

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
MISC. CIVIL APPLICATION NO. E921 OF 2023

MILIMO, MUTHOMI & CO.
ADVOCATES.....APPLICANT
VERSUS
KENYA RAILWAYS STAFF
RETIREMENT BENEFIT
SCHEME.....RESPONDENT

RULING

1. For determination is **Kenya Railways Staff Retirement Benefit Scheme** (hereafter the Respondent) motion dated **05.12.2024** seeking *inter alia* -;
 - a) *Spent.*
 - b) *That leave be granted to the firm of Okwiri & Co. Advocates to be placed on record in the matter on behalf of the Respondent.*
 - c) *Spent.*
 - d) *That the honorable Court be pleased to give an order of enlargement of time allowing the Respondent to give notice in writing to the taxing officer objecting to such items of taxation that it intends to object to in relation to the taxation ruling dated 11.04.2024 within fourteen (14) days of the order of enlargement being granted.*
 - e) *That leave be granted to the Respondent to file its objection out of time and do operate as a stay of any intended execution against it pegged in the Court's orders issued on the 11.04.2024 pending the furnishing to it reasons thereto by the learned Deputy Registrar.*
 - f) *That the costs of the motion be provided for.*
2. The Respondent's application is brought among others pursuant **Paragraph 11(4)** of the **Advocates Remuneration Order (ARO)**

and supported by an affidavit deposed by **Issac Sila**, on **even date**, who cites being the Chief Executive Officer of the Respondent. The gist of his deposition is that **Milimo Muthomi & Co. Advocates** (*hereafter the Applicant*) filed a bill of costs as against the Respondent, which was taxed in the Applicant's favour on 11.04.2024. That being aggrieved by various taxed items in said ruling the Respondent wishes to object to the same, to wit, it has since notified the Applicant of its intention to file an objection. He goes on to depose that the Respondent is under imminent threat of execution given that the Applicant has since extracted a certificate of taxation therefore the Respondent is apprehensive of loss of pensioner's assets as such it is necessary that the orders sought herein are granted.

3. The **Applicant opposes the motion** of a by way of a replying affidavit dated **28.02.2024** deposed by **Jacqueline Busima Cynthia**. She confirms that the Applicant, having filed a bill of cost, was taxed on 11.04.2024 in the sum of Kshs. 3,549,184.34/-. That the Respondent was aware of the date of taxation having been served with a ruling notice which it acknowledged. She goes on to state that by acknowledging receipt of the ruling notice without raising any objection, the Respondent effectively expressed satisfaction with the taxation proceedings. Therefore, the Respondent is estopped from challenging the taxation ruling at this stage given that the instant application appears to be an afterthought. She goes on to state that, despite timeously objecting to the ruling as provided for in the Advocates Remuneration Order, there has been inordinate delay in filing the instant application therefore to re-open the taxation proceedings would be manifestly unjust and

prejudicial to the Applicant. In conclusion she deposes that the motion is devoid of merit and ought to be dismissed with costs.

4. In a rejoinder by way of a further affidavit dated 19.03.2025, **Issac Sila** iterates that given that the Respondent is a pension scheme whose funds belong to the elderly any monies paid out to Applicant needs to be justified to the pensioners and also the Retirement Benefit Authority. He concludes by stating that no prejudice will be visited on the Applicant in the event the application is allowed.
5. Directions were taken on disposal of the motion by way of written submissions, to wit, the parties duly complied. That said, the Court has duly considered the respective parties' affidavit material alongside the filed submissions. *Ex facie* it is the Court's postulation that the issues for **determination concern:** -
 - a) ***Whether the Court ought to grant the firm of Okwiri & Co. Advocates to come on record on behalf of the Respondent?***
 - b) ***Whether the Court ought to enlarge the time within which the Applicant may file its reference?***
 - c) ***Who ought to bear the costs of the motion?***

Whether the Court ought to grant the firm of Okwiri & Co. Advocates to come on record on behalf of the Respondent?

