



**Mwaniki Gitau & Co Advocates v Njoroge (Miscellaneous Application 333 of 2018)
[2024] KEHC 11920 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11920 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 333 OF 2018**

FG MUGAMBI, J

OCTOBER 4, 2024

BETWEEN

MWANIKI GITAU & CO ADVOCATES APPLICANT

AND

ESTHER WAMBUI NJOROGE RESPONDENT

RULING

1. This ruling determines the client/respondent's Chamber Summons dated 18/12/2023, brought under Rule 11 (4) of the Advocates Remuneration Order (ARO). She seeks an enlargement of time to file a reference against the Taxing Officer's ruling of 30/8/2022 (the ruling). The application is supported by an affidavit sworn by the client on 18/12/2023 and written submissions dated 15/3/2024.
2. She acknowledges that the ruling allowed the Advocate/Applicant's bill of costs at Kshs. 640,949/=. That upon delivery of the ruling, which was virtual, her advocates applied for a typed copy of the ruling and reasons through a letter dated 9/9/2022. The ruling was only furnished to her advocates on 17/1/2023. Prior to this, the reasons for the ruling had not been provided when the same was delivered virtually. As such, the reference was then filed on 30/1/2023. She submits that her omission to file the Reference within 14 days from the ruling date was hence inadvertent, excusable and not deliberate.
3. The substance of her case is that the bill of costs filed by the advocate is defective and unmerited. She contends that the Taxing Officer ought to have struck it out or dismissed it in limine and that she stands to be greatly prejudiced if the orders sought are not granted. This is because she will be condemned to personally pay the taxed amount even though the alleged legal services were rendered to the Estate of Diawara Adama in HCCC No. 178 of 2013 and not to her in person as purported in the Bill.
4. She further contends that the advocate will not be prejudiced if the orders are granted as he will have an opportunity to oppose the reference on merits. She relies on Article 159(2)(b) of *the Constitution*



and pleads with this court to administer substantive justice without undue regard to procedural technicalities.

5. In opposing the application, the advocate filed Grounds of Opposition dated 17/1/2024, a Replying Affidavit sworn by JOSEPH MWANIKI GITAU on 17/1/2024 and written submissions dated 21/5/2024.
6. The advocate contends that the application is an abuse of the process of the court whose purpose is to delay the execution of its fees. The advocate contends that the Court is functus officio as through a ruling issued on 8/12/2023, it struck out a reference filed by the client for having been filed out of time in contravention of Rule 11(2) of the ARO. No appeal had been filed against that ruling.
7. The advocate further argues that no plausible explanation for the delay in filing the reference had been given and that the court receipt dated 17/1/2023 cannot be construed as evidence of delay. The advocate highlighted the case of Vashishit Talwar V Anthony Thuo Kanai T/A Thuo Kanai Advocates, [2014] eKLR on the importance of rules of procedure in conduct of litigation. They also relied on the decision in *Evans Thiga Gaturu Advocate v Kenya Commercial Bank Ltd, HC Misc. Appln No. 343 of 2011* (unreported) where the Court held that a party would not be entitled to an indefinite period within which to file a reference. For these reasons, they urged the court to dismiss the application.

Analysis and Determination

8. I have considered the application, the grounds in support and opposition and the parties' respective submissions and authorities. The first issue for determination is whether this court has jurisdiction to grant the client leave to file a reference out of time following the ruling of 8/12/2023. Rule 11(4) of the ARO is relevant in answering this question. It provides that:

“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.”

9. I would therefore answer this question in the affirmative that indeed, this court is clothed with the discretion to consider and enlarge time in the present circumstances. Further, by the ruling of 8/12/2023, this Court made the following observations, before striking out the client's reference application of 30/1/2023:

“In this case, the client avers that she wrote to the Deputy Registrar on 9th September 2022 indicating her dissatisfaction with the ruling of the taxing officer and asked for reasons for the ruling together with a typed and signed copy of the ruling in order to file a reference.

The purpose of such notice is to bring to the attention of the taxing master the points of taxation which are objected to and to receive reasons for the said objection. I have analysed the impugned ruling dated 30th September 2022 and I note that the taxing master gave reasons for her findings. The client was aware of the contents of the said ruling. I therefore concur with the submission that it was unnecessary for the client to again seek the same. It would appear to me that the client required more time to file the reference. If this was the case, the client was at liberty to apply for an extension of time to do so, which she has not done, instead of using the guise of rule 11(2).



For the reasons that I have stated, I find merit in the advocates preliminary objection. I further hold that the instant application contravenes Rule 11(2) of the ARO, 2014 having been filed more than 14 days after delivery of the ruling dated 30th August 2022.”

10. Noting that the Court has not previously considered an application for enlargement of time to file a reference or the reference on its merits, it is my finding that the instant application is not res judicata. It is also my finding that this court is not functus officio as it has not yet entered judgment in terms of the Certificate of Costs dated 4/10/2022.
11. I now move to consider whether the client has made a case for enlargement of time to file its reference application. The principles for consideration in considering whether or not to extend time were set out by the Supreme Court in *Nicholas Kiptoo Korir Arap Salat V Independent Electoral & Boundaries Commission & 7 Others*, [2014] eKLR.
12. The client’s case is that the taxation ruling of 30/8/2022 was delivered virtually and that the Taxing Officer merely read out the taxed amount without giving reasons. Thus, it was not possible to determine the grounds for appeal without obtaining a copy of the ruling and perusing the same. I note that the advocate did not controvert the client’s averment that the typed ruling was not immediately available upon virtual delivery of the ruling.
13. The client produced a copy of the letter dated 9/9/2022, in which her counsel wrote to the court, seeking a typed copy of the ruling and reasons thereof, for purposes of filing a reference. She also produced a court receipt dated 17/1/2023. I agree with the advocates that the receipt on its own may not prove that the ruling was ready on that date. However, considering the totality of what I have already observed, I am persuaded that on a balance of probabilities, there is sufficient evidence to show that indeed the said ruling was not immediately available to the client.
14. The client raises a pertinent issue which is that the taxed costs are in respect of legal services rendered to the Estate of Diawara Adama in HCCC No. 178 of 2013 and not to her in person as per the Bill. In my view, she has demonstrated that she stands to be prejudiced if the orders sought are not granted as she will be condemned to personally pay the taxed amount. On the other hand, I see no particular prejudice to the advocate as they will be granted the opportunity to be heard on the merits of the matter.

Disposition

15. Accordingly, the client’s application dated 18/12/2023 is allowed as prayed. The client shall have the costs. Parties shall take directions on the expedited filing, hearing and determination of the reference application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 4TH DAY OF OCTOBER 2024.

F. MUGAMBI

JUDGE

