



**Commissioner of Domestic Taxes v Lewa Conservancy Limited (Income Tax Appeal 17 of 2017) [2023] KEHC 17317 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17317 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL 17 OF 2017**

**A MABEYA, J**

**MAY 12, 2023**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**LEWA CONSERVANCY LIMITED ..... RESPONDENT**

**RULING**

1. Before court is an application dated 12/9/2022. It was by the appellant and was brought under Order 45 Rules 1 & 5 and Order 51 Rule 1 of the [Civil Procedure Rules](#), and Section 1A, 1B and 3A of the [Civil Procedure Act](#).
2. The application sought leave to file an objection and taxation reference out of time against the ruling of the taxing officer delivered on 13/6/2022 and orders staying execution of the ruling.
3. The grounds for the application were set out on the face of it and in the supporting affidavit of Trizah Nyakundi sworn on 12/9/2022. It was contended that failure to file the reference within time was as a result of the applicant's counsel being transferred to another department.
4. That the objection was based on the fact that the taxing master arrived at the instruction fee of Kshs 1,535,000/= relying on the subject matter which was found to be Kshs 88,590,23/= being the assessment issued by the applicant on park entry fees. The applicant took issue with that assessment and submitted that, the taxes in dispute could not be used to assess the value of the subject matter.
5. That the delay was not inordinate and was a result of the inadvertent oversight on the appellant's counsel. That the instant application had been brought without delay and it was in the interest of justice that it be allowed.



6. The respondent opposed the application vide grounds of opposition dated 5/10/2022 and the replying affidavit sworn by George Rioba on 5/10/2022. It was averred that the applicant had 14 days from 13/6/2022 when the ruling was delivered to challenge the ruling but failed to do so. That it was over 3 months after the decision was made that the applicant was now seeking leave to file the reference and stay execution contrary to Rule 11 of the Advocates (Remuneration) Order (ARO).
7. That the explanation given regarding transfer was not sufficient as the advocate was still in the litigation department of the applicant when the ruling was delivered and during the 14.day statutory period. That the instruction fees assessed by the taxing master was correct as it was based on the correct value of the subject matter of Kshs 88,590,236/= which was ascertainable from the judgment given by this court on 26/9/2019.
8. It was thus pleaded that the delay was inordinate and no sufficient reason was given for the same. That extension of time would serve no purpose as the assessment was correct.
9. The application was canvassed by way of written submissions. The applicants' submissions were dated October 14, 2022 whereas those of the respondent were dated 7/11/2022. This Court has considered those submissions as well as the pleadings and the record.
10. This is an application for extension of time within which to lodge a reference against a taxation. The principles applicable are that the application must be brought timeously, the length of the delay should be considered and the reason for the delay. The Court will also consider the prejudice, if any to be suffered by the other party if the extension sought is granted.
11. There is no dispute that the power donated by Rule 11 (4) of the ARO is purely discretionary and to exercise it, the Court should not fetter itself except that it must be exercise that discretion judiciously and not whimsically
12. In Salat v Independent Electoral & Boundaries Commission & 7 others [2014] eKLR, the Supreme Court stated that: -

“Discretion to extend time is indeed unfettered but it is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there were extenuating circumstances that could enable the Court to exercise discretion in favour of the applicant. In doing so the following principles are applicable thus:

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party.
- 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 ought to exercise 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, which ought to be explained to the satisfaction of the Court.
- v. Whether there would be any prejudice suffered, the respondent if the extension was granted.
- vi. Whether, the application had been brought without undue delay and



- vii. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”
13. In *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* {2013} eKLR the Court of Appeal stated 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 the 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.” (See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. 255 of 1997).
14. Rule 11 of the *ARO* provides that an appeal against the decision of the Deputy Registrar shall be a matter to be lodged within 14 days from the date of the order. In this instance, that was not done.
15. In the present case, the decision sought to be impugned was made on 13/6/2022. The time to lodge an objection expired on 27/6/2022. The present application was lodged on 12/9/2023. There was a delay of approximately 75 days. In the view of this Court, that was inordinate.
16. The explanation given was that the applicant’s counsel was transferred to another division and was therefore not vested with instructions to file the objection.
17. However, from the transfer letter issued to the advocate and annexed as TN 2, it is evident that the advocate was informed of the transfer on 20/7/2022. The ruling herein was delivered on 13/6/2022 when the advocate was still vested with the matter until after the statutory timeline expired. This indicates that the advocate was still in the litigation department but failed to file the objection within time.
18. This Court finds that the explanation is not satisfactory. In any case, after the advocate was transferred on 20/7/2022, the applicant still waited for another two months before bringing the instant application.
19. This Court finds that the application to enlarge time was brought inordinately late and the explanation given was not satisfactory. That applicant was indolent. In any case, other than pleading that the subject value relied on by the taxing officer was not correct, the applicant did not point out what was the correct subject value to be relied on, for this court to consider whether the intended objection is arguable.
20. As regards prejudice, I consider the delay from 2019 when the appeal was dismissed to-date for the respondent to recoup its ascertained costs to be prejudicial.
21. Accordingly, the application dated 12/9/2022 is found to be unmerited and the same is dismissed with costs to the respondent.
22. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCI Arb  
JUDGE**

