



**Malombo t/a OM Robinson & Company Advocates v Premier Flour Mills Limited  
(Miscellaneous Application E076 of 2023) [2024] KEHC 1079 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1079 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E076 OF 2023  
DKN MAGARE, J  
FEBRUARY 7, 2024**

**BETWEEN**

**ROBINSON ONYANGO MALOMBO T/A OM ROBINSON & COMPANY  
ADVOCATES ..... APPLICANT**

**AND**

**PREMIER FLOUR MILLS LIMITED ..... RESPONDENT**

**RULING**

1. This is a ruling in respect of the application dated 17/8/2023. The application seeks the following orders: -
  - a. That for reasons to be recorded this application be certified urgent, service thereof be dispensed with and the application be heard ex-parte in the first instance in respect of prayer 2 and 3 hereof.
  - b. That an urgent date be assigned for hearing of the application, in the interests of justice.
  - c. That there be a temporary stay of the hearing and determination of the Application dated 4<sup>th</sup> July, 2023 pending the hearing and determination of this application inter partes.
  - d. That this Honourable Court be pleased to grant leave to the Applicant to file and admit this reference for hearing against the bill of costs taxed on 25<sup>th</sup> May, 2023 out of time.
  - e. The Honourable court be pleased to set aside the Deputy Registrar's ruling delivered on 25/05/2023 as it relates to the reasoning and determination pertaining to item 1 of the Party and party Bill of costs dated 22/03/2023.
  - f. Costs of this application be provided for.



2. The application is supported by the affidavit of Eugene Xavier Wepoh and annexures. The orders sought are:-
  - a. Spent
  - b. Spent
  - c. Spent
  - d. This Honourable Court be pleased to grant leave to the Applicant to file and admit this reference for hearing against the bill of costs taxed on 25<sup>th</sup> May, 2023 out of time.
  - e. The Honourable Court be pleased to set aside the Deputy Registrar's ruling delivered on 25/05/2023 as it relates to the reasoning and determination pertaining to item 1 of the Party and Party Bill of Costs dated 22/03/2023.
  - f. Costs of this application be provided for.
3. The first three prayers are spent. The application is not the normal ones where the client is indolent. It is where there hire advocates, who don't turn up in court. After being served, they diligently instructed the firm of Kadima & Company Advocates to act for them. Instead of defending them. They state had they been heard they will have shown that the applicant took over the primary mater form W.M. Njagi and were only involved in an interlocutory application. They state there were charged and paid. They discovered what transpired form their advocates when they discovered that the matter was coming for ruling on 19/9/2023. They seek to be heard.
4. They filed submissions on the case of *Ahmed Nassir -vs- National Bank of Kenya Ltd.* (2006) EA. They state that Nasir have a good defence to the claim.
5. They state that rule 11(1) and (2) of the Advocates, they rely on the case of *Wilimna Nekesa & another -vs - Amos Omondi Mbala* (2021) eKLR where the Court stated:-
  - “(1) should and a party object to the decision of the Hon. Taxing Officer, he may within fourteen days after the decision give notice in writing to the Hon. Taxing Master of the items of taxation to which he objects.
  - (2) The Hon. Taxing Officer shall forthwith record and forward to the Objector the reason for his decision on those items and the Objector may within fourteen days from the receipt of the reasons to a Judge by Chamber Summons, which shall be served on all the parties concerned to setting out the grounds of his objection.”
6. It is their case that that failure to file an objection is not fatal to their case.
7. On whether time can be enacted, they state that the court has to exercise discretion judiciously. They rely on the case of Lucy Wanjiru Ikabutia:-

“The above provisions of the law is clear. This court has unfettered discretion to enlarge time for any party to do what is required under the provisions of paragraph 111 of the Advocates (Remuneration) Order. This discretion however has to be exercised judicially... I do not agree with the submission made by the respondent that the applicant had been indolent and therefore should not benefit from the exercise of this court's discretion in her favour.



Having evaluated the facts in contention in this application, it is clear that this court would exercise its discretion in favour of the applicant. The applicant should be given an opportunity to ventilate her case in the reference to be filed against taxation by the Deputy Registrar of this court of the respondent's bill of costs."

