



JM Njenga & Co Advocates LLP v Kimuri Housing Company Limited (Environment and Land Miscellaneous Application E032 of 2023) [2025] KEELC 5686 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5686 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E032 OF 2023
NA MATHEKA, J
JULY 29, 2025

BETWEEN

JM NJENGA & CO APPLICANT

AND

KIMURI HOUSING COMPANY LIMITED RESPONDENT

RULING

1. The application is dated 20th January 2025 and is brought under Section 1A, 1B, 3, 3A and 34 of the *Civil Procedure Act*, Order 10 Rule 11, Order 22 Rule 22, 42 Rule 6, Order 45 Rule 11 of the Civil Procedure Rules and paragraph 11 of the Advocates Remuneration Order seeking the following orders;
 1. That the matter be certified urgent to be heard ex-parte in the first instance.
 2. That pending the hearing and determination of this Application, there be a stay of execution of the Decree and or decision dated 5th December, 2024 together with all subsequent orders geared towards execution.
 3. That the attachment of the Respondent's/Judgment Debtor's assets be lifted and the Warrant of Attachment dated 19th December, 2024 be set aside.
 4. That the Order and or Judgment entered on the 5th December, 2024 be set aside and or reviewed and the Respondent be granted an opportunity to defend the Application dated 15th October, 2024.
 5. That leave be granted to the Respondent/Client to file a Reference and or Appeal against the decision of the Taxing Master dated 18th September, 2024.
 6. That costs of this Application be in the cause.



2. The application is supported by the annexed Affidavit of MARGARET WAMBUI NGUGI and based on the grounds that on 18th September, 2024, the Decree Holder's Bill of Costs was taxed and allowed (inadvertently, the Client's Advocates were not in court) at a sum of Kshs. 15,834,785/= only. By an Application dated 15th October, 2024, the Decree Holder sought to enforce the Certificate of Taxation. The said Application and the hearing date were never served upon the Client's Advocates. Subsequently, the Client has established that in the stead, either by design or error, by an email dated 22nd November, 2024, the Decree Holder served upon the Client's Advocates an Application dated 16th September, 2024 filed in a different matter involving the same parties, to wit, ELC MISC. E122 of 2023. On 5th December, 2024, when the Application dated 15th October, 2024 came up for hearing, Mr. Kalii Advocate, an Associate in the Client's Advocates law firm, who was before the same court on a different matter, was notified of the Application by the court. Despite his having indicated that he was not aware of the matter and seeking time to establish the position, the court proceeded to allow the Application.
3. By a letter dated 9th December, 2024, the Client wrote to the Decree Holder's Advocates in a bid to establish the position of the matter but unfortunately, the same was not responded to. The Client is desirous of filing a Reference and or Appeal against the decision of the Taxing Master. Having studied the Ruling, it is evident that the Taxing Master fell into grave error by relying on a purported Valuation Report of the suit property which was not filed in the matter nor before her, in arriving at the value of the subject matter as a sum of Kshs. 500,000,000/=. On 14th January, 2024, M/S Fisra Auctioneer attached the Client's property by way of Proclamation. Unless an order of stay is issued the Client's properties are at a risk of being attached and consequence of which the Client shall suffer substantial loss and render the Application and intended Reference nugatory. The Reference and or Appeal has high chances of success. The Auctioneer has attached the Clients' tools of trade, an illegality. The Client is ready and willing to issue a bank guarantee for due performance of the Judgment herein. Justice in this matter will be served by giving the Client an opportunity to be heard on the Reference and the Application dated 15th October, 2024.
4. This court has considered the application and the submissions therein. The procedure for the challenge of a Taxing Master's decision is provided under Rule 11 of the Advocates Remuneration Order which provides as follows:
 - “(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the 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.”
5. The Applicant stated that the delay in filing the Application herein is explained by the fact that the Client was not aware of delivery of the Ruling by the Taxing Master and that the Advocate handling the matter was on leave from 6th December, 2024 until 20th January, 2025. That on the 18th September 2024, the Decree Holder's Bill of Costs was taxed and allowed (inadvertently, the Client's Advocates were not in court) at a sum of Kshs. 15,834,785/= only. They state that the taxing master relied on a valuation report which was not in court. The Respondents state that the Applicant was properly served with the hearing dated and dose not have an arguable defence. That the Applicant's acts are not



excusable and the application is meant to delay and frustrate the payment of taxed costs. I find that reasons given by the Applicant for failure to participate in the taxation are excusable

6. In the case of *Belinda Muras & 6 Others –vs- Amos Wainaina* [1978] KLR in which Hon Madan JIA (as) he then was defined what constitutes a mistake as follows:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.”

7. Similarly in *Phillip Chemwolo & Another Vs Augustine Kubede* [1982-88] KLR 103 at 1040 Apaloo J/A as he then was stated thus:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit”.

8. Finally on this point in *Shah Vs Mbogo & Another* (1967)6.A U7, the Court of Appeal for Eastern Africa held that;

“Applying the principle that the court’s discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused”.

9. I find that it has been demonstrated and has been conceded that no reference was filed within the stipulated 14 days period. The question is whether that failure to file the reference in time was excusable. The court must weigh the rights of the Respondent who has judgment in his favour against the rights of the Applicant to have their case heard and determined on the merits.

10. Counsel has explained what led to the inadvertent mistake and the failure to attend court during the taxation of file the reference in time. I find that this is not a case where there has indolence on the part of the Applicant or his advocate. The present application has not been brought merely to delay and/or to obstruct justice. In the case of *Martha Wangari Karua vs IEBC Nyeri Civil Appeal No.1 of 2017* the Court of Appeal held as follows;

“The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be..”

11. The amount involved in this taxation is a very substantial sum of Kshs. 15,834,785/=. I find this application is merited and I grant the following orders;

1. That the attachment of the Respondent’s/Judgment Debtor’s assets be lifted and the Warrant of Attachment dated 19th December, 2024 be set aside.
2. That the Order and or Judgment entered on the 5th December, 2024 be set aside and leave be granted to the Respondent/Client to file a Reference and or Appeal against the decision of the Taxing Master dated 18th September, 2024 within the next 30 days.



3. That costs of this Application be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JULY 2025.

N.A. MATHEKA

JUDGE

