

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU**

MISCELLANEOUS NO. E012 OF 2023

(Before Hon. Justice Dr. Jacob Gakeri)

**BENARD O. ODERO T/A BENARD ODERO AND
COMPANY**

ADVOCATES.....APPLICANT

VERSUS

KENYA COUNTY GOVERNMENT WORKERS

UNION.....1ST

CONTEMNOR

RULING

**BENARD O. ODERO T/A BENARD ODERO AND
COMPANY**

ADVOCATES.....ADVOCATE/RESPONDENT

VERSUS

KENYA COUNTY GOVERNMENT WORKERS

UNION.....CLIENT/APPLICAN

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RULING

Before the court for determination is the applicant's Chamber Summons application dated 15th August 2025 seeking Orders that:

1. Spent.
2. The Honourable Court be pleased to enlarge and/or extend ex debito justitiae, the time fixed by paragraphs (1) and (2) of rule 11 of the Advocates Remuneration Order with regards to the time within which the client Applicant herein is required to file and serve its notice of objection to taxation and the instant reference application challenging the taxing officer's decision dated 21st November 2023.
3. Upon grant of Order (2) above, the court be pleased to deem as having been properly or duly filed and served the instant reference application and draft notice of objection to taxation annexed herewith.
4. The entire taxation proceedings in this matter culminating in the Taxing Officer's decision and/or ruling delivered on 21st November 2023 on the Advocate's Bill of Costs dated 13th March 2023 and all consequential Orders emanating there from including any certificate of taxation issued to the advocate be set aside, reviewed and/or varied on account of having been made without hearing the applicant.
5. The court be pleased to issue a declaration under Section 45 of the Advocates Act that the Taxing Officer did not have requisite jurisdiction to

- entertain, hear and/or determine and/or tax the Advocate's Bill of Costs dated 13th march 2023 on account of the existence of a valid, binding and enforceable retainer agreement between the advocate/respondent and the client/applicant herein.*
- 6. An Order staying any and all execution processes that may have been commenced or contemplated by the advocate herein against the applicant or any certificate of taxation and/or decree issued by the court to the advocate herein.*
 - 7. The Advocate's Bill of Costs dated 13th March 2023 be struck out and/or dismissed with costs to the applicant as the taxing Officer lacked jurisdiction to entertain it on account of the retainer agreement dated 17th November 2022 and the taxation proceedings were a nullity.*
 - 8. The court be pleased to grant any other Order and/or directions as it deems fit, just, appropriate and fair in the circumstances.*
 - 9. The costs of this application be borne by the Advocate herein.*

The Chamber Summons is expressed under paragraph 11(1)(2) and (4) of the Advocates (Remuneration) (Amendment) Order and Article 50 of the Constitution of

Kenya and is based on the grounds set out on its face and the Supporting Affidavit sworn by Roba Sharu Duba on 15th August 2025.

The affiant deposed that he had just learnt that the Advocate had filed his Advocate/Client Bill of Costs dated 13th March 2023 for Kshs.6,856,329.64 from the union and the same was taxed on 21st November 2023 without proper service and the taxing officer proceeded *ex parte*.

That he learnt of the matter when a union official was served with a ruling by the Advocate through WhatsApp in ELRC MISC. NO. E178 OF 2023 arising out of NAIROBI ELRC 1068 of 2015, covered by the retainer agreement dated 17th November 2025 and the union official instructed the firm of James Oketch & Co. Advocates to inquire from the registry.

The affiant deposed that pursuant to instructions on 27th January 2025, the advocates wrote an email to Judiciary ICT support inquiring about the Bill of Costs by Mr. Benard Odera and a response was received itemising many matters including those in Kisumu E011/2023, E013/2023 and E014/2023 and the advocate filed the instant reference.

According to the affiant, during the hearing, Mr. Odera indicated his willingness to explore an out of court settlement of the Bills but during negotiations he threatened to file other bills of Costs.

That the applicant's Advocate enquired about other Bills of Costs against the applicant and a response was received and the applicant's Advocate wrote to Mr. Odera on 6th August 2025 demanding disclosure of all Bills of Costs against the applicant but the letter was unresponded to.

That the applicant's counsel discovered that the only attempt to serve the applicant was vide email unknown to the applicant and the Advocate swore affidavit of service dated 29th September 2023 and 11th November 2023 on service and a ruling notice.

That there was no email communication between the Advocate and the Applicant/Client and no email address had been shared save in letters dated 28th October 2020 and 10th December 2020.

The affiant deposed that the applicant's Advocate was not served and the provisions of the Civil Procedure Rules were not complied with.

That the applicant was not given an opportunity to be heard or respond to the Advocate's Bill of Costs.

