



**Catholic Diocese of Ngong Registered Trustees v Kerubo Makori and Associates Advocates
(Miscellaneous Application E049 of 2023) [2024] KEHC 5254 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 5254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS APPLICATION E049 OF 2023**

SN MUTUKU, J

MARCH 12, 2024

**IN THE MATTER OF THE ADVOCATE -CLIENT BILL OF COSTS
IN THE MATTER OF REFERENCE FROM THE RULING OF THE TAXING
OFFICER OF THE HIGH COURT AT KAJIADO IN MISC. CIVIL NO E009 OF 2022**

BETWEEN

**THE CATHOLIC DIOCESE OF NGONG REGISTERED
TRUSTEES APPLICANT**

AND

KERUBO MAKORI AND ASSOCIATES ADVOCATES RESPONDENT

RULING

1. The Applicant brought this matter through Chamber Summons dated 28th April, 2023 under Rule 11(4) of the *Advocates (Remunerations) Order* 1962, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Rule 9A of the *Civil Procedure (Amendment Rules 2020) (Legal Notice 22)*, Article 159 of the *Constitution* and all enabling provisions of the Law for orders that:
 - a. Spent.
 - b. That leave be granted to the Applicant to file an Objection and a Reference out of time to this court against the ruling of the Honorable Taxing Officer delivered on 8th March, 2023.
 - c. That the leave granted in prayer 2 above do operate as stay of execution of the Ruling of the Taxing Officer aforesaid and any other consequential proceedings.
 - d. That the Objection to the Taxing Officer and the Application for the Reference annexed hereto be deemed as duly filed upon payment of requisite fees.
 - e. That the costs of this be in the cause.



2. The application is supported by the grounds on the face of it and in the Supporting Affidavit sworn by Patrick Nkaai dated 28th April, 2023. The Applicant is saying that by a ruling delivered on 8th March, 2023 in Misc. Civil Application No. E009 of 2022 the Taxing Officer taxed the advocates costs at KShs. 72,911.80/-. The Applicant is dissatisfied with the ruling and wishes to file a Reference for the reasons that the ruling was scheduled to be delivered on 27th February, 2023 but the same was delivered on 8th March, 2023 without any notice being served upon the Applicant's advocates; that the Taxing Officer did not have any jurisdiction to tax the Bill because the Applicant had a retainer agreement of KShs. 50,000 with the Respondent; that the Respondent will not suffer any prejudice if orders sought are granted; that the intended Objection and Reference are arguable and that if the orders sought are granted, the Respondent will not suffer irreparable harm.
3. The Application was opposed by the Respondent through a Replying Affidavit dated 26th June, 2023 in which it is deposed that the Chamber Summons and the supporting affidavit should be struck out for being bad in law and grossly incompetent for offending the mandatory provisions of the Societies Act and Societies Rules in that the deponent failed to provide signed and sealed documents to confirm his appointment to represent the Applicant and that the deponent did not provide authorization to represent the Catholic Church and is therefore a stranger to this suit.
4. The Respondent further, states that the application should be dismissed due to failure by the Applicant to provide certified copy of the ruling contrary to provisions of the Civil Procedure Rules and the Advocates Remuneration Order and that the Applicant failed to issue notice to the Taxing Master of the items of taxation being objected to as provided by law.
5. It is deposed that the Court's link was working on 27th February, 2023 contrary to the statement by the Applicant that it was not working; that the Reference has no chances of success; that contrary to the Applicant's statements, there was indeed an advocate-client relationship as shown in the letter of instruction which was filed in court as document No. 14 of the Advocates list of documents; that the said document was not objected to by the Applicant and that the intended Reference is an afterthought meant to deny the Respondent any chance of receiving legal fees.
6. The parties in this application did not file their submissions within the timelines allocated to them. On 15th November 2023 when this matter came up for mention to confirm filing of submissions, this court noted that none of the submissions were in the court file as at that date. The court fixed a Ruling date, lack of submissions notwithstanding. I have noted that as at the time of writing this Ruling, only the Respondent's submissions were in the court file, but they do not bear a court stamp and therefore this court is not able to ascertain if they are properly filed. Although Mr. Ombati, learned counsel for the Applicant told the court on 15th November 2023 that they had filed submissions, they were not in the court file as noted by the court.
7. I proceeded to write this ruling, submissions notwithstanding. In my view, there is no prejudice to either party if this court were to proceed and determine this matter without considering the parties' submissions. Submissions are not pleadings. The role of submissions is to display what that party understands his/her case and to persuade the court to rule in favour of that party.

