

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL SUIT NO. 58 OF 2009

SYOMBUA MULE MUTAVA Alias
GLADYS SYOMBUA KILONZO
SALOME SYOMBUA MULE
PLAINTIFF/RESPONDENT

VERSUS

CHARLES A.K MULELA Alias
CHARLES ANDREW
KILONZO MULELA.....
DEFENDANT/APPLICANT

RULING

1. Before this court for determination is a Chamber Summons application dated 15th January 2025 filed by the Decree Holder seeking THAT;
 - a. The Applicant be granted leave to file an objection and a taxation reference to this Honourable court's taxing officer's ruling delivered on 28th November 2024;
 - b. The leave in prayer 1 above do operate as stay of execution of the Ruling of the Taxing officer aforesaid and any other consequential proceedings;
 - c. The objection to the Taxing Officer and the Application for reference annexed hereto be deemed as duly filed and served upon payment of requisite fees.

- d.** Costs of this application be provided for.
2. The application dated 6th May 2024 is premised on the grounds set out on its face and is supported by the affidavit sworn by the Applicant's counsel. The crux of the application is that three days following delivery of the impugned ruling, the counsel with due conduct of the matter became indisposed and was unable to file the reference within the prescribed fourteen days as specified under Paragraph 11 (1) of the Advocates Remuneration Order 2014. That it was not immediately brought to the attention of the counsel who took over as he only came to realize after the expiration of the time limits set out in the foregoing provisions of the law thus necessitating the filing of the present application.
 3. In opposition to the said application, the Respondent filed a Replying Affidavit sworn on 31ST January 2025. She deposes that the present application seeking stay is without merit as it does not meet the grounds for issuance of stay pending appeal stipulated under Order 42 Rule 6 of the Civil procedure Rules. She avers that the application has been brought after an inordinate delay that is, way after the taxation ruling was made with the knowledge of the Defendant's advocate on 28th November 2024 and that the present application has been filed on 15th January 2025 and only upon the communication by the judgment creditor to the respondent to settle the taxed costs on 8th January 2025.

She avers that the filing therefore is an afterthought only meant to frustrate her from recovering the awarded costs. She further depones that the Defendant has not indicated any willingness to deposit the costs awarded as security and therefore no evidence has been tendered that the Defendant is willing and able to settle the taxed costs. That without deposit of the entire taxed costs in court or joint interest earning account that there is a risk that the Applicant may fail to recover the sums awarded upon the determination of the reference.

4. The Respondent avers that the Defendant does not stand to suffer any loss if the application is declined and costs executed as the dispute concerns a money decree and in the event the reference is successful, the funds executed or paid will be refunded. Further, she avers that the extension of time being sought does not lie as of right and is discretionary to court and that the Applicant has not given any sufficient reasons warranting grant of leave/extension of time sought to file a reference. She states that although mistakes of advocates ought not to be visited upon a litigant, there must be cogent and credible evidence of demonstration of any efforts of due diligence of follow ups with the advocates to pursue his rights. Consequently, she deposes that since there is also no evidence of the applicant himself finding out the outcome of the taxation ruling and promptly taking necessary action to promptly file the

reference/appeal, the application is an afterthought. Further, she avers that the defendant and or his advocate have not demonstrated the alleged indisposition that occasioned their failure to file the reference on time having been aware of the decision. That in any event, upon the alleged indisposition 3 days after the said taxation ruling on 28th November 2024, the applicant's advocate had time to inform the client and or another counsel in the firm to take up the reference. She states that the foregoing was not done and it is until they were served with the certificate of taxation on 8th January 2025 that the Applicant filed the application.

5. She urged this court to dismiss the present application with costs.
6. The court directed that the present application be heard and canvassed by written submissions. The Applicant's submissions is dated 5th May 2025 and the Respondents' submissions is dated 29th April 2025.

Applicant's submissions

7. The Applicants submitted that the orders sought are discretionary and urged the Court to exercise its discretion in a manner that advances substantive justice. It was contended that the delay in filing the objection and reference within the timelines stipulated under Paragraph 11(1) and (2) of the Advocates Remuneration Order, 2014

was occasioned by circumstances beyond the Applicant's control. Specifically, counsel who had conduct of the matter became indisposed shortly after delivery of the impugned ruling and the existence of the ruling was not immediately brought to the attention of the counsel who subsequently took over the matter, resulting in the lapse of the prescribed timelines.

8. The Applicant identified two issues for determination, that is, whether the extension of time under Paragraph 11 (1) and (2) and 4 of the Advocates Remuneration Order 2014 should be granted and whether or not execution should be stayed.
9. Regarding the first issue, the Applicant the court's discretion under Sections 1A, 1B, 3A and 79 (G) of the Civil Procedure Act and on Paragraph 11(4) of the Advocates Remuneration Order, in submitting that the Court has express power to enlarge time even where the prescribed period has already expired. He further urged this court that the delay was neither deliberate nor inordinate, and that the Respondent would not suffer any prejudice incapable of compensation by costs. The Applicant cited **Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR** and **Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. Nairobi 255 OF 1997 (Unreported)**, to underscore the principles guiding the exercise of discretion in applications for extension of time,

particularly the length of delay, the reasons for delay, and the absence of prejudice. He submitted further that the delay in filing the reference is not inordinate or deliberate and the application brought solely in good faith and will not in any way occasion any prejudice to the Respondent.

10. On the issue of stay of execution, the Applicant submitted that unless stay is granted, the intended reference would be rendered nugatory. Reliance was placed on Order 42 Rule 6 of the Civil Procedure Rules and the decision in **Butt v Rent Restriction Tribunal [1979] eKLR and the case of RWW versus EKW [2019] Eklr** emphasizing that the purpose of stay is to preserve the subject matter pending determination of the dispute. It was contended that the application had been brought without undue delay and that substantial loss would be occasioned to the Applicant if execution were allowed to proceed.

11. The Applicant further submitted that the Taxing Officer erred in taxing the Bill of Costs at Kshs. 4,417,176/= without considering the binding decision of the Court of Appeal in **Syombua Mule Mutuva v Charles A.K. Mulela, Civil Appeal No. 2 of 2015**, wherein the Court expressly awarded the Respondent only one quarter of the costs of both the appeal and the High Court proceedings. It was argued that the failure to apply this clear directive resulted in an erroneous and illegal taxation, and that allowing

execution to proceed on the basis of such taxation would occasion substantial loss to the Applicant.

12. In conclusion, the Applicant maintained that sufficient cause had been demonstrated to warrant enlargement of time, that the intended reference raised arguable issues, and that the balance of justice favoured the grant of stay of execution pending determination of the reference. The Court was therefore urged to allow the application as prayed.

Respondent's Submissions

13. The Plaintiff/Respondent submitted that the Taxing Officer delivered a ruling on 28th November 2024 taxing the Plaintiff's Bill of Costs dated 20th November 2023 at Kshs.4,417,176/= and that the certificate of taxation was duly issued and served upon the Defendant on 8th January 2025 after failure to settle the taxed costs. The Respondent contended that the Applicant's motion seeking leave to file an objection and reference out of time, together with stay of execution, was an afterthought triggered only by the service of the certificate of taxation.

14. On the issue of enlargement of time, the Respondent submitted that Paragraph 11 of the Advocates Remuneration Order, 2014 provides clear timelines within which a party aggrieved by a taxation ruling must lodge an objection and reference, and although the Court has

discretion to extend time, such discretion is to be exercised judiciously and upon sufficient cause being shown. It was argued that since the taxation ruling was delivered on 28th November 2024, the Applicant had until 13th December 2024 to lodge an objection but failed to do so. The ruling was also availed to the parties on the e-filing system on 6th December 2024, well within the statutory period and no explanation was given as to why no steps were taken within that time.

15. The Respondent relied on the Supreme Court decision in **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] Eklr** , the case of **Great Rift Express Shuttle Limited & Another versus Onjete (Miscellaneous Reference Application 101 of 2023) [2024] KEHC 4523 (KLR) (20 March 2024) (Ruling)** and the case of **Lubuleliah & Associates Advocates versus N K Brothers Limited (Miscellaneous Civil Case 52 of 2012) [2014] KEHC 7393 (KLR) (Commercial and Tax) (24 January 2014) (Ruling)** to submit that an applicant seeking extension of time bears the burden of satisfactorily explaining the entire period of delay. It was contended that the Applicant's explanation, premised on the alleged indisposition of his advocate was vague, unsupported by evidence and failed to account for the Applicant's own duty to exercise diligence in following up the matter. The Respondent argued that no details were

provided regarding the nature of the indisposition, the steps taken upon discovery of the alleged illness or any efforts by the Applicant to pursue the objection within time.

16. It was further submitted that while mistakes of counsel may, in appropriate cases, not be visited upon a litigant, a party must nonetheless demonstrate that they did not condone or contribute to the delay. The Respondent maintained that the Applicant had failed to show any follow-up or proactive steps taken to safeguard his interests, and merely blamed counsel after the lapse of time. Reliance was placed on the case of **Raila Odinga versus Independent Electoral and Boundaries Commission and 3 others [2013] eKLR** and the case of **Nicholas Kiptoo Korir Salat versus Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** emphasizing that Article 159 of the Constitution and the overriding objective are not meant to undermine procedural rules or timelines, which are essential to certainty, fairness and orderly administration of justice.

17. On the prayer for stay of execution, the Respondent submitted that the Applicant had failed to meet the threshold set out under Order 42 Rule 6 of the Civil Procedure Rules. It was contended that the application was filed after inordinate delay, only after service of the certificate of taxation, thereby demonstrating lack of bona fides. The Respondent further argued that the Applicant had

not offered any security for the due performance of the decree, and had not expressed willingness to deposit the taxed sum or any portion thereof as required by law.

