



**Scania Sacco Limited v Sireka (Miscellaneous Application
E299 of 2022) [2023] KEHC 3831 (KLR) (Civ) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3831 (KLR)

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

CIVIL

MISCELLANEOUS APPLICATION E299 OF 2022

JN MULWA, J

MAY 3, 2023

BETWEEN

SCANIA SACCO LIMITED APPLICANT

AND

WASHINGTON ODERA SIREKA RESPONDENT

RULING

1. Before court is a Chamber Summons application dated 19th May 2022 brought under Article 50 and 159 of *the Constitution* of Kenya 2010, Section 44 of the *Advocates Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Rule 11(2) and (4) of the Advocates (Remuneration) Order. The Applicant seeks the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. THAT this Honourable Court enlarges the time within which to file a Notice of Objection and Reference against the Decree and Certificate of Costs of the Magistrate issued on 10th December 2021
 - v. THAT the Notice of Objection attached herewith be admitted and the Reference filed herein be deemed as properly filed though filed out of time.
 - vi. THAT this Honourable Court be pleased to review, vary and/ or set aside the assessment of costs as per Certificate of Costs issued by the Magistrate on 10th December 2021.



- vii. THAT this Honourable Court be pleased to issue a set off of the re-assessed costs in this Reference against the costs awarded in Misc. Application No. E181 of 2021 - Washington Odera vs. Scania Sacco Limited pending before this Honourable Court.
 - viii. THAT the costs of this application be provided for.
2. The application is predicated on the grounds set out on its face and the supporting as well as further affidavits of BRIAN MAKAU, the Chairman of the Applicant herein.
 3. The Respondent opposed the application by way of a Replying Affidavit sworn on 22nd June 2022.
 4. The application was canvassed by way of written submissions which the court has duly considered. The only issue that arise for determination is whether the Applicant has made out a case for enlargement of time to file a Notice of Objection and Reference.
 5. The legal framework on extension of time within which to file a notice of objection to taxation and/or a reference is clearly stipulated under Paragraph 11 of the Advocates Remuneration Order which provides as follows:
 - “ 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.”
 6. In the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, the Supreme Court set down the principles for extension of time, as follows:
 - “ 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; ...”
7. On the issue of delay, Mohammed JA. (as he then was) held as follows in *George Kagima Kariuki & 2 Others v George M. Gichimu & 2 Others* [2014] eKLR: -
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”
8. In the instant case, the Certificate of Costs from the lower court was issued on 10th December 2021 and the Application filed on 19th May 2022. It is therefore undisputed that there was a delay of about five months in the filing of the Notice of Objection and Reference against the magistrate’s assessment of costs in *Milimani CMCC No. 11257 of 2018 - Scania Sacco Limited vs. Washington Odera Sireka*.
 9. The Applicant attributes the delay in filing its Notice of Objection and Reference to the failure by the Respondent to copy and serve it with the letter requesting for assessment of said costs and his failure to inform it about the assessed costs of Kshs. 115,575/- in good time. The Applicant contends that it only got to know of the Decree issued pursuant to the Certificate of Costs therein on 9th May 2022 upon being served with the Respondent’s application dated 5th May 2022 which sought garnishee orders to attach the sum of Kshs. 115,575/- held in the Applicant’s bank account.
 10. The Respondent has refuted these claims and contends that there is no basis for enlargement of time for filing the intended reference because is no provision under the Advocates Remuneration Order for challenging assessment of costs made by a magistrate’s court to a Judge, through a Reference.
 11. To begin with, Order 21 Rule 9D of the Civil Procedure Rules 2010 requires the magistrate courts to be guided by the Advocates (Remuneration) Order in awarding of costs. From this provision, it goes without saying that a party aggrieved by the award of costs in the said court can only seek redress through the procedure set out under Paragraph 11 of the Advocates Remuneration Order. See *Aburili J. in Nyamogo & Nyamogo Advocates vs. Pan African Insurance Company Limited* [2016] eKLR.
 12. Moving on, the court notes that the Respondent has not produced any proof that the Applicant was aware of the assessed costs but chose to be indolent in filing its Notice of Objection. Such proof would have taken the form of a letter to the lower court, duly copied and served on the Applicant, seeking for assessment of costs as required under Order 21 Rule 9A of the Civil Procedure Rules, 2010. Another proof would have been an Affidavit of Service showing that the Applicant was duly served with the resultant Decree and/or Certificate of Costs dated 10th December 2021. In the absence of the aforesaid, this court finds that the Applicant has demonstrated that there was sufficient cause for the delay in filing the Notice of Objection and Reference. Ultimately, the court finds that prayer 4 of the application is merited.
 13. As regards the already filed Notice of Objection and Reference, the court will not allow the same to be deemed as duly filed as prayed because that was done before obtaining leave of court. By allowing the same, the court will essentially be sanitizing an illegality which cannot happen. The Supreme Court



in *Nicholas Kptoo Korir Arap Salt v IEBC & 7 others* [2014] eKLR, pronounced itself on a similar issue as follows:

“...By filing an appeal out of time/before seeking the court to extend time and recognize such “an appeal” is tantamount to moving the court to remedy an illegality. The court cannot do so ... such a filing render the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of the time without leave of court...”

14. Consequently, the Applicant’s application partly succeeds. The court shall strike out the incompetent Notice of Objection and Reference filed herewith. The Applicant shall file the Notice of Objection to taxation and Reference against the lower court’s assessment of costs within 21 days of this ruling, failing which this order shall lapse.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 3RD DAY OF MAY, 2023.

JANET MULWA

JUDGE

