible;
 - (iii) whether there is an arguable case on the merits of the intended action (in other words, if the applicant has a prima facie meritorious claim or defence);
 - (iv) the degree of prejudice that the respondent would suffer if the extension is granted vis-à-vis the prejudice to the applicant if denied; and
 - (v) any other relevant considerations such as the conduct of the parties and the need to facilitate orderly administration of justice. These factors are consistent with numerous Court of Appeal decisions which have emphasized that the discretion to extend time should be exercised judicially and not whimsically, with the overarching goal being to dispense substantive justice.
18. The impugned taxation was conducted on 25th July 2023. Pursuant to Rule 11 of the Advocates (Remuneration) Order, the Applicants, as clients, were required to issue a written notice of objection to the taxing officer within fourteen (14) days, and thereafter, upon receipt of the taxing officer’s reasons, to file a reference in the High Court within a further fourteen (14) days. These timelines were not complied with. Instead, the Applicants filed a Reference on 17th January 2024 approximately five (5) months after the date of taxation and well beyond the statutory deadlines. As previously noted, that Reference was rendered incompetent for failure to first obtain leave of the Court. The present application seeking enlargement of time was subsequently filed on 12th May 2025, nearly one year and nine months after the date of taxation, and approximately one year after the time within which an application for extension ought properly to have been brought. On its face, the delay is considerable. Even when the intervening period during which the defective Reference was pending (January 2024



to April 2025) is excluded, there remains a substantial lapse between the date of taxation and the filing of a proper application for extension of time.

19. However, the character of the delay warrants closer examination. A substantial portion of the elapsed time from early 2024 to April 2025 was spent actively litigating the Reference, albeit in a procedurally defective manner. During that period, the matter was before the Court; hearing dates were taken, submissions were filed, and parties engaged with the judicial process. It would therefore be inaccurate to assert that the Applicants were entirely indolent or indifferent to their rights. Rather, they were pursuing their remedy, albeit through irregular procedure. Following the Court's ruling of 30th April 2025 striking out the Reference for want of leave, the Applicants acted with reasonable promptitude by filing the present application on 12th May 2025 merely twelve (12) days later. There is no evidence of undue delay or lethargy after the procedural defect was formally identified. Consequently, the period that calls for scrutiny and explanation is the initial five-month delay from August 2023 to January 2024 before the initial (albeit incompetent) Reference was filed. The Court will therefore focus on the explanation provided in respect of that initial period of inaction.
20. The Applicants proffer a two-pronged explanation for the delay: first, alleged difficulties in obtaining the taxing officer's reasons for the ruling; and second, an internal mishap within their advocate's firm. With respect to the first limb, the Applicants contend that they did not receive the detailed reasons for the taxation in a timely manner, thereby hampering their ability to formulate and file the Reference.
21. It is indeed correct that Rule 11(1) and (2) of the Advocates (Remuneration) Order envisage a scenario in which a party may await the taxing officer's reasons before filing a reference. In practice, where a taxing officer delivers a ruling that is either summary in nature or omits express reasoning on particular items, parties are permitted to request such reasons, and time is deemed to begin running from the date they are provided. However, in the present case, it has been asserted and is not disputed that the ruling delivered by the taxing officer on 25th July 2023 was sufficiently detailed and comprehensive, such that the reasons for the taxation could reasonably have been discerned therefrom. As such, the justification based on delay in obtaining reasons appears, on the face of it, to be of limited weight of the omission or that they contributed to the delay.
22. In my view, to visit the full consequences of the advocate's lapse upon the client who was otherwise intent on prosecuting their claim would be unduly punitive. In the spirit of Article 50(1) of *the Constitution*, which guarantees the right to a fair hearing, and Article 159(2)(d), which enjoins courts to administer justice without undue regard to technicalities, I find that the explanation while imperfect is sufficient in the circumstances.
23. Another pertinent consideration in exercising discretion to extend time is whether the intended Reference raises bona fide issues for determination or whether it is plainly frivolous. The Court is not required to undertake a detailed merits analysis at this stage but must be satisfied that the Reference is not an exercise in futility.
24. Upon perusing the pleadings on record, including the draft Reference annexed to the application, it is evident that the Applicants raise several substantive objections to the taxation. These include the contention that the taxing officer erroneously applied Paragraph 49A of the Remuneration Order applicable to contentious matters to what was essentially non-contentious advisory work; that the instruction fee awarded was excessive and based on an incorrect assumption that the two Applicants were distinct clients; and that certain charges (including disbursements, perusals, and drafting fees) were wrongly allowed. Most significantly, the Applicants challenge the jurisdiction of the taxing officer, asserting that the parties had entered into a binding fee agreement, and that the Advocate had already been paid pursuant to that agreement. If proven, this argument would invoke Section 45(6) of the



