



**Ojienda v Nairobi City County (Miscellaneous Application 10 of 2019)
[2024] KEHC 724 (KLR) (Constitutional and Human Rights) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION 10 OF 2019
LN MUGAMBI, J
FEBRUARY 1, 2024**

BETWEEN

PROF TOM OJIENDA ADVOCATE

AND

NAIROBI CITY COUNTY CLIENT

RULING

Introduction

1. By a Notice of Motion application dated 9th May 2023, the applicant sought the following orders against the ruling of this Court (Mrima, J) dated 10th March 2023:
 - i. Spent.
 - ii. This Court be pleased to review and vary its Order No.(a) of its Ruling delivered on 10th March 2023 and enlarge time within which to file a reference by the client/applicant.
 - iii. In the alternative to Prayer 2 above the annexed draft Reference be deemed as duly filed upon payment of court fees.
 - iv. The Honourable Court grants stay of execution of Order no. (b) of its Ruling delivered on 10th March 2023 pending the hearing and determination of this application.
 - v. The Honourable Court grants stay of execution of Order No. (b) of its Ruling delivered on 10th March 2023 pending the hearing and determination of the intended Reference.
 - vi. Costs be in the cause.



Client/ Applicant's Case

2. The applicant through its Advocate David Mukii Mereka deposed that this Court allowed the client/ applicant's application dated 7th May 2021 that had sought enlargement of time to file its Reference in respect of the respondent's Advocate – Client Bill of Costs.
3. He deposed that prior to the Court's decision in that application, the parties had been directed that the Ruling would be delivered on 29th September 2022. However, when the parties attended Court on the material day, they were notified that the Ruling would be delivered on Notice.
4. He stated that the applicant did not receive the said Notice and only got to know about delivery of the ruling through correspondence from the respondent dated 10th March 2023 at 4:57 pm. The Court notice had been issued via email. He avers that attempts to obtain the Ruling through the Kenya Law Reports was futile. He thus requested for a copy of the Ruling from the respondent on 21st March 2023 which was also not availed.
5. That he only managed to get hold of the said Ruling from the Court on 27th April 2023. He stated that while the applicant had been granted enlargement of time to file the Reference within 21 days, that time had lapsed already. Attempts to seek the respondent's indulgence to file their Reference out of time was declined by a letter dated 2nd May 2023.
6. He deposes that the delay in filing the Reference was unintentional and arose due to his being unaware that the Court had allowed the application. He contends that the draft Reference attached to the application will be rendered nugatory if the orders sought herein are not granted. He emphasized the same position in the further affidavit dated 30th May 2023.

Respondent's Case

7. The respondent in reply to the application through Prof. Tom Ojienda SC, filed a replying affidavit dated 25th May 2023. He traced the genesis of this matter to the Advocate - Client Bill of Costs dated 14th February 2019 which was taxed at Ksh.3,809,469 in a Ruling by the Taxing Officer dated 28th August 2019.
8. He countered that the application is misconceived and untruthful hence should be dismissed with costs. He stated that the applicant got dissatisfied with the Taxing Officer's Ruling delivered on 28th August,2019 and filed an application dated 3rd October 2019 seeking enlargement of time under the provisions of Paragraph 11 of the Advocates Remuneration Order to file a Reference. This application was allowed by the Court in its Ruling dated 25th February 2021. However, despite extension of time being granted to the applicant, the applicant failed to file the Reference within the 14 days that had been extended to facilitate the filing of the said reference.
9. The applicant thus filed another application dated 7th May 2021 citing its inability to access Court virtually due to technological issues hence sought a further extension of time to file the Reference out of time. The application was subsequently allowed by the Court in its Ruling dated 9th March 2023. The Court's Ruling was delivered on Notice following an email communication dated 9th March 2023 at 1:21pm sent to the parties. He stresses that this email was also sent to the applicant vide the email address xxxxxxxxxxxx@gmail.com.
10. He asserts that the applicant's affidavit shows the applicant was aware of the delivery of the Ruling as early as 10th March 2023 yet only reached out to the respondent for a copy of the Ruling on 2nd May 2023. Further, the respondent contended that the petitioner did not adduce any evidence to the effect



that it requested the Court for a copy of the Ruling before the 27th April 2023 when it says it obtained it. Accordingly, the applicant has not demonstrated there has been inordinate delay.

