



**O&M Law LLP v Eveready East Africa PLC (Miscellaneous Application E095 of 2022)
[2023] KEHC 18536 (KLR) (Commercial and Tax) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E095 OF 2022**

FG MUGAMBI, J

JUNE 2, 2023

BETWEEN

O&M LAW LLP ADVOCATE

AND

EVEREADY EAST AFRICA PLC CLIENT

RULING

1. The application before the court is one dated September 16, 2022. It is brought under Section 3A and 95 of the *Civil Procedure Act* and Order 50 Rule 1 of the *Civil Procedure Rules*.
2. The application seeks the following orders;
 - i. Spent
 - ii. That the Honourable court be pleased to grant leave to the client to file a Reference against taxation out of time
 - iii. That the Honourable court be pleased to make an order extending the time within which the client may lodge and or file a reference and the reference dated September 15, 2021 be admitted and deemed duly filed and served.
3. Briefly, the genesis of this application is a contractual agreement whereby the applicant engaged the services of the respondent to carry out an in-depth legal audit of the respondent's affairs. The applicant failed to pay for the legal services and as a result the respondent filed a bill of costs seeking a sum of Kshs 1,757,998/= for services rendered. The bill was taxed and a ruling delivered on August 31, 2022 whereupon the bill was taxed at Kshs 2,610,939.60/=. Dissatisfied with the ruling of the taxing master, the applicant filed the application that is now before the Court.



4. The application is supported by the grounds contained therein, the affidavit sworn by Lyra Ikonge on September 15, 2022 and the written submissions dated March 10, 2023 seeking leave to extend and enlarge time within which to file a reference. The applicant's case was that the ruling on taxation was delivered on August 31, 2022 and the reasons for taxation were forwarded to the applicant on September 5, 2022. The applicant gave the advocate instructions on September 14, 2022 whereupon the present application was filed.
5. The applicant submitted that the court was seized with the jurisdiction to enlarge time for the filing of the reference herein, by virtue of section 95 of the Civil Procedure Act as well as regulation 11(4) of the Advocates Remuneration Orders. Counsel also submitted that section 1A, 1B and 3A of the Civil Procedure Rule gave wide discretion to this court to ensure that justice is done.
6. Counsel acknowledged that this is a discretionary power and is not a right that parties enjoy. It was further submitted that the court would be guided by considerations on the length of the delay, the reasons for delay, chances of the appeal succeeding if the extension is granted and the level of prejudice that would result to the respondent if the application is granted. The respondent has referred this court to decisions in support of this point.
7. Counsel additionally submitted that the delay was of two (2) days, from August 31, 2022 when the ruling was delivered to September 16, 2022 when the application was filed. In explaining the reasons for the delay Counsel submitted that the reasons for the ruling were delivered on 5th September and not together with the ruling on 31st August. There were also intervening events arising from the concluded general elections and the public holiday hence the delay.
8. The applicant also argued that the intended appeal had very high chances of success. It challenged the excessive award of Kshs 2,610,936.60/= against the sum that had been pleaded, which was Kshs 1,751,600/=. The applicant avers that other than this ground, the appeal challenges the failure by the taxing master to consider the evidence that was presented before the court, in arriving at its decision.
9. Finally, the applicant urges that the respondent will not be prejudiced at all and prays that this court strikes a balance between the rights of the parties. The applicant states that if the application is not granted, it is they who stand to be prejudiced as the respondent will proceed with execution.
10. The application was opposed. The respondent filed its replying affidavit dated November 18, 2022 sworn by Awa Muhindi. The respondent's position was that no plausible reason had been given for the late filing of the reference. This was more so considering that the applicant's advocates were present in court when the ruling was delivered and they were therefore aware of it. Further, it was contended that the respondent had been deprived of the funds for work done, noting that the present application was meant to further deprive the advocate of the legal fees.
11. The respondents filed their written submissions dated May 22, 2023. Counsel submitted that extension of time is not an automatic right of any party and that a party praying for such extension must prove that they are deserving. It was further contended that the principles of extension of time required that the applicant gives a proper explanation for the delay.
12. The respondent avers that despite the applicant making assertions of the delay in receiving reasons for the ruling, no evidence had been placed on record to show that there were 'several requests' made requesting its delivery. The respondent further avers that intervening events such as the just concluded general elections and public holidays were not plausible reasons. The general elections took place in August 9, 2022 and the courts resumed operations immediately and therefore it was upon the applicants to file the reference in advance.



13. The respondent submitted that it would be highly prejudiced if the application was granted for it had been deprived of the funds for services that it had delivered, for almost four years and the same had had an impact in the respondent's business operations.

Analysis

14. I have considered the rival pleadings, the written submissions and authorities presented by the parties in support of their cases. Paragraph 11 of the [Advocates Remuneration Order](#) stipulates as follows on the filing of reference objecting to the decision of the Taxing Master:-
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 which he objects.
 2. The Taxing Officer shall forthwith record and forward to the objector the reasons or 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 subparagraph (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 expired."
15. The application of this provision has been a subject of judicial finding. In *Abmed Nassir Vs National Bank of Kenya Ltd* [2006] EA the court found that :-
- Although Rule 11(1) of the [Advocates Remuneration Order](#) stipulates that any party who wishes to object to the decision of the Hon Taxing Officer should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the [Advocates Remuneration Order](#) demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling."
16. Part of the delay in filing the reference has been attributed to the need to comply with Rule 11(2) of the [Advocates Remuneration Order](#). To say that Counsel need not have waited for further reasons from the Taxing Master is too late as the action has already been overtaken by events. That said, the authorities that have been cited by Counsel all agree with the Supreme Court's finding in [County Executive of](#)



Kisumu v County Government of Kisumu and 8 Others [2017] eKLR with respect to extension of time that:

In an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case ...the underlying principles that a Court should consider in exercise of such discretion:

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

17. It is not disputed that the applicant did not file the reference within 14 days as required by the law. The Taxing Master delivered her ruling on taxation of the bill of costs on August 31, 2022 and the present application was filed on September 16, 2022, two (2) days late. I find that this period is indeed not inordinate. It is unfortunate that Counsel has not brought any evidence to show that time was lost when pursuing the reasons for the ruling, yet this is perhaps the most pressing reason for the delay. It is not enough to simply state as such. The burden of proof lies on the applicant to prove his averments. This is more so considering that the Taxing Master delivered a ‘Ruling and Reasons for Taxation’ dated August 31, 2022.
18. Further, the applicant states that the delay was also caused by intervening events arising from the general elections and there being a public holiday. Whereas it is a matter of public notoriety that the country was in the period of elections in August 2022 there is no evidence to show that the courts were not working at the time.
19. Against this, I also note that the respondent does not controvert the averment by the applicant that the intended appeal has good chances of success. The applicant states that the amount awarded by the Taxing Master was excessive and more than had been pleaded, amongst other grounds. The fact that the appeal presents triable issues is a fact that this Court should not ignore.

Determination and final orders

20. In the circumstances, I find that this is a proper case for the court to exercise its discretion and grant the orders sought. My view is that the respondent would not be highly prejudiced if the court enlarges time for filing of the reference. This court is mindful of the need to balance this against the applicant’s right to have an opportunity to canvass its claim. I find merit in the application dated September 16, 2022 and the same is allowed as prayed.



DATED, SIGNED AND DELIVERED IN NAIROBI THIS 2nd DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