Advocates Act, which provides that where an advocate and client have entered into a valid agreement on fees, the costs "shall not be subject to taxation".

25. The Applicants assert that the Advocate's remuneration was agreed upon and settled in advance, thereby ousting the jurisdiction of the taxing officer. The Respondent disputes the existence of any binding agreement. This gives rise to a genuine dispute of fact and law that can only be resolved through the Reference proceedings. At this juncture, the Court's role is to assess whether the issue raised is substantial or merely a pretext. I am satisfied that the jurisdictional objection is not fanciful. It constitutes a serious question deserving of adjudication and is therefore not frivolous or vexatious.
26. The Respondent, understandably, expresses frustration at the prolonged nature of these proceedings. It notes that over two years have elapsed since the services in question were rendered and payment remains outstanding. However, part of the delay is attributable to the Respondent itself, which elected to file a bill of costs notwithstanding the clients' assertion that the fee had been settled. That course of action inevitably invited a challenge and has contributed to the protraction of these proceedings. The Respondent's legitimate interest lies in achieving finality and recovering any amounts due. While the grant of this application will occasion some further delay, I do not consider it inordinate. The Reference may be expedited. Moreover, the Advocates Act safeguards the Advocate's interest through the accrual of interest at court rates on unpaid fees from the date of demand or taxation. Should the Advocate ultimately succeed, such interest will provide a measure of compensation for the delay suffered.
27. Conversely, denying the application would have far-reaching consequences for the Applicants. They would be compelled to satisfy a fee they believe rightly or wrongly was not due, and would have no forum to ventilate their grievances. That outcome would, in my view, constitute a disproportionate hardship, particularly where the Applicants appear to have been victims of counsel's inadvertence.
28. Given the foregoing, the balance of justice weighs in favour of extending time to allow the dispute to be determined on its merits. Procedural rules exist to serve the cause of justice not to subvert it. This is a case where the procedural lapse is curable without occasioning undue prejudice to the Respondent, whereas a refusal to cure it may result in significant injustice.
29. Finally, I acknowledge the Respondent's concern that allowing this application might erode the efficacy of Rule 11 and encourage laxity in compliance. That concern is valid. However, the discretion exercised herein is firmly grounded on the specific and exceptional facts of this case. Advocates and litigants are reminded that procedural rules remain binding and are not to be ignored with impunity. The indulgence extended to the Applicants herein is not a licence for procedural indiscipline. It is informed by the credible explanation given, the absence of bad faith, and the real risk of injustice if the extension is denied.
30. The Court also notes that the Applicants have already suffered a sanction in the form of adverse costs orders when the earlier Reference was struck out. That, in my view, is sufficient to mark the Court's disapproval of the initial procedural misstep. Going forward, it is expected that both the Applicants and their counsel shall comply strictly with all applicable timelines and directions to ensure the expeditious resolution of the Reference.

Conclusion and Disposition

31. Having found in favour of the Applicants on the principal issue, the Court now turns to the determination of the appropriate orders to be made. Accordingly, and in accordance with the reliefs sought in the Chamber Summons, the following orders are hereby issued
 - a. Leave to file the Reference out of time is hereby granted;



- b. The draft Reference attached to the Supporting Affidavit dated 17th November 2023 and re-dated 17th January 2024 challenging the Certificate of Taxation dated 2nd August 2023 is hereby deemed as duly filed and properly on record; and
- c. The costs of the present Chamber Summons application shall abide the outcome of the Reference.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 10TH DAY OF SEPTEMBER, 2025.

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BAHATI MWAMUYE

JUDGE

In the presence of; -

Ms Kabura h/b Mr. Kimathi as the Advocate/Applicant

Mr. Abuga for the Respondent/Client

Ms. Lwambia – Court assistant

