



**Kemboy Law Advocates v Narok County Government (Civil Miscellaneous Application E351 of 2023) [2024] KEHC 3683 (KLR) (Civ) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3683 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL MISCELLANEOUS APPLICATION E351 OF 2023**

**AN ONGERI, J**

**MARCH 8, 2024**

**BETWEEN**

**KEMBOY LAW ADVOCATES ..... APPLICANT**

**AND**

**NAROK COUNTY GOVERNMENT ..... RESPONDENT**

**RULING**

1. The application coming for consideration is the one dated 12/9/2023 brought under the *Judicature Act* Cap. 8 of the Laws of Kenya, the *High Court (Practice & Procedure Rules)* (Part 1 Rule 3) and any enabling provisions of the Law seeking the following orders;
  - i. That this application be certified as urgent and be heard ex-parte in the first instance.
  - ii. That this honourable court be pleased to issue a stay proceedings in execution of the taxation ruling issued on the 7<sup>th</sup> August, 2023 and all other consequential orders pending the hearing and determination of this application.
  - iii. That this honourable court be pleased to issue a stay proceedings in execution of the taxation ruling issued on the 7<sup>th</sup> August, 2023 and all other consequential orders pending the hearing and determination of the intended Reference.
  - iv. That this honorable court be pleased to enlarge time out of the stipulated fourteen (14) days for the applicant to file a reference (A draft reference is annexed herein) against the decision of the taxing officer delivered on the 7<sup>th</sup> august, 2023.
  - v. That the draft reference annexed herein and dated 11<sup>th</sup> September, 2023 be deemed by this honourable court as dully filed by the applicant upon payment of the requisite court fees.



- vi. That the costs of this application be in the cause.
2. The application is supported by the affidavit sworn on 12/9/2023 in which it is deposed that the Advocate/ Respondent filed a Bill of Cost dated 10<sup>th</sup> March, 2023 seeking a total of Ten Million, Six Hundred and Seventy Thousand, Six Hundred and Thirty and Fifty Cents (Kshs 10,670, 630. 50/= before the Taxing Master.
3. That his firm was instructed to act for the Client/Applicant and they came on record on 10<sup>th</sup> July, 2023 after the Ruling date was set for 10<sup>th</sup> August, 2023. The same was later rescheduled to an earlier date of 7<sup>th</sup> August, 2023.
4. That vide an Application dated 3<sup>rd</sup> August, 2023, the Advocate/ Applicant sought to have the Honourable Court vacate the Ruling date and grant the Applicant leave to file its Response out of time.
5. That on the date of delivery of the ruling, the Applicant brought to the courts attention the said Application which was pending before Honourable Justice A.N Ongeri. However the Magistrate proceeded to tax the Respondents Bill of Costs dated 10<sup>th</sup> March, 2023 regardless.
6. That on 8<sup>th</sup> August, 2023, Honourable Justice A.N Ongeri gave directions on the Applicant's application dated 3<sup>rd</sup> August, 2023, certifying it as urgent and scheduled the same for Inter-partes Hearing on 1<sup>st</sup> November, 2023.
7. That in the circumstances, the Deputy Registrar denied the Applicant herein an opportunity to present its case and be heard through the pending application. As such, the Applicant was greatly prejudiced as it was condemned unheard against the rules of natural justice.
8. That aggrieved with the said award, the Client/Applicant vide a Notice dated the 9<sup>th</sup> August, 2023 to the Deputy Registrar requesting for written reasons and Certified copy of the ruling that led to the award with the intention of filing a Reference before this Honourable Court.
9. That there was inordinate delay in getting the Certified Ruling and Reasons for Taxation as the Applicant was furnished with the same on the 29<sup>th</sup> August, 2023.
10. That pursuant to Rule 11 of the *Advocates Remuneration Order* the fourteen (14) days for filing a reference have since lapsed and the Client/ Applicant will be greatly prejudiced if the same is not extended as the Respondent is likely to execute anytime.
11. That if execution of the ruling is allowed to proceed then the Applicant stands to suffer since it will render the intended Reference nugatory.
12. That this application is made promptly and in good faith and the Applicant has advanced sufficient reasons and the adequate explanations rendered are excusable for this Honourable court to exercise its discretion to grant the orders sought herein.
13. That no prejudice will be suffered by the Respondent if the orders sought by the Applicant are granted.
14. That the award by the Taxing Officer is manifestly excessive and contrary to the spirit and principle of the *Advocates Remuneration Order* and that the Advocate/ Respondent will proceed with the execution unless the orders sought are granted.
15. The advocate filed a replying affidavit in which he stated that he had personal conduct of the dispute between Atlas Coptco Eastern Africa Limited and Narok County Government on behalf of the latter and therefore duly competent to swear this Affidavit.



