

**IN THE COURT OF APPEAL**  
**AT MALINDI**  
**(CORAM: MURGOR, JA - IN CHAMBERS)**

**CIVIL APPLICATION NO. E100 OF 2016**

**BETWEEN**

**MARY WAMBUI NJUGUNA.....APPELLANT/APPLICANT**

**AND**

**WILLIAM OLE NABALA & 9 OTHERS.....RESPONDENTS**

***(An application seeking leave to file a reference out of time brought under rules 4 & 117 of the Court of Appeal Rules, and Article 159(2) (d) CoK 2010, & All enabling Provisions of Law)***

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**RULING OF THE COURT**

By a Notice of Motion dated 28<sup>th</sup> February 2025, brought pursuant to **Rules 4 and 117** of the **Court of Appeal Rules and Article 159(2)(d)** of the Constitution, the Applicant, Mary Wambui Njuguna seeks for;

*“i) leave be granted to the Applicant to file a reference out of time to a Judge of this Court against the ruling and order of the taxing officer dated 20<sup>th</sup> December 2018 in respect of the 1<sup>st</sup> Respondent’s party-and-party bill of costs.*

*ii) the reference before a Judge of this Court against the*

*ruling of the taxing officer dated 20<sup>th</sup> December 2018 be deemed as duly filed.*

*iii) the ruling of the taxing officer dated 20th December 2018, taxing the 1<sup>st</sup> Respondent's party-and-party bill of costs at Kshs. 3,057,650/=, is manifestly*

*excessive and the same be revised downwards as the justice of the case may require.*

*iv) the costs of this application be provided for.”*

The Notice is supported by the grounds stated on its face and by the affidavits sworn by the Applicant, in which she reiterates that the party-and- party bill of costs was taxed in her absence because her former advocate did not notify her of the date of taxation or of the delivery of the ruling. She avers that she only became aware of the taxation much later when she instructed her new advocate to lodge a reference, but since then she has been unable to reach her former advocate or obtain her file, owing partly to the fact that Mr.

S.M. Kimani, her advocate, was ill during the material period and ceased communication with her thereafter.

She further stated that she is now facing committal proceedings to civil jail following execution of the taxed costs; that the taxing officer allowed the item on instruction fees as drawn of Kshs. 3,000,000, which is manifestly excessive and constitutes an error of principle, as it was based on a valuation report of the suit property that was neither part of the Record of appeal nor relevant to the interlocutory nature of the appeal. She explains that the appeal concerned a post-judgment

application for review and rehearing, not a determination of land value, and therefore reliance by the taxing officer on a valuation report was improper.

The Applicant further contended that the 1<sup>st</sup> Respondent's advocates themselves appeared unaware of the taxation proceedings, as evidenced by their letter to the court seeking a mention date for directions on the same bill of costs. She asserts that, having joined the proceedings as a widow and administrator of the estate of the 2<sup>nd</sup> Defendant, she owed a fiduciary duty to the estate to exhaust all legal avenues to secure a fair, reasonable, and just outcome, including challenging a taxation that is irregular, excessive, and founded on erroneous principles.

Annexed to the application is a letter of reference dated 16<sup>th</sup> May 2022.

However no Ruling dated 20<sup>th</sup> December 2018 was annexed.

By way of a Replying Affidavit sworn on 19<sup>th</sup> May 2025, the 1<sup>st</sup> Respondent, opposed the application and stated that it was incompetent and incurably defective as it had been filed by a stranger, namely Mburu Kariuki & Company Advocates, yet the advocates on record for the Applicant remained Stephen (also known as Suleiman) Macharia Kimani Advocates, as no Notice of Change of Advocates had been filed. He further deposed that the delay of seven (7) years before seeking to set aside the taxation was inordinate, inexcusable, and an afterthought; that

no reference was pending before the Court; that the application improperly doubled as a reference in prayer 5 and was therefore itself filed out of time without leave; that no evidence had been tendered to show that Mr. Kimani, the Applicant's former

advocate, had been sick; that the Applicant had continued conducting proceedings in the High Court through Mburu Kariuki & Company Advocates as evidenced by the Notice of Motion dated 20<sup>th</sup> September 2023; that the Supporting Affidavit improperly delved into the merits of a proposed reference and fell outside the scope of an application for leave; that the application was not a reference and therefore issues relating to the merits of taxation could not be determined at this stage; that the Applicant's advocates were at all times aware of the taxation proceedings, as shown by the bill of costs stamped by them, the Taxation Notice served by the Deputy Registrar, and the Certificate of Costs served on them on 1<sup>st</sup> April 2022; that no reasonable cause had been shown for the inordinate delay; and that the Applicant had already challenged the taxation before the Environment and Land Court and a ruling was delivered on merit, rendering the current attempt *res judicata*.

Both parties file written submissions, and when the application came up for hearing on a virtual platform, learned counsel **Mr. Kariuki** appeared for the Applicant, while learned counsel **Mr. Kioko** appeared for the 1<sup>st</sup> Respondent. There was no appearance for the other Respondents which prompted Mr.

Kariuki to withdraw the application against the 2<sup>nd</sup> to 9<sup>th</sup> Respondents.

Counsel for the Applicant also withdrew the prayer for orders of stay of execution, as it was not an issue that was properly before this Court.