Applicant's Submissions

11. The applicant through the firm of Mereka and Company Advocates filed written submissions dated 30th May 2023. Counsel reiterating the reasons for filing this matter urged the Court to exercise its discretion to allow the instant application. Reliance was placed on the case of *Republic vs Kenyatta University and another ex parte Wellington Kihanto Wamburu* (2018)eKLR where it was held that:

“ This Court has discretion to grant extension of time for filing a reference provided there are;
- (a) good and substantial reasons for the failure to file the reference within the prescribed period and (b) there are grounds in the application which prima facie show good cause why the applicant should be heard.”
12. Similar reliance was placed on the case of *Stanley Kaboro Mwangi and 2 others v Kanyamwi Trading Company Limited* (2015) eKLR.
13. Counsel further submitted that the applicant had complied with Order Number (b) of the Court's Ruling dated 10th March 2023. In closing, Counsel submitted that the applicant would suffer prejudice if the application is not allowed. He urged the Court therefore to strike a balance between the rights of the applicant and the respondent as observed in the case of *Muka Mukuu Farmers' Co-operative Society Ltd v B.M. Mungata and Company Advocates* (2021) eKLR.

Respondent's Submissions

14. The respondent filed written submissions dated 29th May 2023. He urged this Court not to allow extension of time to file the Reference out of time by submitting that the Court had already exercised its discretion to extend the time on two previous occasions. He relied on the Court of Appeal case of *Paul Wanjobi Mathenge V Duncan Gichane Mathenege* (2013) eKLR where the Court held:

“ 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 prejudice to the respondent and interested parties if the application is granted and whether the matter raises issues of public importance.”
15. Counsel also cited the Supreme Court case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* (2014) eKLR which underscored the principles to consider before extension of time and the case of *County Executive of Kisumu vs. County Government of Kisumu and 8 others* (2017) eKLR. Additional reliance was likewise placed on the case of *Republic v Kenyatta University and another Ex parte Wellington Kihato Wamburu* (2018)eKLR.
16. The Respondent submitted that the applicant had justified exercise of this Court's discretion in its favour. He further submitted that due to the applicant's applications, the respondent had not been able to enjoy the fruits of its labour for the legal services rendered to the applicant. Counsel thus urged the Court to examine the conduct of the applicant asserting that allowing the application would enable the continued inaction which is an injustice to the respondent.



Analysis and Determination

17. The only issue for determination is whether this Court should extend the time for filing of the applicant's reference having regard to the circumstances of this case
18. The legal foundation of making such an application of this nature is provided for under Rule 11 of the [Advocates \(Remuneration\) Order](#), 1962 which grants the Court discretion to extend time for filing of a reference. Rule 11 states:

Objection to decision on taxation and appeal to Court of Appeal.

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.
 3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 5. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.
19. Extension of time is an exercise of judicial discretion and the principles that guide courts in considering such applications have developed through judicial precedents. In the [County Executive of Kisumu v County Government of Kisumu & 8 others](#) (*supra*), the Supreme Court held:
- (23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the [Nicholas Salat case](#) to which all the parties herein have relied upon. The Court delineated the following as:

the under-lying principles that a Court should consider in exercise of such discretion:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

20. In *Republic v Kenyatta University & another Ex parte Wsellington Kihato Wamburu* (supra), the Court stated:

- “ 16. Clearly, there is a limitation period with respect to the time when a reference should be filed. My understanding of the scheme of Rule 11 (1) of the Advocates Remuneration Order is that the expiration of the period of limitation prescribed above for filing a reference gives rise to a right in favour of the Certificate of Taxation to treat the same as binding between the parties. In other words, when the period of limitation prescribed has expired the holder of the Certificate of Costs obtains a benefit under the law to treat it as beyond challenge, and this legal right which accrues by lapse of time should not be lightly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to disregard the delay and admit the reference out of time. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice.
17. However, it is necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court. If sufficient cause is not proved nothing further has to be done; the application for excusing delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration.
18. Far away from home but in a jurisdiction like ours, a common law jurisdiction, there is a case authority that is instructive on what a court user should do where there has been a delay before such delay is condoned. Thus, in *Union of India vs. Tata Yodogawa Ltd*, the Court while granting some latitude in relation to condonation of delay, still held that there must be some way or attempt to explain the cause for such delay, and in absence of an explanation, the application for condonation of delay was therefore dismissed.”