8. They are not opposed under any other ground.

### Analysis

9. It is apparent that the parties have a long history. At hand we have a certificate of costs taxed at Kshs. 14,586,718.33. The applicants appear to have held the short end of the stick. They instructed an advocate who did not turn up in court. The Respondent concedes that Mr. Wepoh attended court twice. It is not a sign of a client who is not keen on the case. They were let down by their advocate. Even if we hear to seek refuge in indemnity, it will create a moral hazard where the insuring public does not case other hand the respondent to the application stated. Mr. Wepoh advocate appeared in court on 17/8/2023 and 9/9/2023. They rely on the case of David Anunda: -

"We wish to rely on the case of *David Anunda v John Karu & 2 others* (2021) eKLR, the Court whilst dealing with a similar Application held as follows: - (See page 4 of the attached authority).

"26. However, in respect of the instant matter, the Plaintiff/ Applicant has not filed a Notice of Objection to taxation. In any event, the Plaintiff/Applicant has also not sought for extension of time within which to lodge and/ or file the Notice of objection to taxation.

27. I must say, that the Notice of Objection to taxation is envisaged under Rule 11 (1) and (2) of the *Advocates Remuneration Order*, which is the fulcrum upon which an intended reference is premised and/or predicated. Simply put, the Notice of Objection to taxation, is the foundation upon which the skyscraper, known as the reference stands.

28. Having not filed any Notice of Objection to taxation and there being no application for extension of time within which to file any, the application for extension of time herein, is premature, stillborn and nullity ab initio.

29. It is my further finding, that like in the Court of appeal where an aggrieved Appellant who is keen to file an Appeal in the Court of Appeal, must first file a notice of Appeal in line with Rule e75 of the Court of appeal Rules, before filing a record of appeal, the situation beforehand bears resemblance.

30. In the premises, where no Notice of objection to taxation has been filed and/or lodged the intended reference, for which enlargement of time has been sought, it would be an act in futility. One cannot put something on nothing and expect the something to hold sway. Certainly, the something will collapse."

10. They state that the application is fatally defective for not seeking to file notice of objection out of time.

11. They also rely on the cases of:-

"A the Supreme court of Kenya stated in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No. 16 of 2014 [2014] eKLR extension of time is not a right of



a party but an equitable remedy available to a deserving party at the discretion of the court, that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.”

12. Cited in the Court of Appeal in [Charles Karanja Kiiru v Charles Githinji Muigwaa](#) [ 2017] eKLR, the Court stated thus: -

“In that, he did not take into account the applicable principles of enlarging time. Specifically, he failed to appreciate that the respondent had not offered any explanation for the delay in filing the appeal. Making reference to *Hilda Kaari Mwendwa v Zakayo M. Magara & 2 Others* [2016] eKLR & *Kapaln & Stratton v L.Z. Engineering Construction Limited & 2 Others* [ 20000] eKLR he stressed that a reasonable or plausible explanation of the delay (if any) is what the court’s flow of discretionary favour.”

13. They urge the Court to allow the application. They lay blame on mistake of advocate. They state that an award of cost will be sufficient. They rely on the case of: -

“However, as the reason for failure to meet the strict timelines pivots around mistake of counsel, the nature of mistake and perhaps the general conduct of the client in keeping watch over his case needs to be interrogated. Regarding the former, this court in the case of *Itute Ingu & another vs Ismael Mwakavi Mwendwa* [ 1994] eKLR stated:

“What I understood the applicants to be telling me by citing this case I that the error by their advocate should not be a bar to my exercising my discretion in their favour. Since the amendment to this Court’s rule 4, the discretion of the court under that rule is wholly amendment to this Courts rule 4, the discretion of the court under hat rule is wholly.”

14. The Respondents on the whether the insurers are at loss. The insuring public will be the losers. I note that the potential loss is equal substantial. The next question is whether failure to file a Notice of objection to taxation is fatal? I will answer in the negative. The Applicant is seeking leave to file a reference out of time. He will know what entails a reference. Further what is contained in the notice of taxation is the reasons.

15. I have perused the file and note that reason are given in the body of the judgment. The necessity of notice of objection is obviously not tenable. I find part of the application tenable and allow it. In order to properly ground the matter, I cannot deal with the last matter as it is part of the reference.

16. I therefore make the following orders: -

- a. Leave is hereby granted to the client to file a reference from the decision of the Honourable Taxing Master given on 22/5/2023 out of time.
- b. A reference be filed in this matter within 14 days from the date hereof.
- c. Cost of Kshs. 30,000/= to the advocate payable within 30 days from the date hereof.
- d. Directions on 26/2/2024.



**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**

Echessa & Bwire Advocates, LLP Advocates for the Applicant

O.M. Robinson & Company Advocates for the Respondent

Court Assistant - Brian

