



Republic v Judicial Service Commission; Karua (Exparte) (Application E1127 of 2020) [2024] KEHC 9583 (KLR) (2 August 2024) (Ruling)

Neutral citation: [2024] KEHC 9583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
APPLICATION E1127 OF 2020**

**J NGAAH, J
AUGUST 2, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

AND

HON. MARTHA KARUA EXPARTE

RULING

1. The application before court is the ex parte applicant’s chamber summons dated 23 February 2024 expressed to be brought under Order 22 Rule 22, Order 42 Rule 6 and Order 50 Rule 5 of the [Civil Procedure Rules](#). The applicant has also invoked paragraphs 11(1) and (2) of the [Advocates Remuneration Order, 1962](#). The application seeks the following orders:
 - “1. That the Application herein be certified as extremely urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
 2. That pending the inter-parties hearing of this application, the Honourable Court be pleased to grant an interim stay of execution of the Ruling delivered on 25th January, 2024 and the extracted Certificate of Costs dated 3 1st January, 2024.
 3. That pending the hearing and determination of this application, the Honourable Court be pleased to order stay of execution of the Ruling delivered on 25th January, 2024 and the extracted Certificate of Costs dated 31st January, 2024.



4. That pending the hearing and determination of the Applicant's intended Appeal against the entire judgment of Hon. Justice Jairus Ngaah delivered on 27th January, 2023, the Honourable Court be pleased to order stay of execution of the extracted Certificate of Costs dated 31st January, 2024.
5. That leave be granted to the Applicant to file a Reference to the Judge out of time.
6. That the decision of the Learned Deputy Registrar delivered on 25th January, 2024 on the Respondent's Bill of Cost dated 7th February 2023 be set aside.
7. That the Respondent's Bill of Cost dated 7th February 2023 be remitted for fresh taxation before the taxing master and with proper directions thereof.
8. That the costs of this reference be provided for.

The application is supported by the applicant's own affidavit sworn 23 February 2024."

2. The applicant's application is as a result of the taxation of the respondent's party and party bill of costs which was taxed at Kshs. 1,186,325.40. This was after the applicant's suit against the respondent was dismissed with costs. The applicant swears that she is aggrieved by the taxing officer's taxation and in particular, her ruling rendered on 25 January 2024 and, therefore, wishes to file a reference against the ruling for the reasons that:

- i. The amount in item 1 of the Bill of Costs, which was taxed and allowed at Kshs. 1,000,000/=, is manifestly excessive and contrary to the law and principles of taxation and should thus be reduced.
- ii. The Taxing Officer misdirected herself and erred in holding that my application dated 13th November, 2020 which sought the prerogative orders met the criteria of importance and so merited an award of instruction fees at the figure of Kshs. 1, 000, 000/=.
- iii. That the matter was filed on 9th November, 2020 and determined on 27th January, 2023 with parties appearing in Court three (3) times only and the application was canvassed by way of written submissions therefore the taxing master should have considered the time in which the advocate used in defending the matter.
- iv. The Taxing Officer erred in fact and law in exercising discretion to award exorbitant instruction fees under item 1 contrary to the established legal principle on taxation that costs should not be so high so as to confine access to justice or to deny a party access to justice.
- v. The Taxing Officer misdirected herself and exercised her discretion wrongly in awarding the Respondent Costs of Kshs. 1, 186,325 which sum was excessively high and unjustifiable in the circumstances of the case."

3. The taxing officer's decision is also impugned because she is alleged to have erred in law by failing to apply the applicable principles of taxation and tax the bill of costs as provided under schedule 6 paragraph (l) (j) (ii) of the Advocates Remuneration (Amendment) Order, 2014. Accordingly, the taxing officer's decision is said to be oppressive, unjustified and meant to deny the applicant the right to access justice as guaranteed under Article 48 of the *Constitution*.



4. The applicant has also sworn that she has been informed by her advocates on record, which information she verily believes to be true and accurate, that the Respondent has commenced execution proceedings against her because it has sought warrants of attachment and sale of the applicant's movable properties to be issued to auctioneers. Even as the respondent seeks to execute against her, the applicant deposes that she is owed USD 25,000 equivalent to Kshs. 4,000,000/= by the Government which she was awarded in the East African Court of Justice at Arusha in Reference No. 20 of 2019. It is the applicant's position that if the execution of the Certificate of Costs dated 31 January, 2024 is not stayed, her intended reference would be rendered nugatory thereby occasioning her loss and damage.
5. As far as the filing of the reference is concerned, the applicant has sworn the reference ought to have been filed by 8 February, 2024 but it was not filed because the learned counsel seized of the applicant's brief was indisposed and was away from office on sick leave from 30 January, 2024 until 20 February, 2024. Accordingly, she could not file the reference within 14 days as specified under Paragraph 11 (1) of the Advocates Remuneration Order, 2014. In the applicant's assessment, there is a delay of 14 days in filing the reference which, in her view, is not inordinate.
6. The applicant also wants to appeal against this Honourable Court's decision dismissing her suit and she swears that her appeal will be rendered nugatory if execution is allowed to proceed before her appeal is heard and determined.
7. Mr. Charles Kanjama, the learned counsel for the respondent swore a replying affidavit opposing the application. According to Mr. Kanjama, since the ruling of the taxing officer was delivered on 25 January 2024, the applicant ought to have filed her reference on or before 8 February 2024 when the 14-day window open to filing such references lapsed.
8. The respondent extracted a certificate of taxation on 31 January 2024 and on 21 February 2024, it applied for warrants of attachment and sale, apparently of the applicant's property. It is only after the respondent obtained warrants of attachment and sale that the applicant filed the instant application, 18 days after the date by which the reference ought to have been filed.
9. On the question of the applicant's learned counsel being on sick leave when she ought to have filed the reference, Mr. Kanjama has sworn that there is no evidence of any sort that the learned counsel was indisposed as alleged or at all and neither is there any proof from her employer that she was away on sick leave. In any event, the learned counsel for the applicant has not explained why she could not file the reference before she became ill and left for sick leave. Accordingly, the explanation given for the delay in filing the reference is not sufficient and, even then, a delay of days is, in these circumstances, inordinate.
10. Paragraph 11 of the *Advocate Remuneration Order*, 2014 prescribes the steps to be taken by a party who objects to a taxation of a bill of costs and, for that reason, wishes to challenge it before a judge. It states as follows:

