



**AS Kuloba & Wangila Advocates v Walingo (Miscellaneous Application
E011 of 2022) [2024] KEELRC 2176 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2176 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E011 OF 2022**

DN NDERITU, J

JULY 4, 2024

BETWEEN

AS KULOBA & WANGILA ADVOCATES APPLICANT

AND

MARY KHAKONI WALINGO RESPONDENT

RULING

I. Introduction

1. In this ruling, for ease of reference, the applicant shall be referred to as “the advocate” while the respondent shall be referred to as “the client”.
2. The advocate, a law-firm, commenced the proceedings herein by way of an advocate/client bill of costs dated 17th May, 2022, claiming for a total sum of Kshs1,207,009/= in legal fees for services rendered to the client.
3. In a ruling delivered on 3rd October, 2023, the deputy registrar (taxing officer) taxed the bill at Kshs482,012.50 and subsequently a certificate of costs was issued on 25th October, 2023.
4. Subsequently, the advocate proceeded to apply for and obtained warrants for execution in satisfaction of the debt due and owing, and properties belonging to the client were proclaimed for attachment and sale through public auction.
5. On 24th November, 2023 the client filed a chamber summons (the application) under a certificate of urgency seeking for the following orders –
 1. That this application be certified urgent and heard ex-parte in the first instance;



2. That the Applicant be granted leave to file an objection and a Taxation Reference to this Honourable Court against the Ruling of the Honourable Court's Taxing Officer delivered on 3rd October, 2023.
 3. That pending inter-parties hearing and determination of this Application this Honourable Court be pleased to grant and hereby grants a stay of execution of the Ruling delivered on 3rd October, 2023 as to the taxation of the Respondent's Bill of Costs dated 17th May, 2022.
 4. That pending inter parties hearing and determination of this Application this Honourable Court be pleased to grant and hereby grants a Stay of Execution of the Warrants of Attachment of Movable property issued on 22nd November, 2023.
 5. That the court do grant any other order that this Honourable Court deems fit and just to grant in the circumstances.
 6. That costs of the application be provided for.
6. The court issued a temporary order for stay of execution on 27th November, 2023 and the said orders were on 13th December, 2023 extended by consent pending the hearing and determination of the application.
 7. The application is expressed to be brought under the provisions of Article 159 of *the Constitution*, Rule 11(1)(2) & (4) of the Advocates (Remuneration)(Amendment) Order 2014, & Sections 1A, 1B, & 3A of the *Civil Procedure Act*. It is based on the grounds on the face of it and supported with the affidavit of the client sworn on 23rd November, 2023, with several annexures thereto.
 8. In response to the application the advocate filed a replying affidavit sworn by Albert S. Kuloba, on 11th December, 2023 with several annexures thereto.
 9. With the leave of the court the client filed a supplementary affidavit sworn by herself on 15th January, 2024 with several annexures thereto.
 10. On 13th December, 2023 the court directed that the application be canvassed by way of written submissions. Counsel for the client, Miss Amuka filed her submissions on 12th February, 2024 while Mr. Kuloba for the advocate filed on 26th February, 2024.

II. Evidence/affidavits

11. Essentially, the application by the client is seeking for leave to file a reference (essentially an appeal or review) of the taxation done by the taxing officer, alluded to in the introductory part of this ruling, out of time. The other prayer is for stay of execution pending the hearing and determination of the application, which was allowed by consent as stated in an earlier part of this ruling. There is no express prayer for stay of execution pending the filing, hearing, and determination of the intended reference.
12. In the supporting affidavit, it is deposed that after the advocate/client bill of costs was taxed at Kshs482,012.50 the advocate applied for execution and warrants of attachment were issued and the client's moveable properties were proclaimed for attachment and sale through public auction in satisfaction and settlement of the amount due and payable.
13. The impugned ruling on taxation was delivered on 3rd October, 2023 while the warrants of attachment were issued on 22nd November, 2023.