16. That the facts deponed to herein are derived from his own knowledge acquired in the course of representing the Client/Respondent and in prosecuting his firm's Advocate Client Bill of Costs dated 10<sup>th</sup> March, 2023.
17. That for the reasons enumerated hereunder, the Client/Respondent's Application is not urgent! It is not only a premature Application in so far as it seeks stay of execution but is also a frivolous and vexatious Application brought with the sole intention of aiding the Client in filing a stale and incompetent Taxation Reference without just cause.
18. That the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [20141 eKLR set out the guiding principles for extension of time when an applicant seeks leave of Court:
- 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.
 

A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court.

Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis

Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

Whether there will be any prejudice suffered by the respondent of the extension is granted.

Whether the application has been brought without undue delay; and

Whether uncertain cases, like election petition, public interests should be a consideration for extending time,”
19. That in Civil Application NAI E049 of 2022 Njoroge v Kimani (Civil Application Nai E049 of 2022) [20221 KECA 1188 (KLR) (28 October 2022) (Ruling), the Court of Appeal interrogated what would amount to an excusable delay in the following terms:
- “ That the Client asks this Court to extend time for it to file its Reference against the Taxation Ruling issued on 7th August, 2023, The only reason put forth by the Client as to why it has been unable to file its Reference is that it allegedly received a certified copy of the Ruling and Written Reasons on 29th August, 2023 despite having made several requests and follow ups to obtain the same.”
20. That what is being sought in the instant Application is for the enlargement of time within which the Client can file its supposed Reference. To this end, paragraph 11 of the Advocates Remuneration Order, 2009 is instructive. The said Paragraph provides as follows:
- 21.
- “11. Objection to decision on taxation and appeal to Court of appeal.
22. That the provisions of Paragraph 11(1) of the Advocates Remuneration Order, 2009 provide that the fourteen (14) days period within which to file a Reference against a Taxation Ruling begin to run from the date of receipt of reasons from the Taxing Officer.



