



**Ruto v Maru (Miscellaneous Civil Application E001 of 2023)
[2024] KEHC 2378 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
MISCELLANEOUS CIVIL APPLICATION E001 OF 2023
JRA WANANDA, J
MARCH 8, 2024**

BETWEEN

VINCENT KIBIWOTT RUTO APPLICANT

AND

DICKSON KIPLETING MARU RESPONDENT

RULING

1. By the Notice of Motion dated 14/7/2023 filed through Messrs Kimondo & Gachoka & Co. Advocates, the Applicant seeks the following orders:
 - a. Spent.
 - b. That the Court grants stay of execution of the Certificate of Costs delivered by the Honourable C.A. Kutwa (SPM) on 20/2/2023 pending the hearing and determination of this Application.
 - c. That this Honourable Court does grant the Applicant leave to file their Reference out of time.
 - d. That this Honourable Court be pleased to give any other and or further orders that it may deem fit, just and expedient in the circumstances and in the interest of justice.
 - e. That the costs of this Application be in the cause.
2. The Application is brought under the provisions of Sections 1, 1A, 3A of the *Civil Procedure Act*, Sections 4(1) and 22 of the *Limitation of Actions Act*, Section 11 of the *Advocates Act*, Schedule 6 of the *Advocates (Remuneration) Order* 2009 and 159 of *the Constitution* and “all other enabling provisions of the law”. The Application is based on the grounds set out on the face thereof and is supported by the Affidavit sworn by Victor Ng’ang’a, the Applicant’s Advocate.
3. In the Affidavit, the Advocate deponed that on 20/2/2023, the Respondent’s Bill of Costs was taxed at Kshs 283,520/- in Iten Senior Principal Magistrate’s Court Cause No. 10 of 2019, a figure that



is grossly exaggerated wherein the decretal sum was reduced from Kshs 800,000/- to Kshs 500,000/- upon appeal, that the Applicant is dissatisfied with the Court's Ruling and the period within which to prefer the grievance has lapsed hence the present Application seeking leave to appeal the Ruling out of time, that there is no stay of execution currently and the Applicant is exposed as the Respondent might execute based on the said Ruling, that unless the Court issues stay of execution, the Respondent shall execute thereby rendering this Application nugatory and the Applicant will have been condemned unheard, that that unless the Court grants stay of execution the Respondent shall unjustly enrich himself and that the Application herein has been made without unreasonable and or inordinate delay.

Replying Affidavit

4. The Application is opposed by the Respondent vide the Replying Affidavit sworn by Delmas Lugonzo Mwinamo, the Respondent's Counsel in this matter and filed on 14/12/2023 through Messrs Mwinamo Lugonzo & Co. Advocates. Counsel deponed that the Respondent served the Applicant with the Taxation Notice in respect to the Respondent's Party and Party Bill of Costs on 1/2/2023, that when the matter came up for assessment of the Bill before the trial Magistrate, the Applicant had an opportunity to object to any items that it wished to oppose but did not attend Court to oppose the same, that the Magistrate considered the Bill, had the same taxed as presented, that the Applicant had an opportunity to voice and object to any items in the Subordinate Court Civil but chose to ignore attendance in spite of the service. He deponed further that the Court is bereft of the jurisdiction to hear and determine the Application to file a Reference out of time as there is no provision for a Reference Assessment of the Party to Party costs in the Subordinate Court to the High Court as defined under the Advocates Act and the Remuneration Order, that the decision by the Magistrate on Taxation does not fall within the meaning of a decision by the Taxing Officer to warrant a Reference, and that there is no provision for a Reference following an Assessment in the Subordinate Court by the Magistrate and that there is a long and inordinate delay in filing the Application.
5. According to the Respondent, the Application is also premature and also offend the provisions of Rule 11 (1) of the Advocates Remuneration Orders as the Applicant has not sought for a typed copy of the Taxation Application, the Reference ought to be filed within 14 days upon receipt of the reasons for taxation, if any, and that the Application is premature having been lodged before the reasons being furnished as required under Rule 11(1) of the Advocates Remuneration Order. Further, according to Counsel, the Applicant is acting in bad faith and the Application is aimed at frustrating the Respondent from enjoying the fruits of his judgment. In conclusion, he deponed that the Applicant is in contempt of Court orders having failed to pay half the taxed costs in the Subordinate Court and it is therefore undeserving of the exercise of the Court's discretion.