6. Here, it is not in dispute that the taxation of the Applicant's bill of costs proceeded and was taxed *ex parte*, without the Respondent's participation. By the taxation ruling rendered on 11.04.2024, there exists a final determination of the Court as pertains to the Applicant's bill of costs. As a result of the said taxation proceedings, a certificate of costs was extracted by the Applicant.
7. The purport of **Order 9** of the **CPR**, upon which the firm of **Okwiri & Co. Advocates** seeks leave to come on record for the

Respondent, has since long been settled. I associate myself fully with the rendition of **Kemei, J.** in **Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR** wherein she pithily observed that-;

“Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties.”

8. Therefore, in light of the fact that there was no counsel on record for Respondent as at determination of the Applicant’s bill of costs, I will not belabor any further on the issue and accord the firm of the firm of **Okwiri & Co. Advocates** leave to come on record on behalf of the Respondent.

Whether the Court ought to enlarge the time within which the Applicant may file its appeal?

9. In presenting the instant motion, the Respondent has relied on **Paragraph 11(4)** of the **ARO. Paragraph 11** of the ARO in its entirety provides that-;

(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.

10. Reasonably, a reference in my view is essentially a form of appeal, challenging the decision of a taxing officer. The applicable principles as may concern the instant application would thus not be dissimilar to those applicable when seeking leave to appeal out of time and or enlargement of time within which to lodge an appeal. The applicable principles with respect to the latter are settled and require no restatement.
11. It is trite that a successful applicant seeking leave to appeal out of time must demonstrate “*good and sufficient cause*” for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering **Rule 4** of the old Court of Appeal Rules which was in *pari materia* with **Order 50 Rule 6** of the **CPR** as well as **Section 79G** of the **CPA**, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that generally the matters which this Court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and

fourthly, the degree of prejudice to the Respondent of the application is granted.”

See also: - **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)**

12. It must be restated that the discretion of the Court in an application of this nature is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in his favor. The Applicant has specifically pointed out that the Respondent's delay in filing the motion was more than seven (7) months, of which, is unreasonable and inordinate whereas despite being served with a ruling notice on taxation, the Respondent failed to act and or assuage the situation.
13. A review of the record and Respondent's affidavit material, the Court indeed notes that the Respondent was served with a ruling notice on or about 25.03.2024 (**Annexure JBC-2**) whereafter the ruling was delivered on 11.04.2024. The Respondent only moved to action when it wrote to the Applicant intimating its intention to lodge an objection and instant application vide a letter dated 02.12.2024 (**Annexure IS-4A**) which is close to eight months after the impugned taxation ruling was delivered.
14. The Appellant is a pension scheme holding monies for retired pensioners of the Kenya Railway Corporation and being regulated by the Retirement Benefits Authority especially in regard to finances. This may indicate that the Appellant being a large corporation would be subject to beaurocracy. As said earlier, there was no counsel on record for the Respondent as at the determination of the Applicant's

bill of costs. The bill of costs was dated exparte and now the Respondent has an advocate.

Prejudice

15. The Appellant will greatly be prejudiced if this Application is allowed as its input will not be taken into consideration. On the other hand, the only prejudice that the Respondent will suffer is time. Taxation of bill of tax is a simple process that does not consume a lot of time and after all the Appellant has waited to enjoy its fruits for so many and so another wait of a month or so may not be of much significance compared to denying the Respondent the right to be heard. Needless to say, the decretal amount will continue to attract interests during the pendency of taxation.

Conclusion

16. This Court will balance Justice by allowing the application and since the Appellant was the cause of delay, it is condemned to pay costs of this Application.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 18TH DAY OF DECEMBER 2025.

**HON L P KASSAN
JUDGE**

In the presence of;

Olieti for Applicant

Ms Bwima for Respondent

Carol – Court Assistant

Mention on 19/2/2026