23. That I know for a fact that as at the time of filing of the instant Application, the Client's right to file its Reference has since lapsed and is Indeed lost, Thus, the Instant Application has been overtaken by events:
24. I have established that the Client/Respondent's Advocates were present on 7<sup>th</sup> August, 2023 when the Honourable Deputy Registrar delivered the Ruling and notified parties that the same would be uploaded on the CTS Platform thereafter.
25. While the Client alleges inordinate delay in obtaining a Certified Ruling and reasons for Taxation, I can confirm that a certified copy of the Ruling was readily accessible on the CTS Platform on 7<sup>th</sup> August, 2023, immediately following the Ruling's delivery.
26. That means that the deadline to file the said Reference fell on 21<sup>st</sup> August, 2023. However, the Reference was not filed on that day and the Client has not offered any reasons why it failed to file its said Reference on the said date, It is important to note that we subsequently utilized this same Ruling as was uploaded on the e-filing portal to lodge my firm's Reference on 21<sup>st</sup> August, 2023, well within the stipulated timelines.
27. Even then and without prejudice to the foregoing, if we were to take the Client's supposed reasons into context, it becomes clear that the same amount to nothing but blatant excuses. The Client in the instant Application has readily admitted to receiving a certified hard copy of the Taxation Ruling on 29<sup>th</sup> August, 2023. Going by this latter date, pursuant to Paragraph 11(1) of the [Advocates Remuneration Order](#), 2009, the Client would then have been required to file its Reference latest by 12<sup>th</sup> September, 2023.
28. However, as it is now clear, the Client failed to file its Reference even as of 12<sup>th</sup> September, 2023.
29. It then becomes clear that even after the Client obtained a hard certified copy of the said Taxation Ruling on 29<sup>th</sup> August, 2023, it never bothered to comply with the provisions of the Paragraph 11 (2) of the [Advocates Remuneration Order](#) by filing its said Reference within the stipulated fourteen (14) days it was required to do so after obtaining a certified copy of the same.
30. Therefore, the Respondent's reliance on purported delays in obtaining the Certified Ruling cannot serve as a valid excuse for their tardiness. In reality, this Application appears to be just another addition to a lengthy list of maneuvers aimed at pressuring the Court to accommodate their preferences rather than adhering to the clearly defined statutory timelines
31. No reason has been given by the Client as to why it is yet to file its said Reference. Indeed, nothing prevented the Client from filing its said Reference by 21<sup>st</sup> August, 2023 when it was supposed to do so in accordance with Paragraph 11 (2) of the [Advocates Remuneration Order](#) or on 12<sup>th</sup> September, 2023 after it obtained a hard copy certified copy of the said Taxation Ruling on 29<sup>th</sup> August, 2023.
32. It is important to note that any such reference filed by the Client after 21<sup>st</sup> August, 2023 is incompetent for having been filed out of time without just cause.
33. That therefore there is no reason demonstrated in the instant Application for which this Court can then reasonably enlarge time for the Client to file its alleged reference.
34. That it is not the first time that the Client has shown contempt in adhering to Statutory timeline or conducting itself with diligence in this matter. As the record will bear, the Client employed all manner of dubious schemes to evade its responsibility of settling legal fees for work done. It granted unto itself



- carte blanche to do as it deems fit and proper in line with its temporal interest to delay the taxation process.
35. That while the Client/Respondent alleges that the Deputy Registrar denied it an opportunity to present its case and be heard on the pending Application dated 3<sup>rd</sup> August, 2023, it is of significant importance that this Honorable Court acknowledges the Respondent's consistent pattern of delaying proceedings, which appears to be a calculated effort to avoid the payment of the legal fees owed, as outlined hereunder:
  36. On 19<sup>th</sup> June, 2023, the Respondent was properly served with the Bill of Costs and the Taxation Notice, scheduling the matter for Taxation on 27<sup>th</sup> June, 2023.
  37. During our Court Appearance on 27<sup>th</sup> June, 2023, the Respondent was noticeably absent from the proceedings. Despite our confirmation of serving the Bill of Costs and the Taxation Notice to the Respondent, supported by a filed affidavit of service, the Deputy Registrar directed us to re-serve the Respondent before proceeding with any directions.
  38. Subsequently, on 27<sup>th</sup> June, 2023, the Respondent was served once again with the Bill of Costs, and the matter was scheduled for Ruling on 7<sup>th</sup> August, 2023
  39. On 3<sup>rd</sup> August 2023, the Respondent served us with a Notice of Appointment, dated 10<sup>th</sup> July, 2023.
  40. Interestingly, despite having ample time since the initial service, the Respondent chose to file an Application under the Certificate of Urgency, seeking leave to file its Response to the Bill of Costs out of time, and concurrently requested the Court to vacate the Ruling date scheduled for 7<sup>th</sup> August, 2023.
  41. That Lord Templeman of the House of Lords was a relentless crusader against abuse of court process and he endlessly implored courts to be vigilant and jealous of their process. Expressing his displeasure, yet highlighting the strategy of lawyers and their clients as part of a deliberate strategy to abuse the Court process, he stated in *Asbmore v Corp of Lloyd's* [19921 All ER 486 at page 493 as follows:
  42. That Lord Templeman again in *Banque Financiere de la Cile SA v Westgate Insurance Co. Ltd* 119901 2 All ER 947, at 959 emphasized the trouble and cost to the victims of court process abuse:
  43. "Proceedings in which all or some of the litigants indulge in overelaboration cause difficulties to Judges at all levels in the achievement of a just result. Such proceedings obstruct the hearing of other litigation. A litigant faced with expense and delay on the part of his opponent which threatens to rival the excesses of Jarndyce v Jarndyce must perforce compromise or withdraw with a real grievance. In the present case the burdens placed on Steyn J and the Court of Appeal were very great. The problems were complex but the resolution of these problems was not assisted by the length of the hearing or the complexity of the oral evidence and oral argument. The costs must be formidable. I have no doubt that every effort was made in the courts below to alleviate the ordeal but the history of these proceedings is disquieting. The present practice is to allow every litigant unlimited time and unlimited scope so that the litigant and his advisers are able to conduct their case in all respects in the way which seems best to them. The results not infrequently are torrents of words, written and oral, which are oppressive and which the Judge must examine in an attempt to eliminate everything.
  44. That a judicial system or process that implicitly acquiesces to parties and their lawyers to play Russian roulette with the court process and shape it to their liking and whims apart from degrading the juridic quality of the justice process. unfairly disadvantages the innocent party that plays by the rules as written, It causes a reverse of roles whereby the party that plays contrary to the established rules assumes an authoritative role vis-a-vis both against the court itself and the opposing litigant and force the court