14. It is deposed that the delay in filing of the reference was occasioned by illness on the part of counsel for the client who allegedly was on sick-leave from 4th October, 2023 to 17th November, 2023.
15. It is deposed that the application was filed without unreasonable or inordinate delay and that the delay is explained on the basis of illness on the part of counsel for the client.
16. It is deposed that the client now wishes to file a reference against the taxation. It is alleged that the taxing officer failed to account for a sum of Kshs200,000/= that had allegedly been paid by the client to the advocate prior to the taxation.
17. It is deposed that the taxing officer failed to give reasons for the taxation as she did and as such it is alleged that the taxation highly prejudiced the client.
18. In response, it is deposed in the replying affidavit that the client only filed the application to forestall the execution process and to further delay the settlement of the matter. It is deposed that the advocate expected a higher award than what was granted in the taxation, but for the sake of bringing the matter to a close the advocate decided not to apply for a reference and hence only proceeded to apply for execution once the client took no steps towards payment and settlement of the taxed amount. It is deposed that the application is intended to frustrate the advocate from recovering lawful fees for services rendered.
19. It is deposed that the client filed the application only upon being served with the notice of proclamation and attachment in execution.
20. It is deposed that on 3rd October, 2023, the date of the ruling on taxation, counsel for the client, Mr. Chumo, was present in court and no application for stay of execution, leave to file a reference, or any other application was made in court.
21. It is further deposed that no efforts were made by the client to pay the amount awarded in taxation or file a reference and therefore, ultimately, the advocate took out the execution proceedings.
22. It is deposed that no evidence has been availed in court to demonstrate that the client's counsel was sick on or between 3rd October, 2023 and 17th November, 2023. It is deposed that counsel for the advocate was in constant contact with the counsel for the client and at no point was it mentioned or alleged that counsel for the client was unwell.
23. It is deposed that the alleged sum of Kshs200,000/= paid to the advocate by the client was fees in a completely different matter, an anticorruption case, where the advocate defended the client and the same had nothing to do with the taxation herein which was in regard to an employment and labour relations cause between the client and her former employer, Maasai Mara University, being Nakuru ELRC No. E009 of 2020.
24. It is deposed that the taxing officer gave her reasons for the taxation in the ruling and in any event no request has been made by the client to have such reasons clarified or restated altogether.
25. In the supplementary affidavit it is deposed that the counsel in conduct of the matter, Mr. Chum Kibet, fell ill on 9th October, 2023 and remained on sick-leave till 24th October, 2023 and it is alleged that this explains why he was unable to file the reference within the time allowed. It is deposed that when the client contacted the said counsel sometimes in November, 2023 the time for filing a reference was long gone hence the instant application.



III. Submissions By Counsel

26. Counsel for the client submits that the client intends to challenge the entire taxing as the same is deemed excessive with no reasons given by the taxing officer.
27. In regard to whether the leave to file the intended reference out of time should be granted, counsel cited Paragraph 11 of the Advocates Remuneration Order, 2014 (ARO) which provides as follows –
- 11.
- (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 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 already expired.
28. It is submitted that going by the above provisions this court has discretionary powers to enlarge time. It is further submitted that the same position is supported by Order 50 Rule 6 of the Civil Procedure Rules, 2010 that provides as follows –
6. Whereas a limited time has been fixed for doing any act or taking any proceedings under the Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed.
- Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.
29. Counsel cited several decisions on the factors that the court should consider in determining how to exercise its discretion in an application such as this one. It is submitted that the court should consider the length of the delay, the reasons for the delay, the chances of the reference succeeding, and the degree of prejudice to either party if the application is granted.
30. In regard to the length of delay counsel cited Sokoro Savings & Credit Co-operative Society Ltd V Mwamburi (2023) eKLR; Charles N. Ngugi V ASL Credit Limited (2022) eKLR; and George Kagima Kariuki & 2 Others V George M. Gichimu (2014) eKLR.
31. On the reasons for the delay it is submitted that the illness on the part of the counsel for the client caused the delay and failure of the reference being filed in the time stipulated. It is submitted that in the circumstances the delay is excusable. Counsel cited Mativo J (now JA) in Njoroge V Kimani (2022)