According to the affiant, the Advocate acted in bad faith and had ill-motive.

That the applicant learnt of Nyeri ELRC MISC E006/2023 from a notice from the court not the Advocate and the matter was later dismissed for want of prosecution.

The affiant further deposed that lack of service by the Advocate violated the Constitution of Kenya as it denied the applicant a fundamental right and the statutory timelines lapsed and the court had jurisdiction to extend time.

The affiant further made reference to the retainer agreement dated 17th November 2022 and deposed that the advocate breached the agreement by not prosecuting ELRC No.007 of 2021.

The affiant deposed the taxing Officer had no jurisdiction to tax the Bill of Costs by dint of Section 45(1) and (6) of the Advocates Act and case law.

According to the affiant the advocate had filed other Bill of Costs covered by the Retainer Agreement and itemised 12 matters.

That the applicant stood to suffer irreparably if the Orders sought were not granted as it would be compelled to incur additional costs.

That the interests of justice were in favour of the applicant to be given an opportunity to be heard on the Bill of Costs.

Respondent's case

By a Replying Affidavit sworn on 17th November 2025, Mr. Benard Okello Advocate deponed that the amount awarded as instruction fees was proper and was in accord with Schedule VI of the Advocates (Remuneration) Order 2014 having been instructed in January 2021.

That he filed a notice of appointment and produced all the documents the client sought to rely on but the client

failed, refused and/or neglected to pay for services rendered and was evasive necessitating the filing of the Bill of Costs.

The affiant deponed that the ruling dated 21st November 2023 affirmed that the instruction fees was not arbitrary and was based on the value of the subject matter.

The affiant denied the existence of any retainer agreement having been executed by the parties and the applicant did not avail a copy as by law required and the Taxing Officer had jurisdiction to tax the bill.

That the objection to jurisdiction was contradicting because if the Taxing Officer had no jurisdiction the applicant was seeking the court's intervention to make a determination on the Chamber Summons to challenge the same jurisdiction while seeking substantive relief from the court to delay justice.

That the objection was an afterthought and was for dismissal.

Concerning the disputed service of the bill of Costs the affiant deponed that the client went further to serve the bills on WhatsApp to a union official with capacity to be

served which was regular under the Rules and the instant reference was intended to delay execution and deny the affiant benefits from rendering legal services, and an afterthought, as no proper grounds had been demonstrated to justify the court's intervention.

That the applicant had not demonstrated any error of principle, misdirection or improper exercise of discretion.

Applicant's submissions

Counsel for the applicant submitted on the lack of service of the bills of costs as deponed by Mr. Roba Sharu Duba in the Supporting Affidavit citing the decision in **Frigonken Ltd V Value Pak food Ltd** HCCC No. 424 of 2010 on the effect of absence of proper or no service.

Counsel submitted that the Advocates Bill of Costs dated 13th March 2023 emanated from Nairobi ELRC No. E007 /2021 one of the matters covered by the retainer agreement on fees.

On jurisdiction to extend or enlarge time under Rule 11(1) and (2) of the Advocates Remuneration Order, counsel cited the sentiments of the court in **Nyakundi & Co. Advocates V Kenyatta National Hospital Board**

[2005] eKLR to urge the court's jurisdiction to extend time and **Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 others** [2014] eKLR, to underscore the principles governing extension of time and urge that the advocates failure to serve the applicant with the Bill of Costs was sufficient reason for the court to exercise its discretion favourably and the bill was filed without undue delay.

As regards the jurisdiction of the Taxing officer to tax the bill of costs, counsel submitted that she had no jurisdiction on account of the retainer agreement and cited the decision in **Chaudhri & Associates V Registered Trustees of Shekh Zayed Bin Sultan-Al Nahyan** [2024] KEELC 13803 (KLR) and Section 45(1) and (6) of the Advocates Act to urge that the advocate knew that there was a retainer agreement.

Reliance was also placed on **Southern Credit Banking Corporation V Kipkori Titoo & Riara Advocates** Civil Case No. 332 of 2003, **Rachuonyo & Rachuonyo Advocates V National Bank of Kenya Ltd** [2020] eKLR, **Kenyariri & Associates Advocates V First Community Bank Ltd** and **Mercy Nduta Mwangi t/a Mwangi Kengara & Co. Advocates V Invesco**

Assurance Co. Ltd [2016] eKLR among others to submit that the retainer agreement estopped the taxing officer from taxing the bill of costs.

Further, counsel submitted that the Taxing Officer committed errors of principle by proceeding *ex parte* denying the applicant opportunity to be heard as there was no service.