Hearing of the Application & Submissions

6. The parties were then directed to file Submissions. While the Respondent filed his Submission on 14/3/2023, by the time of concluding this Ruling, and despite granting the Applicant, on 26/02/24, an extension of 3 days on to file such Submissions I had not come across the Applicant's Submissions.
7. Regarding the Respondent's Submissions, the same is basically a "word-for-word" recap of the same matters and arguments already set out in the Replying Affidavit. There would therefore be no benefit in reproducing the same herein since so doing would only amount to unnecessary repetition.

Determination

8. Upon carefully considering the record, including the Pleadings, Affidavits, Submissions and authorities presented, I find the issues that arise for determination to be as follows:



- i. Whether this Court has jurisdiction to interfere with the Assessment of Costs made by the Magistrate’s Court.
 - ii. Whether the Application is incompetent for failure by the Applicant to seek and obtain the Magistrate’s Court’s reasoning in assessing the costs.
 - iii. Whether this Court should enlarge time to enable the Applicant file a Reference against the assessment of costs by the Magistrates Court.
 - iv. Whether this Court should stay execution of the assessed costs.
9. I now proceed to determine the said issues.

i. Whether this Court has jurisdiction to interfere with the Assessment of Costs made by the Magistrate’s Court

10. The Respondent has submitted that this High Court is bereft of the jurisdiction to hear or determine the Application to file a Reference out of time as there is no provision for a Reference Assessment of the Party to Party costs in the Subordinate Court to the High Court as defined under the Advocates Act and the Remuneration Order, that the decision by the Magistrate on Taxation does not fall within the meaning of a decision by the Taxing Officer to warrant a Reference, and that there is no provision for a Reference following an Assessment in the Subordinate Court by the Magistrate
11. On this issue of jurisdiction, I cite the decision of M. Kasango J, in the case of Mathiu Elijah Solo v Joseph Murira [2009] eKLR, in which she remarked as follows:

“..... Before I proceed to consider the challenge on the various items of the bill of costs, it is necessary to deal with the objection raised by the respondent. The respondent argued in his submissions that the applicant’s reference was incompetent because no reasons had been given by the magistrate on the taxation as required under paragraph 11 of the Remuneration Order. Paragraph 2 of that Order provides:-

“This order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in Subordinate Court (other than Muslim courts), in Tribunal appointed under the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act and in a Tribunal established under the Rent Restriction Act.” (Underlining mine).

The respondent’s bill of costs before the Maua Magistrate’s Court was a party and party bill of costs and no doubt from the proceedings the matter was a contentious one. The paragraph therefore is applicable to that bill of costs. Was it then necessary for the magistrate to give his reasons for the taxation/assessment as required under paragraph 11? Paragraph 10 defines the taxing master, who is to give reasons for taxation as:-

“The taxing officer for the taxation of bills under this Order shall be the Registrar or District or Deputy Registrar of the High Court, or in the absence of a Registrar such other qualified officer as the Chief Justice may in writing appoint;