- eKLR on what constitutes inexcusable or inordinate delay. In the same breath, counsel cited other decisions among them County Government of Tana River V Miller & Co Advocates (2021) eKLR; Florence Nyaguthii Muchemi V Attorney General & Another (2018) eKLR; and CMC Holdings Limited V Nzioki (2004) 1KLR 173 amongst other decisions on the same point.
32. It is submitted that prima facie the intended reference has merits.
 33. On the issue of prejudice to the client if the application is allowed, it is submitted that with the high chances of success in the intended reference, the client shall be prejudiced if the application is denied and the execution allowed to proceed.
 34. Although the application does not expressly pray for stay of execution pending the filing, hearing, and determination of the reference, counsel for the client has submitted on stay of execution without specifying what the requested stay shall pend.
 35. Counsel for the advocate submitted that the medical records attached to the supplementary affidavit are categorical that contrary to the allegations made by the client, counsel for the client was unwell between 9th and 24th days of November, 2023. It is therefore submitted that for the period after the ruling on 3rd October, 2023 to 9th November, 2023 the concerned counsel was well and in good health. It is submitted that this fact demonstrates that the application by the client is made in bad faith, intended to frustrate the advocate in recovery of lawful legal fees for services rendered, aimed at delaying the conclusion of the matter, filed with the intention of misleading the court, and without merits.
 36. Counsel for the advocate cited Joseph Lekodi Teleu V Jonathan Paapai & Another (2022) eKLR in support of the argument that the application has no merits and urged the court to be persuaded by the said decision which dealt with similar issues as those in the instant application.
 37. It is submitted that after the ruling on the taxation the client did not issue a notice to the taxing officer on what items she was opposed or objecting to as required under Paragraph 11 of the ARO as reproduced elsewhere in this ruling. It is argued that the client has not even demonstrated in the application which items she intends to object to or challenge.
 38. It is vehemently argued that the application is a ploy to frustrate the advocate in the process of recovery of legal fees for services rendered and delay the settlement as long as it takes. It is argued that even if one assumed that the counsel for the client fell ill as alleged, which is however vehemently denied, the client has not demonstrated what efforts she made in following up the matter that in reality belongs to her not to her counsel. The court is urged to dismiss the application.

IV. Determination

39. Upon careful and thorough reading of the application, the affidavits filed in support and in opposition thereto, the proceedings and the ruling by the taxing officer, and the written submissions by counsel for both parties, the following issues commend themselves for determination by the court -
 - a. Should the client be granted leave to file a reference out of time?
 - b. If (a) above is in the affirmative, should the applicant be granted stay of execution pending the hearing and determination of the intended reference?
 - c. What are the appropriate orders on costs?
40. The subject matter of this application is not as complex as the parties, and more so the client, wishes the court to believe. The applicable law is Paragraph 11 of the ARO cited verbatim in a proceeding part of this ruling. The procedure applicable is that once a taxing officer makes a ruling a party wishing to



object to any of the items may issue a notice to the taxing officer within 14 days of the decision to that effect. Upon receipt of the notice the taxing officer may respond thereto giving or stating the reasons for the taxation of the objected items within 14 days of the notice. Upon receipt of the reasons from the taxing officer the objecting party may within 14 days file a reference before a judge by way of a chamber summons for the determination on the objected items.

41. Paragraph 11(4) of the ARO donates to a judge the discretionary power to enlarge the foregoing timelines upon an application filed by way of chamber summons.
42. The client missed on the deadlines set by the law cited above as a result of which she has filed the instant application for enlargement of the time to start the process of filing the intended reference. The reason advanced for the client not acting within the time allowed is that her counsel fell sick and failed to take the appropriate steps. That is the one and only reason given as to why the intended reference was not filed within the time allowed.
43. The court finds and holds that the above reason advanced by the client lacks merits and it is only intended to mislead the court. Firstly, counsel for the client was present in court when the ruling on the taxation was delivered on 3rd October, 2023. The medical records availed by the client for the alleged illness on the part of the said counsel, Mr. Chumo Kibet, indicate and confirm that he was attended to in the hospital between 9th to 24th November, 2023, over a month after the ruling. Secondly, there is no evidence or explanation whatsoever as to what steps the client took to instruct his counsel to commence the process of filing the reference. Thirdly, the said counsel has not filed any affidavit in support or in explanation of the delay in filing the reference and even the application to file the reference out of time. Fourthly, it is not explained or established that the said counsel was the only one in the law-firm who could handle the matter.
44. The court finds and holds that the client only considered filing the application after the advocate took out the execution proceedings. The delay has not been explained and hence there is no reason for the same, the same is an afterthought intended to defeat justice and deny the advocate the fees as taxed for legal services rendered.
45. Since there is no explanation given for the delay, the delay is held to be unreasonable and inordinate. The law sets deadlines for the purposes of fair and just adjudication of disputes. If parties were allowed to take actions at their pace, pleasure, and convenience, justice shall be delayed and denied.
46. In the circumstances, the court finds no reason to grant the leave sought and consequently there are no grounds for granting stay of execution.
47. Consequently, therefore, the application by the client is hereby dismissed with costs to the advocate. The costs of the application are hereby assessed at Kshs20,000/=. The client shall also meet the costs of the execution that was stayed.

V. Orders

48. For all the foregoing reasons, the chamber summons application by the client dated November 23, 2023 is hereby dismissed in its entirety with costs to the Advocate, which costs are hereby assessed at Kshs20,000/=. The client shall also meet the costs of the execution that was stayed.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 4TH DAY OF JULY, 2024.

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DAVID NDERITU



JUDGE

