



CM Advocates LLP v Cole (Sued as the administrator of the Estate of Josephine Eleanor Moikobu) (Miscellaneous Application E245 of 2021) [2024] KEHC 4839 (KLR) (Family) (19 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4839 (KLR)

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

FAMILY

MISCELLANEOUS APPLICATION E245 OF 2021

PM NYAUNDI, J

APRIL 19, 2024

BETWEEN

CM ADVOCATES LLP ADVOCATE

AND

ANDREW OMANDI COLE (SUED AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPHINE ELEANOR MOIKOBU) CLIENT

RULING

1. By Notice of Motion Application dated 14th August 2023 presented under Article 159(d) of *the Constitution*, Rule 11 of the *Advocates (Remuneration) Order*, Section 1A,1B & 3A of the *Civil Procedure Act* Cap 21, Order 50 Rule 6, Order 51 rule 1 of the *Civil Procedure Rules*, 2010 and all enabling provisions of the law, the Applicant seeks the following orders-
 - i. Spent
 - ii. That the Honourable Court be pleased to grant the Applicant leave to file a reference against the Ruling of the Honourable Deputy Registrar, Catherine Nganga delivered on 26th May, 2023 delivered via email.
 - iii. That the leave granted in prayer (ii) above do operate as stay of execution of the ruling of the Honourable Deputy Registrar, Catherine Nganga on 26th May 2023 and all consequential orders arising thereof pending the hearing and determination of this Application inter partes
 - iv. The costs of this Application be provided for
2. The Application is supported by the Affidavits of Andrew Omandi Cole sworn on the 14th August 2023 and 10th February 2024. It is the Applicant's case that the ruling was delivered by email and was



- delivered to his previous counsel who did not furnish him with a copy. It is clear that this Application was triggered by the Respondent's Application dated 1st August 2023 seeking for judgment in terms of the Certificate of Taxation.
3. The Applicant seeks to challenge the ruling of the taxation on the basis that the Bill of costs is a nullity in law ab initio as their was a Advocate- Client had a retainer engagement and the said Advocates has expressly committed to a contractual arrangement and the legal fees for representation.
 4. It is his averment that the delay in filing the reference was occasioned by matters beyond the Applicant's control. He only secured the ruling on 8th August 2023 after several efforts. Having changed Advocates, his Advocates at the time the ruling was delivered had challenges being mapped into the system and therefore did not receive notification of the ruling and therefore did not receive communication from the CTS/ E filing system.
 5. The Appellant says the orders sought will meet the ends of justice as provided for under Articles 47 and 50 of the Constitution.
 6. The Applicant also filed Submissions dated 10th February 2024. He identified the following as the issue for determination
 - a. Whether the Applicant is entitled to an order extending time to file reference and stay of execution
 - b. Costs.
 7. The Applicant submits that the Court should exercise its discretion in his favour and relies on statute and judicial precedent. The principles to considered are those set out by the Court of Appeal in First American Bank of Kenya Ltd v Gulab P. Shab & 2 others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65 which are
 - i. The length of the delay
 - ii. The explanation if any for the delay
 - iii. The merits of the contemplated action, whether the matter is arguable one deserving a day in Court or whether it is a frivolous one which would only result in the delay of the course of justice;
 - iv. Whether or not the Respondent adequately be compensated in costs for nay prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
 8. Case law is well settled that the party who seeks the extension of time has the burden of laying a basis to the satisfaction of the Court. The Applicant relies on the decision in Belinda Murai & Others v Amos Wainaina [1978] eKLR to urge that he should not carry the cross for a mistake by his counsel. Finally, it is submitted that the intended reference is arguable, meritorious with high chance of success and will be rendered nugatory should the Court not exercise discretion in favour of the Applicant.
 9. It is submitted that the Applicant made the Application as soon as the ruling came into his possession
 10. The Application is opposed and the Respondent swore a replying affidavit on 23rd October 2023. It is contended that the Applicant was represented by Counsel and the date of the ruling was taken in the presence of his Advocate. That his current firm of Advocates came on record on 12th April 2023 while the matter was pending ruling.



11. The Respondent further contends that at the time the Counsel came on record the matter was slated for ruling on 26th May 2023 and they would have obtained this information from the case tracking system (CTS) with the exercise of due diligence.
12. It is further contended that with CTS the Counsel and the party would be notified of the delivery of the ruling. The Applicant is therefore not being candid. It is contended that for the Applicant to benefit from the Court's exercise of discretion he must give 'a full, detailed and accurate account of the causes of the delay. In the end the explanation must be reasonable enough to excuse the default.
13. It is contended that the Applicant the intended reference does not meet the merit and arguable test.
14. The Submissions of the Respondent are dated 1st March 2024. The following are the issues the respondent identifies for determination
 - A. Whether the failure to annex a draft reference to the application is fatal and as such the application as filed is a non- starter;
 - B. Whether in any event, the Applicant has satisfied the threshold for extension of time to file a reference;
 - C. Whether the Application as filed is unmerited and ought to be dismissed with costs.
15. On the 1st issue the Respondent relies on the decisions in *Muli Musembi & Another v Ruth Katunga Isika* [2018]Eklr and *Gori, Ombongi & Company Advocated v Mary Wangechi Kamara* [2022] eKLR and argues failure to present the intended reference is fatal.
16. It is further submitted that the taxing master has pronounced herself on the issue of the retainer which it is intended to raise in the reference and that the retainer agreement does not meet the prerequisites of a valid agreement as provided for under Section 45 (6) of the *Advocates Act*. The Respondent further cites the decision in *Omulele & Tollo Advocates v Mount Holdings Limited*[2016] Eklr
17. The Respondent further faults the attempt by the Applicant to introduce new evidence that was not presented before the taxation master without leave.
18. The Respondent further submits that in any event the Applicant has not met the threshold for extension of time to file a reference and relies on the Supreme Court decision in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR
19. It is submitted that the Applicant has not offered a reasonable reason for the delay in filing the reference and reliance placed on the decision in *Premier Food Industries Limited v Public Health Prosecutor – Kisumu* [2021] Eklr

Analysis And Determination

20. It is common ground that this is the sequence of events following the Ruling on the taxation of Bill of costs delivered on 26th May 2023
 - i. 13th June 2023 Certificate of Taxation issued
 - ii. 1st August 2023 Application for entry of judgment in terms of certificate of costs
 - iii. 14th August 2023 Application for leave to file reference out of time
21. Having considered the rival affidavits and submissions I discern the following as the issues for determination



- i. Whether the Applicant has shown cause to justify the granting of the extension sought
 - ii. Who should pay costs
22. On the 1st Issue, Whether the Applicant has shown cause to justify the granting of the extension sought-
- It is not in contest that the Court has discretion under Rule 11(4) of the Advocates Remuneration Order to enlarge time for filing of a reference. The Principles to guide courts in considering applications of this nature are well articulated by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the court stated as follows:
- i. 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
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time
23. As set out in paragraph 20 above the impugned ruling was delivered on 26th May 2023 and this Application was presented on 14th August 2023, just 2 weeks shy of 3 months after the ruling. The reason given is that the Applicant did not obtain the ruling until August after relentless follow up by his Counsel.
24. As stated in the Salat case to meet the test the delay must be explained to the satisfaction of the Court. The Respondent correctly raised the issue that, with the introduction of the Case Tracking System/ E filing system by the Judiciary parties can no longer avail themselves of excuses such as they were not aware of any steps taken in a matter or as in this instance allege that they had followed up with the Court without response.
25. This is because the system is designed to allow access to matters in real time and also keep tabs on all official information on the file. I have taken the time to review the Application, it is alleged that the Applicant made several attempts to secure the ruling. There is no record of these requests to the judiciary. Neither is there evidence of transmission of the ruling to the Applicant in August as alleged. This has the effect of causing the reason given by the Applicant to evaporate into thin air.
26. On the first limb I find that the delay has not been reasonably explained.
27. On the second limb of the test, in the absence of a draft reference, there is nothing for the Court to consider so as to gauge the merit or otherwise of the intended reference. I will not restate the authorities cited by the Respondent but agree that failure to attach the intended reference is fatal to this Application.



28. For the 2 reasons cited above; the fact that the delay is not satisfactorily explained and the fact that there is no draft reference for consideration, I find that the Application is for dismissal.
29. Costs of the Application are awarded to the Respondent

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 19th DAY OF APRIL, 2024.

P M NYAUNDI

HIGH COURT JUDGE

In the Presence of;

Sylvia Court Assistant

Ms. Kendi Advocate for the Respondents