It is clear the reasons for the purpose of paragraph 11 are to be given a taxing officer who is stated in paragraph 10 to be Registrar or Deputy Registrar of the High Court. The learned



magistrate at Maua Magistrate’s Court does not qualify to be a taxing master/officer as per that paragraph. Paragraph 11(2) requires the taxing officer to give reasons for his decision, and on receipt of those reasons a party who raised an objection to the taxation should within 14 days file a reference of that taxation before a judge. Therein lies the answer to the respondent’s objection. The reference filed by the applicant, hereof, does not fall within the provisions of paragraph 11 of the Order. Then one might ask, is there a provision for challenging the assessment made by magistrate? In the *Advocate’s (Remuneration) Order*, I could not find a specific provision for such a challenge. I am however of the view that the court can invoke, in view of that Lacuna, its inherent power to check such assessments of costs. Since paragraph 11 provides that references can be challenged by way of chamber summons, I find I cannot fault the applicant for approaching this court in the same way.”

12. I associate myself fully with the logic and reasoning of Kasango J to the effect that, despite the lacunae on the issue, this Court can very well invoke its inherent powers to check assessments of costs by the Magistrates Court. I therefore find that I have the necessary jurisdiction to entertain the present Application.

13. I also cite the decision of Mrima J in the case of *Richard Otieno Oloo v Anastacia Anditi Oloo & another* [2019] eKLR, in which he stated as follows:

“ 11. Section 27(1) of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya provides for costs in matters before Courts. The provision states as follows:

“Subject to conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

12. Costs usually accrue in matters before Courts. The matters may be before subordinate courts or the superior courts. Pursuant to Section 27(1) above the Court or Judge has powers to inter alia determine to what extent costs are payable.

13. The determination of the costs payable in matters where Advocates appear for parties is governed by the Advocates Remuneration Order, 1962 as amended time to time. I will henceforth refer to the Advocates Remuneration Order as ‘the Order’.

14. Section 10 of the Order provides who the Taxing Officer is. The provision states as follows: -

The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a register, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under



Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.

15. Section 10 of the Order provides for who a taxing officer is in matters before the High Court and also matters relating to trademarks. The section does not deal with matters before the subordinate courts. It is therefore in order to find, which I hereby do, that bills of costs in the High Court are taxed by a taxing officer. The taxing officer may be the Registrar, a Deputy Registrar or a District Registrar of the High Court or any other qualified officer as the Chief Justice may appoint in writing. That is the reason why the term ‘taxation of bill of costs’ is usually used for process in ascertainment of costs in the High Court.
 16. The position in the High Court seems to be clearly settled. That is however not the case in the subordinate courts. Whereas the Order provides for the costs in matters before the subordinate courts the Order does not provide for who shall be the officer in charge of the ascertainment of the costs. In such a scenario recourse must be to Section 27 of the *Civil Procedure Act*.
 17. Section 27 aforesaid deals with assessment of costs. The section does not deal with taxation thereof. It is therefore still in order to find, which I hereby do, that the subordinate courts do not have powers to tax bills of costs. Instead, the subordinate courts assess the bills of costs.”
14. I agree with the above holding of Mrima J as it bolsters the argument that this Court can also invoke its powers under Section 27 of the *Civil Procedure Act* to check assessments of costs by the Magistrates Court. I therefore reiterate my finding that this Court possesses the jurisdiction to entertain the present Application.

ii. Whether the Application is incompetent for failure by the Applicant to seek and obtain the Court’s Ruling and/or reasoning in assessing the costs

15. This issue has already been addressed in the two decisions cited above which, as I have already stated, I agree with and which reiterate that the obligation to give reasons for the decision for the purpose of paragraph 11 is imposed on a taxing officer who is stated in paragraph 10 to be Registrar or Deputy Registrar of the High Court. An ordinary Magistrate sitting as such is therefore such officer contemplated to be “taxing master/officer”. Paragraph 11(2) requires only the “taxing officer”, not “Magistrate”, to give reasons for his decision on taxing a bill of costs, and on receipt of those reasons a party who wishes to challenge the taxation then has 14 days file a reference against that taxation before a Judge. I therefore find that the reference intended to be filed by the Applicant is not one that can be said to be solely or entirely to be based on the provisions of paragraph 11 of the Advocates Remuneration Order. The same can still be said to be founded under this Court’s inherent powers and also under Section 26 of the *Civil Procedure Act*.
16. The present Application is therefore not incompetent and is properly before this Court.



