

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS APPLICATION NO. E741 OF 2022

MUTUNDU WALLACE
ADVOCATES.....ADVOCATE/APPLICANT
VERSUS

JOHN **WAWERU**
KINUTHIA.....CLIENT/RESPONDENT

RULING

1. This ruling concerns the Client/Respondent's Chamber Summons dated 10th August 2023, brought under Paragraph 11 of the Advocates Remuneration Order, Section 3A of the Civil Procedure Act, Order 10 Rule 11, Order 12 Rule 7 of the Civil Procedure Rules and Article 159(2)(d) of the Constitution.

2. The Applicant seeks, inter alia:
 - i. Leave to file a reference out of time against the decision of the Taxing Master delivered on 24th February 2023;*
 - ii. Setting aside, quashing or vacating the taxation of the Advocate/Client Bill of Costs dated 12th October 2022;*

- iii. Stay of execution of the Certificate of Costs issued on 12th April 2023, and all consequential proceedings pending determination of the reference.*
3. The application is supported by the affidavit of John Waweru Kinuthia, sworn on 10th August 2023, wherein he depones that although he had instructed previous counsel to oppose the Bill of Costs, no submissions were filed on his behalf, resulting in taxation proceeding unopposed and culminating in execution through auctioneers without his knowledge.
4. The application is opposed through a Replying Affidavit sworn by Mutundu W. Chege on 16th August 2023, wherein it is contended that the Client was indolent, duly served, and that mistakes of counsel, if any, should not prejudice the Advocate who lawfully taxed his costs. A Preliminary Objection on jurisdiction and propriety of representation was also raised.

Analysis and determination

5. Having considered the pleadings, affidavits, submissions and authorities relied upon, the Court isolates the following issues for determination:
- i. Whether the Applicant has laid a basis for enlargement of time under Paragraph 11 of the Advocates Remuneration Order;*

- ii. *Whether the Court should interfere with the discretion of the Taxing Master; and*
- iii. *Whether stay of execution should issue.*

6. Paragraph 11(1) and (2) of the Advocates Remuneration Order provides a strict procedure and timeline for challenging a taxation. An applicant must issue a notice of objection within fourteen (14) days and thereafter file a reference upon receipt of reasons. It 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.”

7. However, it is equally settled that this Court retains residual discretion to enlarge time where sufficient cause is shown, in order to meet the ends of justice. The Court of Appeal in **Nicholas Kiptoo Arap Korir Salat v Independent**

Electoral and Boundaries Commission & 7 Others [2014] eKLR emphatically stated that:

“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.”

8. The Client’s explanation, borne out by the record, is that although represented, he was effectively unheard due to the failure by previous advocates to file submissions or take steps to oppose the Bill of Costs, thereby allowing taxation to proceed unopposed.
9. The record confirms that the Client was granted an opportunity to file submissions but none were filed, leading to the delivery of the taxation ruling in his absence.
10. Courts have consistently held that procedural timelines, though important, should not be applied mechanistically where their enforcement would result in manifest injustice. In **Belinda Murai & Others v Amos Wainaina [1979] eKLR**, the Court stated:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip...it should not necessarily debar a litigant from pursuing his rights.”

11. While the Court is alive to the principle that mistakes of counsel should not always be visited upon a litigant, that principle is not absolute. In **Habo Agencies Ltd v Wilfred Odhiambo Musingo [2015] eKLR**, the Court held:

“It is not enough for a party to simply state that his advocate failed to act. A litigant has a duty to follow up his case.”

12. The court cannot aid a litigant who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice

13. The court’s discretion should be exercised to facilitate substantive justice. The Applicant herein went to sleep on his rights for several months without any plausible explanation. Indolence, negligence and lack of vigilance cannot be sanitized by the mere invocation of “mistake of counsel.”

14. On whether the court should interfere with the Taxing master’s decision, the guiding principles are now settled. In **Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd [1972] EA 162**, the Court held:

“The taxation of costs is a matter of judicial discretion and an appellate court will not interfere unless the taxing officer has erred in principle or the award is manifestly excessive.”

15. Similarly, in **Joreth Ltd v Kigano & Associates [2002] eKLR**, the Court of Appeal stated:

“A judge will not interfere with the exercise of discretion by a taxing officer unless it is shown that either the decision was based on an error of principle or the fee awarded was manifestly excessive.”

16. The Applicant has not demonstrated any error of principle, misdirection, or application of a wrong tariff by the Taxing Master. Dissatisfaction with the quantum, without more, does not justify interference.

17. This Court finds that the Taxing Master properly exercised discretion within the parameters of the Advocates' Remuneration Order.

18. Lastly, stay of execution is a discretionary remedy. In **Butt v Rent Restriction Tribunal [1982] KLR 417**, the Court of Appeal held:

“The power of the court to grant or refuse an application for stay of execution is discretionary and should be exercised in such a way as not to prevent an appeal.”

19. However, discretion cannot be exercised in favour of an indolent litigant. There is no competent reference before this

Court and no arguable challenge to the taxation. Stay cannot issue in a vacuum.

20. To grant a stay in the circumstances would unjustly deny the Advocate the fruits of a lawful taxation and judgment.

21. In the upshot, the court finds the Applicant has failed to satisfy the threshold for extension of time, interference with taxation, or grant of stay. The application is an afterthought and an abuse of the court process, aimed at delaying the enjoyment of a valid decree.

22. Consequently, the Chamber Summons dated 10th August 2023 is hereby dismissed in its entirety. The Advocate/Respondent shall have the costs of the application Orders accordingly.

RULING delivered virtually, dated and signed at **NAIROBI**

This **12th** day of **February** 2026.

P.M. MULWA

JUDGE

In the presence of:

Mr. Chege for Advocate/Respondent

Ms. Njiru for JD/Applicant

Court Assistant: *Carlos*