to follow the route it chaffs for it. It tilts the scale of justice in its favour and completely upends the norm based rules of engagement between litigants,

45. That playing against or in opposition to the rules of the Court is a form of abuse of the court process. It is so because a party makes a frontal assault to the normative and statutory regime that regulates dispute resolution and either defeats or degrades its value in the process. Lord Diplock highlights the evolving nature of abuse of court process and the need for courts to keep abreast with the same. Courts should never delimit and definitively determine what abuse of court process entails. Lord Diplock was emphatic in his pleas that courts have a duty to arrest and remedy whenever a party before it tries to abuse the process of the court. Such abuse takes the shine off the court's authority, challenges its powers and disadvantages the innocent party. It further dilutes the quality of justice the court dispenses, bring the entire court system into disrepute and ultimately makes the larger society lose faith in the justice system of their country. In *Hunter v Chief Constable of the West Midlands Police & others* [1981] 3 ALL ER 727, Lord Diplock heightened the danger of abuse of court process in the following speech at page 729:
46. That your Lordship, with the above in mind, it is a good course to take in these reply I make before this Court and see why the Client/Respondent (a) challenge the authority of this Court to force adherence to its process and proceedings as per the law established and (b) to contextually appreciate the Client/Respondent's temerity in advancing a frivolous application for extension for time yet fails to even surmount the minimum hurdle of advancing a plausible reason to excuse its delay of not complying on time.
47. Stay of Execution pending Taxation Reference
48. That the principles upon which this Court may stay the execution of a Taxation Ruling pending a Reference are well settled as they are crystalized under precedent:
49. That in *Dilbagh Singh Brothers(Investments) Limited v Alvi Auto Spares Limited* [2012] eKLR, Odunga Js in declining to issue stay of execution held:
50. That further in the case of *Labh Singh Harman Singh Ltd v Attorney General & 2 others* [2016] eKLR the Court held that the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010* should be satisfied by the party that wishes to challenge the Taxing Master's decision on taxation of a bill of costs. The Court held:
51. That under the head of substantial loss, the Client is obliged to state clearly what loss, if any, it stands to suffer. This principle was enunciated in the case of *Shell Limited v Kibiru and another* [1986] KLR 410. Platt JA set out two different circumstances when substantial loss could arise as follows:
52. That the only reasons proffered by the Client for the issuance of the order of Stay 01 — execution is that the taxed costs are colossal and if execution proceeds, it will suffer since its Reference will be rendered nugatory, That is not a justifiable reason why stay of execution ought to be granted:
53. I have already demonstrated that the Client by its own action or inaction lost its right to file a competent Reference. There is and will not be a competent Reference that will be rendered nugatory if the instant Application is not allowed.
54. The Client has made no attempt to show the nature of loss it stands to suffer if the application is not granted. Even if the Client had a competent Reference with high chances of success that does not necessarily amount to substantial loss since parties are only expected to file reference where the reference has chances of success.