iii. Whether this Court should enlarge time to enable the Applicant file a Reference against the assessment of costs by the Magistrates Court

17. That this Court has power to enlarge time cannot in doubt. There are various provisions donating such power to this Court. For instance, Section 95 of the Civil Procedure Act provides as follows:

“where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may in its discretion from time to time enlarge such period, even though the period originally fixed or granted may have expired.”

18. There is also Order 50 Rule 5 of the Civil Procedure Rules 2010 which also deals with the power to enlarge time and also gives unfettered power to the Court in the following terms:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

19. Even if Paragraph 11 of the Advocates’ Remuneration Order 2009 were to invoked, it too, permits extension time for lodging a reference notwithstanding the expiry of the 14 day period prescribed. It provides as follows:

“11. 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.”



20. The discretion of this court to enlarge time is elaborately discussed in the case of the *County Executive of Kisumu v County Government of Kisumu and 8 Others* [2017] eKLR where the Supreme Court of Kenya held thus:

“(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.”

21. In *Paul Wanjohi Mathenge V Duncan Gichane Mathenge* [2013] eKLR, the Court of Appeal, while referring to other authorities on the same point, observed as follows:

“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.”

22. It is therefore clear that the length of delay and the reasons for non-compliance with the set timelines are factors to be considered by the Court in the exercise of its discretion while handling applications seeking enlargement of time. In the instant case, while the assessment of costs was made on 20/02/2023, the present Application was filed on 18/7/2023. The delay is therefore for 5 months. I agree that the Applicant has not given an explanation for the delay. While the delay may appear inordinate, it is also true that each case must be determined on its own facts.
23. In this case, I note that the damages awarded by the Magistrate Court, was on Appeal, reduced from Kshs 800,000/- to Kshs 500,000/-. A perusal of Schedule 7 of the [Advocates Remuneration Order](#) points to Party & Party instruction fees of about Kshs 65,000/- (higher scale) as the appropriate amount. The amount assessed by the Magistrates Court being Kshs 283,520/-, prima facie, the Applicant apperas to have a valid and arguable point which this Court may need to interrogate. For this reason, I allow the prayer for enlargement of time.

iv. Whether this Court should stay execution of the assessed costs

24. Having excused the Applicant’s 5 months delay and having found that the Applicant has raised a valid and arguable point which this Court may need to determine, I am satisfied that substantial loss may result to the Applicant if execution proceeds before the issue of whether the figure assessed as costs is merited, is resolved. While, considering the amount involved, the loss to be suffered by the Applicant should the execution proceed, might not be said be irreparable, it will definitely cause the Applicant substantial loss, unless an order of stay of execution is granted. Accordingly, I grant the prayer for stay of execution.

Final Orders

25. In view of my findings above, I allow the Notice of Motion dated 14/7/2023 in the following terms:
 - i. The Applicant is granted leave to file a Reference or Application in this Court to challenge the assessment of costs and/or the Certificate of Costs made or issued in Iten Senior Principal Magistrate’s Court Cause No. 10 of 2019 on 20/2/2023 and such Reference or Application shall be filed and served within a period of fourteen (14) days from the date hereof.
 - ii. Pending the hearing and determination of the Reference or Application referred to in (i) above to be filed by the Applicant, an order of stay of execution of the said assessment of costs and/or Certificate of Costs made in Iten Senior Principal Magistrate’s Court Cause No. 10 of 2019 on 20/2/2023, is hereby issued.



- iii. Since it did not give sufficient reasons for its delay to file the Reference or Application, the costs of this Application shall be borne by the Applicant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 8TH DAY OF MARCH 2024

.....

WANANDA J.R. ANURO

JUDGE