21. Equally the Court in the case of *County Government of Tana River v Miller and Company Advocates* [2021] eKLR stated:

“The Court enjoys wide discretionary powers under the *Civil Procedure Act* and Rules more specifically as stipulated in section 1 (A), 1(B),3(A), section 79 (G) on overriding objective, the inherent jurisdiction and on account of sufficient cause to exercise jurisdiction in matters of this nature for the interest of justice. It is noted that paragraph 11 (1) (2) of the Advocates Remuneration Order do not speak to the relevant factors that the Court should consider when exercising its discretion on whether or not an extension of time should be granted. Guidance must therefore be solved from case law in *Paul Wanjohi Mathenge V Duncan Gichane Mathenge [2013]* eKLR the Court of Appeal while referring 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 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 Sila 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 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.”

As stated in the above cases the length of the delay and reasons for non-compliance of the time lines are important factors to influence the exercise of discretion of the Court...”

22. As can be discerned from the foregoing, the decision to extend time is involves exercise of judicial discretion based on the specific circumstances of each case and applicable legal principles.
23. Factors to consider include the duration of the delay, the reasons for such delay, the conduct of the any of the parties and the extent of prejudice to the respondent among others.
24. It is not disputed that this third time the client/applicant is seeking an extension of time to file this reference. Twice the client/applicant has succeeded in getting this court enlarge the time to enable the client/applicant file the said reference but has not. The first time was through an application dated 3rd October, 2019 which allowed the client/applicant more time by dint of the court ruling delivered on 25th February, 2021. Having failed to comply with the timelines given in that ruling, the client/



- applicant applied again through an application dated 7th May, 2021 which the court allowed pursuant to the ruling of 10th March, 2023 giving the client/applicant 21 days extension to file the said Reference.
25. The client/Applicant did not comply. The client/applicant gives the reason that it was not aware that its application for enlargement of time to file the reference had been allowed because it did not receive the correspondence from the Court notifying it about the delivery of the ruling and its counsel's efforts to get a copy of the same were futile until April 27. That by the time the applicant laid hands on the ruling, the extension that had been granted was no more.
26. The court has to interrogate the reasons for the delay provided by the client/applicant and consider their impact on this application. The assertion that the client/applicant did not have information about the delivery the ruling of 10/3/2023 flies in the face in view of what the client/ Applicant through counsel swore in paragraph 4 of the supporting affidavit. He deposes:
- “ That on 10th of March 2023, at 4:57 PM my firm was copied in a correspondence between the Respondent and the Court, where it noted the ruling on the matter had been delivered earlier that day following a court notice issued by way of email which was not sent to them, attached herein is a copy of the said email marked ‘DMM 1’.
27. Even if the Applicant did not get the initial Notice indicating that the court will deliver the ruling that day, it is apparent that later on the same day, an email notifying it the ruling had been read was copied to its Advocate by the Court. The client/applicant says that subsequent to that, it made efforts to acquire the ruling through Kenya Law Reports without success. It then wrote to the Respondent's on 21st March, 2023 but got nothing. That was eleven days later.
28. It is curious that despite acknowledging that that the correspondence in which the client/applicant was copied notifying it about delivery of the ruling came from the Court, the client/applicant did not seek to be furnished with a copy of that ruling by the Court at the earliest. No letter or email to the Deputy Registrar of the Court was exhibited seeking supply of the same. Although the client/applicant's claims that it tried to obtain the ruling through Kenya Law; there is no proof that has been tendered to show that those attempts were made.
29. My conclusion is that the conduct of the Applicant demonstrates complete lack commitment and vigilance despite the fact that this was a ruling in respect of its own application. It is trite law that equity aids the vigilant and not the indolent. The conduct of the applicant upon learning about a ruling concerning its application for extension of time is not inexcusable. The approach adopted by the client/applicant was half-hearted and lethargic.
30. The indolence on the part of the client/applicant has been the reason why the Advocate/Respondent has never enjoyed the fruits of his labour granted through a lawful order of this court on 11th September 2019, the day the certificate of costs was issued. Since then, it is approximately five years now. Twice the applicant has come to court and succeeded in getting extensions of time that it never complied with. This would be the third time the client/applicant will be getting a further extension of time on analogous grounds should this court grant this application. I have already demonstrated that in the ruling of 10th March, 2023; the applicant became aware that this particular ruling had been delivered on that day but never applied industry and commitment in following up on that decision yet it concerned his own application. Granting a further extension of time in the circumstances is to sanction lethargy to the detriment of the Respondent. In any case, there is no guarantee that going by past experiences the applicant will not let another opportunity slip away just as happened before.



31. The upshot of the foregoing is that I find no merit in this application which is I dismiss with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 1ST DAY OF FEBRUARY, 2024.

L N MUGAMBI

JUDGE