55. The Client has not alleged that the amount involved is such that if it is made to pay it up, it will bring its operation to a standstill. Neither has it been contended that my firm is unlikely to "cough up" the said amount if the same is paid over.
56. As was held in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, does not in itself amount to substantial loss under Order 42 Rule 6 of the *Civil Procedure Rules, 2010*.
57. This is so because execution is a lawful process.
58. In the instant case, execution is not imminent! The Certificate of Taxed Costs is yet to be issued. Even after the same were to issue, my firm must apply for the same to be adopted as a Judgement and Decree of this Court as stipulated under section 51 (l) of the *Advocates Act* and Paragraph 7 of the *Advocates Remuneration Order, 2009*. After that, since the Client is a County Government, my firm will be obliged to comply with the provisions of section 21 of the *Government Proceedings Act*. If thereafter the Client refuses to settle the taxed costs, my firm will then be forced to commence Mandamus Proceedings to compel the accounting officer for the Client to pay the said sums. For this reason alone, this granting an order for stay of execution would be premature and this Court would be acting in vain, See *Labh Singh Harman Singh Ltd v Attorney General & 2 others* [2016] eKLR.
59. Nothing in the instant Application suggests even remotely that the Client is willing to offer security for the taxed costs as a condition precedent for the granting of the stay orders. As was held in *Gianfranco Manenthi & another v Africa Merchant*.
60. The parties filed written submissions as follows; the client/applicant submitted that ruling of the bill of costs was delivered on 7/8/2023 where the advocate/respondent was awarded Kshs 817,651. Being aggrieved by the said decision of the deputy registrar the applicant wrote to her on 9/8/2023 requesting for a certified copy of the ruling and reasons for taxation and the same was issued on 29/9/2023.
61. The client/applicant submitted that it is after receipt of the certified written reasons that the time for filing the reference started running and the same lapsed on 12/9/2023. The Client/Applicant filed the instant application in court on 14/9/2023 and thus delay in filing the Application was only one day. The applicant argued that the costs awarded were excessively high and the applicant was not granted an opportunity to defend the bill.
62. The advocate/respondent submitted that Paragraph 11 (1) of the *Advocates Remuneration Order, 2009* provides that the 14 days period within which to file a Reference against a Taxation Ruling begin to run from the date of receipt of reasons from the Taxing Officer. It is therefore undisputed that the time for filing a reference has since lapsed.
63. The advocate/respondent submitted that there is no reason demonstrated in the instant application for which the court can reasonably enlarge time for the client to file its alleged reference. The advocate/respondent argued that it is not the first time that the client has shown contempt in adhering to statutory timeline as the record shows that the client employed schemes to evade its responsibility of settling legal fees for work done.
64. On stay of execution pending taxation reference the advocate/respondent submitted that the client has not met the requirements for such orders because, by its own action or inaction lost its right to file a competent reference. It has further made no attempt to show the nature of loss it stands to suffer if the application is not granted. The advocate/respondent indicated that the client has not alleged that the



amount involved is such that if it is made to pay it will bring its operations to a standstill. That in the instant case, execution is not imminent as the certificate of taxed costs is yet to be issued.

65. The sole issue for determination in this application is whether the applicant should be granted enlargement of time to file a reference.

66. The procedure of filing a reference to oppose a taxed bill of costs is set out in Paragraph 11 (1) and (2) of the [Advocates Remuneration Order](#). It stipulates 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.”

67. 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.

68. Guidance must therefore be sought 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.”



69. On enlargement of time, the Supreme Court in the case of *County Executive of Kisumu v County Government of Kisumu and 8 others* [2017] eKLR held as follows;

“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;

- 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 for 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 granted;
- f. Whether the application has been brought without undue delay; and
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

70. The delay in filing the reference is not inordinate considering the reasons advanced by the applicant.

71. The delay has been explained satisfactorily and I allow the application dated 12/9/2023 and grant the applicant leave to file the reference out of time.

72. The reference filed herein dated 11/9/2023 be deemed as properly filed.

73. The order to abide in Misc. E352 of 2023.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8<sup>TH</sup> DAY OF MARCH, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent