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 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.
11. The notice referred to in subparagraph 1 is for the taxing officer to give reasons which, according to subparagraph 2, explain the taxation of items to which an aggrieved party objects. In this particular case, the notice was not necessary because the impugned ruling contained the reasons for taxation of all items in the bill of costs. It was, therefore, open to the applicant to proceed and file a reference to the judge within 14 days after the delivery of the ruling on the respondent's bill of costs. And the ruling having been delivered on 25 January 2024, the 14th day by which the reference ought to have filed was the 8th day of February 2024.
 12. But it was not until 27 February 2024 when the applicant filed the instant application; 18 days after the lapse of the limitation period. The applicant has admitted that indeed there was a delay which she says was of 14 days. The delay was, in fact, of 18 days and not 14 days.
 13. According to subparagraph (4) of paragraph 11 of the *Advocates Remuneration Order*, this Honourable Court has the discretion, on an application by a party challenging the taxing officer's decision, to extend the time fixed by subparagraph (2) for the filing of the reference. This is what the applicant prays for in prayer 5 of her application where she states:

“ 5. That leave be granted to the Applicant to file a Reference to the Judge out of time.”
 14. The exercise of discretion to extend or not to extend time depends very much on the circumstances of each case. In the instant case the amount of delay and the reasons for the delay are pivotal to exercise of my discretion, one way or the other.

The reason given by the applicant is that the advocate handling her case was unwell and, for this reason, she was away from office, at the time material to this application. No doubt, failure to take any action within the prescribed timeline on account of sickness or illness of a counsel is not something to be taken lightly and, more of than not, courts will, in appropriate cases, bend over backwards to accommodate parties or their counsel who find themselves in such unfortunate but unforeseen circumstances.
 15. The trouble with the applicant's explanation is that the fact of sickness on the part of the learned counsel for the applicant is contested by the respondent. As I have noted, a plea of sickness as a reason for failure to act in particular way ought not to be dismissed lightly; however, where it is contested, as it has in the instant application, it behoves he who asserts that he was sick as not to act to prove that he was indeed sick. I cannot think of any particular form of evidence to prove this fact but I would suppose that a medical chit, for instance, or evidence of treatment by a doctor or a medical professional or treatment of a person in a hospital, either as an in-patient or outpatient, would suffice.
 16. Such a proof would discount any doubt that the allegation of sickness is merely being employed as an excuse for failure to comply with the law or discharge certain legal obligations. If, for whatever reason,



one cannot obtain this evidence, then he owes the court an explanation why he cannot obtain it. It will be up to the court to evaluate the plausibility of the explanation offered and come to an appropriate conclusion.

17. The point is that the court's exercise of discretion generally is, to a greater degree, influenced by the material with which it is presented. In exercising its discretion, the court does not act at whim; neither does it act capriciously nor arbitrarily. In a case such as this where it is the applicant's word against the respondent's, the burden was upon the applicant to go a step further than merely state that she was caught out by time because she was sick or that she was away on sick leave.
18. For the reasons I have given, I am not persuaded that this burden has been discharged either to an extent that I can exercise my discretion in favour of the applicant or at all. Want of proof in support of the applicant's learned counsel's indisposition or sick leave and considering the applicant's own admission that this application was filed only after the execution process had commenced lends credence to the respondent's claim that the applicant was only jolted into action by the commencement of the execution process.
19. Having so held, it is not necessary to consider prayers 6 and 7 of the application seeking to have the decision of the taxing officer set aside and the respondent's bill of costs taxed afresh. In any event, I doubt that the two prayers were appropriately included in this application because it is apparent from the pleadings and applicant's own depositions that she intended to file a reference if the application for extension of time was allowed. This can be discerned from prayer 5 in the application in which the applicant is categorical that "leave be granted to the applicant to file a reference to the judge out of time". And in paragraph 6 of the supporting affidavit, Hon. Karua has sworn that "I am aggrieved with the decision of the Taxing Officer and based on the advice of my advocates on record, I wish to file a Reference against the same for the following reasons...". These averments and depositions go to show that the application before court is not a reference as such but an application seeking to file a reference in the future.
20. For the reasons I have given, I find no merits in the applicant's application. It is hereby dismissed with costs. It is so ordered.

SIGNED, DATED AND POSTED ON THE CTS ON 2 AUGUST 2024

NGAAH JAIRUS

JUDGE