18. The Respondent also submitted that no substantial loss had been demonstrated, noting that the dispute concerns a money decree and that, in the event the reference was to succeed, the Respondent was known to the Applicant and capable of refunding any sums recovered through execution. It was therefore argued that the Applicant stood to suffer no irreparable prejudice if execution were allowed to proceed.

19. In conclusion, the Respondent submitted that the Applicant had failed to lay a sufficient basis for the grant of leave to file a taxation reference out of time or for stay of execution, and urged the Court to dismiss the application with costs.

Analysis and Determination

20. I have considered the application herein and the affidavits by parties and submissions and it is my view that two issues that emerge for determination are;

- a. Whether the Applicant has established sufficient cause to warrant enlargement of time to file a taxation reference out of time; and**

b. Whether the Applicant has satisfied the threshold for grant of stay of execution pending determination of the intended reference.

Whether the Applicant has established sufficient cause to warrant enlargement of time to file a taxation reference out of time

21. The procedure guiding the objection to the decision of a taxing officer is provided for under **Paragraph 11 of the Advocates Remuneration Order**. The provision provides for Objection to the decision on taxation 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.

22. Paragraph 11(4) however, vests this Court with discretion to enlarge time, even where the time prescribed has already lapsed. The principles to be considered in exercising the discretion whether or not to enlarge time are well set out by the Supreme Court in the case of **County Executive of Kisumu vs. County Government of Kisumu and 8 Others [2017] eKLR** held: -

“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat’s case to which all the parties herein have relied upon. The Court delineated the following as:

“the under-lying principles that a Court should consider in exercise of such discretion:

- 1.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;**
- 2.A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court**
- 3.Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4.Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- 5.Whether there will be any prejudice suffered by the respondents if the extension is granted**
- 6.Whether the application has been brought without undue delay; and**
- 7.Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

23.In the instance case, the taxation ruling was delivered on 28th November 2024. The Applicant was required to lodge a notice of objection within fourteen (14) days, that is by 13th December 2024. It is not disputed that no objection or reference was filed within the stipulated period. The present application was only filed on 15th January 2025, well over a month after the lapse of the statutory timelines

and after service of the certificate of taxation on 8th January 2025.

24. The explanation advanced by the Applicant for the delay is that counsel who had conduct of the matter became indisposed three days after delivery of the ruling, and that the existence of the ruling was not immediately brought to the attention of the counsel who subsequently took over the matter. The Respondent has contested this explanation, arguing that it is vague, unsupported by evidence, and does not account for the Applicant's own duty to exercise diligence.

25. No doubt, failure to take any action within the prescribed timeline on account of sickness or illness of a counsel is not something to be taken lightly and more of than not, courts will, in appropriate cases, bend over backwards to accommodate parties or their counsel who find themselves in such unfortunate but unforeseen circumstances. However, an explanation of sickness particularly where I have to exercise my discretion cannot be accepted at face value where it is contested. As observed by Odek JA in **George Kiptabut Lelei & Another v Fanikiwa Limited [2019] eKLR**, a plausible and satisfactory explanation for delay is the key that unlocks the Court's discretionary favour.

26. In the instant application, no documentary or other evidence has been placed before the court to demonstrate

the alleged indisposition of counsel. No medical note, treatment record or explanation has been offered to substantiate the claim. Further, no explanation has been given as to why, upon the alleged indisposition occurring only three days after delivery of the ruling, no steps were taken to notify the client or assign another advocate within the firm to act within the remaining period.

27. Additionally, the Applicant has not demonstrated any diligence on his own part in following up the outcome of the taxation or instructing counsel to lodge a reference within time. As held in **Rajesh Rughani v Fifty Investments Limited & Another [2016] eKLR**, it is not sufficient for a litigant to merely blame counsel without showing that he did not condone or contribute to the delay.
28. In the circumstances of this case, I am not persuaded that the Applicant has satisfactorily explained the entire period of delay or laid a sufficient basis to warrant the exercise of this court's discretion in his favour. The delay appears inordinate and the explanation proffered remains unsupported and not convincing.
29. In view of the foregoing, I find that the Applicant has failed to demonstrate sufficient cause to warrant enlargement of time under Paragraph 11(4) of the Advocates Remuneration Order 2014. Consequently, having failed on the primary limb, the prayer for stay of execution cannot stand.

30. The Chamber Summons application dated 15th January 2025 is therefore dismissed in its entirety with costs to the Respondent.

Orders accordingly.

Dated, signed and delivered at Machakos this 19th day of February, 2026.

RHODA RUTTO

JUDGE

In the presence of;

.....Applicant

.....Respondent

Selina Court Assistant