Reliance was placed on **Kirimi & another V Standard Digital & another** [2023] KEHC 25070 (KLR) and **Issa and Co. Advocates V Arihui Construction Engineering Group Co. & another** [2019] eKLR on the right to be heard.

That the other error of principle was that the Taxing Officer proceeded without jurisdiction.

Reliance was placed on **Nyamongo & Nyamongo Advocates V Pan Africa Insurance Co. Ltd & another** and **Benjamin Leonard Macfoy V United Africa Co. Ltd (UK)** [1962] A. C 152.

Finally, on costs, reliance was placed on Section 12(4) of the Employment and Labour Relations Court Act and **Republic V Rosemary Wairimu Munene Ex Parte**

Applicant Ihururu Diary Farmers Co-operative Society Ltd JR No. 6 of 2024 and **Rai & 3 others V Rai & 4 others** [2014] KESC 31 (KLR), to submit that the applicant deserved costs for this reference application.

Respondents submissions

As to whether there was a legal fees agreement between the applicant and the respondent counsel cited the provisions of Section 45 of the Advocates Act to submit that the agreement contemplated by these provisions had to be in writing entered into consensually, clear and signed by the client or his agent.

Reliance was placed on the sentiments of the court in **Mimai Hamise V Peris Pesi Tobiko, Independent Electoral & Boundaries Commission & Returning Officer Kajiado East Constituency** [2017] KEHC 3030 (KLR) and **Nzaku & Nzaku Advocates V Tabitha Waithera Mararo as Trustee of Tracy Naserian Kaaka (minor) & others** [2020] eKLR, to submit that it behooved the applicant to avail the retainer agreement, if it ever existed.

Counsel urged that there was no retainer agreement as alleged.

As to whether the taxing officer had jurisdiction to tax the Bill of Costs, reliance was placed on the provisions of Section 51 of the Advocates Act and Rule 70(7) of the Employment and Labour Relations Court (Procedure) Rules 2024 and Section 11(2) of the Employment and Labour Relations Court Act to urge that the Taxing Officer had jurisdiction to tax the bills of costs as it was a matter of law.

As to whether the decision of the taxing officer should be set aside, counsel restated the principles governing interference with awards of a taxing officers and relied on the sentiments of Odunga J (as he then was) in **Republic V Competition Authority of Kenya Ex Parte Ukwala Supermarkets Ltd and another** [2017] eKLR, on the circumstances in which a court may interfere.

Reliance was also placed on the sentiments of the Court of Appeal and Ojwang J (as he then was) in **Kipkorir, Titoo & Kiara Advocates V Deposit Protection Fund Board** [2005] eKLR and **Republic V Minister for Agriculture & 2 others Ex Parte Samuel Muchiri W'njuguna** [2006] eKLR respectively, to bolster the submission and urge that there was no basis for the court

to interfere with the decision of the Taxing Officer in this case as service was effected.

On costs, counsel relied on the provisions of Section 27(1) of the Civil Procedure Act and the decision in **Party of Independent Candidate of Kenya & another V Mutual Kilonzo & 2 others** [2013] eKLR to urge the dismissal of the reference with costs.

Analysis and determination

It is common ground that the Applicant and the respondent had an Advocate client relationship involving several matters. The genesis of the instant application based on the Advocates bill of Costs dated 13th March 2023 under which the respondent was claiming the sum of Kshs.6,856,329.64 which was taxed to Kshs.746,909.00 on 21st November 2023.

This is the ruling the applicant is objecting to and seeks its being set aside and the bill of costs dealt with *de novo*.

The applicant's case is that the lack of service of the bill of costs by the respondent was the sole cause for the delay in filing the instant application, a delay the applicant had not admitted as having played any role.

Indeed, it averred that the same was filed without undue delay but was seeking extension or enlargement of time to object to the bill of costs.

The two grounds relied upon by the applicant, namely; lack of service by the respondent and want of jurisdiction by the taxing officer were vociferously contested by the respondent by way of affidavits of service and on WhatsApp and the applicant did not avail a copy of the alleged retainer agreement.

In **Omulele & Tollo Advocates V Mount Holdings Ltd** [2016] the Court of Appeal held;

“For the retainer agreement to exist, the terms thereof must have been reduced into writing, which was not the case here. It was the duty of the respondent to prove the existence of the retainer agreements since they were the ones making the claim. They did not discharge that burden as required. That they left their relationship as one governed by a retainer...”

These sentiments apply on all fours to those of the instant case.

The issues for determination are:

- (i) Whether the applicant has made a case for extension or enlargement of time under Rule 11(1) and (2) of the Advocates Remuneration Order.*
- (ii) Whether the taxing officer had jurisdiction to tax the bill of costs dated 13th March 2023.*
- (iii) Whether the taxing officer committed errors of principle.*

On enlargement or extension of time, the court proceeds as follows:

Rule 11 of the Advocates (Remuneration) Order provides:

- (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.**

The applicant's case is that it could not invoke Rule 11(1) and (2) of the Advocates (Remuneration) Order or raise any issue as the respondent did not serve the bills of Costs dated 13th March 2023.

Clearly Rule 11(4) confer upon this court discretion to enlarge time under sub paragraphs (1) and (2) of the Order which explains the applicants prayer No. 2 of the Chamber Summons dated 15th August 2025.

As correctly submitted by the applicant's counsel, the power of the court to enlarge the time under subparagraphs 11(1) and (2) of the Order involves the exercise of judicial discretion as held in **Nyakundi & Co. Advocates V Kenyatta National Hospital Board** (supra).

In exercising its discretion to enlarge time courts, are guided by established principles.

In **United Arab Emirates V Abbeleghafar & others** [1995] IRLR 243 the Employment Appeal Tribunal held *"...The grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the Appeal tribunal. The result of an exercise of discretion is not dictated by any set factor. Discretions are not packaged, programmed responses..."*

Similarly, in **Costellow V Somerset CC** at 959C, Sir Thomas Bingham Mr stated:

“...An extension of time is an indulgence required from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default”.

Equally, in **Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others** (supra) the Supreme Court of Kenya held:

“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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court: Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be

explained to the satisfaction of the court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time..”

The foregoing sentiments established beyond peradventure that the applicant shoulders the burden to demonstrate that the court’s discretionary favour ought to be exercised in their favour.

Applying the foregoing principles to the circumstances of the instant Chamber Summons, the court is satisfied that the applicant has failed to unlock the court’s discretionary favour, and this is why.

First, the applicant deposed that it learnt of the ruling when one of its officials were served with a ruling of a bill of costs in ELRC MISC. NO. E178 OF 2023 arising out of Nairobi ELRC 1068 of 2015.

The affiant did not disclose who the particular union official was and when he was served on WhatsApp.

Similarly, it did not provide snapshots of the message. Creditably, the respondent's counsel did.

The non-disclosure of the union official and more importantly, the date of receipt of the documents was a clear demonstration of the applicant's failure to provide a full and honest account of the factual matrix of its case.

The date of receipt of the service of those documents was critical because it is the date from which time started running against the applicant, if it had not received the bill of costs dated 13th March 2023, an allegation the respondent contested.

Without such a date it is difficult for the court to ascertain whether the applicant acted without unreasonable delay.

Second, assuming that the applicant did not receive the Bill of Costs, and was thus unaware of the ruling delivered on 21st November 2023, it would appear to suggest that the applicant was not communicating with the respondent who was handling its matters or request for status reports, which is done periodically to keep the client abreast with the cases. In any event, it is trite law a case belongs to the litigant not the advocate.

See in this regard **Muhoro V Ndung'u & another** [2025] KECA 1738 (KLR), **Francis Okello Rahuodho V Jael Apondi Akoo** [2025] KECA 328(KLR).

A litigant is obligated to show interest in his/her case as held in **Habo Agencies Ltd V Wilfred Odhiambo Musingo** [2015] eKLR.

The applicant furnished no scintilla of evidence of having contacted the respondent for status updates or any developments in the cases.

In sum, the applicant has failed to satisfactorily explain why it was unaware of a ruling on a bill of costs delivered more than one (1) year and 8 months earlier, yet the respondent was its advocate in ELRC NO. E007 OF 2024.

Third, since extension of time is an equitable remedy, its grant or refusal implicates equitable principles, such as delay defects equity.

In addressing laches, Halsbury's Laws of England, 4th Edition Vol 16(2) at 910 states

“A court refuses its aid to stale demands where the claimant has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (laches)”

It is trite law the equity aids the vigilant not the indolent.

Finally, grant of the Orders sought would prejudice the respondent who rendered services and was awaiting payment but the applicant did not pay, necessitating the bill of costs which birthed the ruling dated 21st November 2023.

The applicant did not allege that services were not rendered yet it came to court late to persuade the court to overturn a decision made almost two (2) years ago in favour of its counsel on record on the matters he was handling on its behalf.

This Chamber Summons, in the court’s view, was an afterthought intended to delay the respondent’s fruits of his labour.

Flowing from the foregoing, it is discernible that the applicant’s Chamber Summons dated 15th August 2025 is

devoid of merit and it is accordingly struck out with no Orders as to costs.

The other issues were dependent on enlargement or extension of time which the court has not granted.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 2ND DAY OF DECEMBER 2025.

DR. JACOB GAKERI
JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under

Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE

ORIGINAL