In their written submissions counsel for the Applicant submitted that the Applicant is deserving of leave to file her Reference out of time because the delay was fully explained and arose from circumstances beyond her control; that the taxation ruling of 19<sup>th</sup> April 2021 was delivered in the absence of all parties, and neither the Applicant nor the then advocate were aware of it. The Applicant contended that her advocate, Mr. S. M. Kimani, only discovered the ruling on 16<sup>th</sup> May 2022, more than a year later, by which time he filed a belated Reference, but failed to pursue it owing to illness and prolonged unavailability; that throughout this period, the Applicant made every effort to follow up, but her advocate did not respond to her written inquiries, leaving her in the dark. She only became aware of the taxed costs when she was confronted with execution proceedings, including a warrant of arrest, which prompted her to appoint new counsel.

Counsel submitted that the Applicant is an elderly widow, over 75 years of age, and had been drawn into the proceedings purely in her capacity as administratrix of her late husband's

estate; that she relied entirely on her advocate's diligence, and therefore should not be punished for his inadvertence and illness. Counsel invoked **Article 50(1)** of the **Constitution**, to argue that the Applicant had a fundamental right to be heard and to access

justice, and submitted that the 1<sup>st</sup> Respondent will not suffer any prejudice if time is extended, whereas the Applicant stands to suffer grave injustice if she is denied an opportunity to challenge the taxed costs. For these reasons, counsel urged the Court to exercise its discretion in her favour and grant leave to file the Reference out of time.

On their part, counsel for the 1<sup>st</sup> Respondent submitted that the application is incompetent, incurably defective and a nullity *ab initio*. Counsel reiterated the contents of the replying affidavit save to add that the delay has not been explained and that the Applicant's conduct was characterised by indolence, delay, and shifting positions that amounted to an abuse of court process, and that the application should therefore be dismissed with costs.

Having carefully reviewed the pleadings and the rival submissions of both the Applicant and the 1<sup>st</sup> Respondent, the central issue arising for determination is whether the Applicant has satisfied the legal threshold for this Court to exercise its discretionary jurisdiction under **Rule 4** of the Rules, to enlarge time for filing and serving a notice of appeal.

The framework under **Rule 4** which is well settled, grants

the Court broad and flexible discretion to extend time, so long as it is exercised judicially and justly.

Under **rule 4 of** this Court's rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the

discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the cases of

**Leo Sila**

**Mutiso vs Rose Hellen Wangari Mwangi - Civil Application No Nai 251 of 1997,**

**Vishva Stone Suppliers Co. Ltd v RSR Stone [2006] Ltd [2020] eKLR.**

Applying these principles to the present application, the first issue is whether the Applicant has offered a satisfactory explanation for the delay. In explaining the delay, counsel for the Applicant submitted that although ruling was delivered on 19<sup>th</sup> April 2021, the Applicant only became aware of it on 16<sup>th</sup> May 2022 through her counsel on record who filed a reference to this court.

And in addressing the question of delay in filing, the Supreme Court in

**County Executive of Kisumu vs County Government of Kisumu & 8 Others [2017] eKLR** emphasized that the entire duration of delay must be clearly and satisfactorily explained.

Having attempted to discern whether the delay has been

explained, our examination of the motion and the prayers sought point to a significant and inherent defect, as the ruling referred to in the prayers was not attached and it would seem that it does not exist. Essentially, the Applicant application seeks leave to file a reference against a ruling allegedly delivered on 20<sup>th</sup>

December 2018, yet no such ruling was annexed to the application, and nor has it been referred to in the body of the motion or the affidavit in support, instead, the Applicant has exhibited a ruling delivered on 19<sup>th</sup> April 2021, which is materially different from the ruling pleaded in the prayers of the motion. The Applicant's submissions equally underscore this inconsistency, as they are premised entirely on the ruling of 19<sup>th</sup> April 2021 and not on the alleged ruling of 20<sup>th</sup> December 2018.

In order to ascertain the length of delay and whether it has been explained, the Court ordinarily relies on the date of the impugned ruling. Where the Applicant references an incorrect date or refers to a ruling that does not exist, and provides an explanation for the delay that bears no reference to the ruling in question, the Court is hamstrung in its ability to discern when time began to run, the period of delay, and whether the delay has been explained, rendering it impossible to evaluate whether the delay is inordinate or excusable. In the absence of a verifiable ruling date, the Court cannot properly invoke or exercise its discretion under **Rule 4**, as the foundation for such discretion—namely, the existence and timing of the impugned decision—is wholly absent. Moreover, it

would be and absurdity a waste of judicial effort and time to consider the merits of an application where the date when the ruling was delivered bears no relation to the explanations for the delay in seeking leave to extend time, as similarly

observed in the case of **Njagi vs Ngoriadomo (Environment & Land Case No. 97 of 2011) [2022] KEELC 3079 (KLR)**.

It is not lost on me that the Applicant has brought this motion seeking to have time extended to file a reference. But given the absurdity of the motion, the orders sought are not capable of being granted. As such, it remains incumbent on counsel drafting pleadings to exercise due care and attention to avoid such errors as this will only subject their client to undue anguish, such as the Applicant in this case.

In sum, I decline to exercise my discretion to extend time for filing of a reference out of time, and accordingly dismiss the Notice of motion dated 28<sup>th</sup> February 2025 with costs to the 1<sup>st</sup> Respondent.

***It is so ordered.***

***Dated and delivered at Mombasa this 5<sup>th</sup> day of December, 2025.***

**A. K. MURGOR**

**DEPUTY REGISTRAR**

*I certify that this is  
the true copy of the  
original*

*signed*

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