Determination

- . My reading and understanding of the application, the grounds in support of the application and the affidavits shows that the issues arising from this application for determination are as follows:
 - i. Whether the Deponent had the capacity to swear the Supporting Affidavit on behalf of the Applicant.



- ii. Whether leave to extend time to file the refence and objection should be granted.
- iii. Whether such leave should operate as stay of execution.

Whether the Deponent has Capacity to Swear the Supporting Affidavit on Behalf of the Applicant

8. Section 24 of the [Societies Act](#) provides that:

Any person who—

- (a) acts or purports to act as an officer of a registered society, and who has not been duly appointed or elected as an officer of that society; or
- (b) having been appointed or elected as an officer of a society (otherwise than at the time of the formation of the society), acts as an officer of that society after the end of the period prescribed by section 17(1) of this [Act](#) for giving notice of his appointment or election to the Registrar, no such notice having been given within such period, shall be guilty of an offence and liable to a fine of five thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment

9. Who is an “officer of a registered society” in the context of this application? Section 2 of the [Societies Act](#) defines “officer” as follows:

“in relation to a society, means the president, vice-president, chairman, deputy chairman, secretary or treasurer thereof, or any member of the committee, council or governing body thereof, or any person who holds in the society any office or position analogous to the foregoing, but does not include a trustee, auditor or patron who takes no part in the management of the society”

10. It is clear to my understanding that “officer” in the context of this definition is one who is elected in the above positions. The deponent in this application, Patrick Nkaai, has described himself as the human resource Manager of the Applicant. In my considered view, this description fits the definition of “any person who holds in the society any office or position analogous to the foregoing”.

11. I have considered this issue against Order 19 Rule 7 of the [Civil Procedure Rules](#) which provides that:

The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.

12. In exercise of this court’s discretion and in view of the above provisions, I will and do hereby accept the Supporting Affidavit sworn by the Patrick Nkaai as properly before the court.

Whether Leave to Extend Time to File the Refence and Objection should be Granted.

13. Rule 11 of the [Advocates Remuneration Order](#) provides that:

- (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 subsection (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) 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.
14. This Court has discretionary powers under the [Civil Procedure Act](#) and the Rules, specifically in section 1 (A), 1(B), 3(A), and section 79 (G) and on account of sufficient cause to exercise jurisdiction in matters of this nature for the interest of justice. In [Paul Wanjobi Mathenge v. Duncan Gichane Mathenge](#) [2013] eKLR the Court of Appeal while referring to other authorities observed that:
- “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. As stated in the above authority the Length of the delay and reasons for non-compliance of the timelines are important factors to influence the exercise of discretion of the Court. In this matter, the ruling was delivered by the Taxing Master on 8th March, 2023. The 14 days therefore started running from this date. This Application was filed on 2nd May, 2023. This amounted to a delay of about 42 days.
16. The Applicant has explained under paragraph 10 of the Supporting Affidavit the reasons for the delay that the ruling was delivered in their absence and that the court link was not working. The Respondent in the Replying Affidavit has countered this explanation by stating that these excuses do not hold any water. They argued that the Applicant's excuses are not clear as on the one hand the Applicant is blaming the delay on the court link not working and on the other hand that the matter was mis-diarized. The Respondent in their affidavit stated that the court link on 27th February, 2023 was working and that the Taxing Master gave the ruling date for 8th March, 2023.
17. In determining the third issue herein, I have considered Order 42 Rule 6 of the [Civil Procedure Rules](#). The guiding principles for determining whether or not to stay execution are; -
- i. Where special circumstances of the case so require.
 - ii. There is proof of substantial loss that may otherwise result.
 - iii. There is substantial question of law to be adjudicated upon by the appellant court.
 - iv. Where if the stay is not granted, the appeal is successful, would be rendered nugatory.
18. In [RWW v EKW](#) [2019] , it was held that; -
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted



right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

19. The question is whether the subject matter of the Reference if successful will be rendered nugatory. It has also been stated that the applicant is likely to suffer substantial loss in the event the respondent is allowed to proceed with entry of judgment and subsequent execution.
20. I have noted the grounds of appeal in the draft reference attached. I note that it raises the issue of jurisdiction; the issue of whether there was an advocate/client relationship and whether there was a retainer agreement. These issues, in my view, are arguable and the Applicants should be given a chance to argue them on appeal.
21. It is my considered view that, in the interest of justice, this application should be and is hereby allowed. Costs shall be in the cause.
22. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 12TH MARCH 2024.

S. N. MUTUKU

JUDGE

