

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**MISC. CIVIL APPLICATION NO. E858 OF 2023**

**NJERU NYAGA &**

**CO.**

**ADVOCATES**

**LLP.....ADVOCATE/RESPONDENT**

**-VERSUS-**

**ANNE WAMBUI MUIRURI.....1<sup>ST</sup> CLIENT/APPLICANT**

**JAMES NJOROGE KARIUKI.....2<sup>ND</sup> CLIENT/APPLICANT**

**RULING**

1. For determination is the chamber summons application dated **11/08/2025** filed by **Anne Wambui Muiruri** and **James Njoroge Kariuki** as against **Njeru Nyaga & Co. Advocates LLP** pursuant to **Section 1A, 1B, 3 & 3A** of the **Civil Procedure Act (CPA)**, **Order 42 Rule 6** of the **Civil Procedure Rules (CPR)** and **Paragraph 11(1) & (4)** of the **Advocates Remuneration Order (ARO)** seeking *inter alia* -:

a) *Spent.*

b) *Spent.*

c) *That the honourable Court be pleased to enlarge the time within which the Client/Applicants may file a reference under Paragraph 11(1) of the Advocates Remuneration Order against the ruling of the Taxing Officer dated 15/08/2024.*

- d) That corollary to above prayer, this honorable Court be pleased to allow the Client/Applicants file the said reference within fourteen (14) days.
- e) That pending hearing and determination of the intended reference this honorable Court be pleased to grant stay of execution of taxation arising from the ruling delivered by the learned Taxing Officer on 15/08/2024
- f) That the costs of an incidental to this application be provided for.

2. The application is premised on grounds amplified in the supporting affidavit, of even date, sworn by **James Njoroge Kariuki** (hereafter the 1<sup>st</sup> Client/Applicant). The Court will set out the gist of the said affidavit later in this ruling.

3. **Njeru Nyaga & Co. Advocates LLP** (hereafter the Advocate/Respondent) on its part opposes the application by way of **grounds of opposition dated 14/08/2025** on grounds -;

- a. That the motion is incompetent and totally defective.
- b. That the attachments to the bill of costs clearly disclose an advocate client relationship and payment in excess of Kshs. 20 million being Kshs. 19,200,000/- LR. No. 7977/24 & 25 and Kshs. 8 million in cash as at 21/01/2020 when the supporting affidavit on Pg. 40 of the annexures was sworn.
- c. That the motion is res judicata.
- d. That the motion has no merit.
- e. That the motion has been filed after inordinate delay which has not been explained sufficiently.

- f. *That the supporting affidavit of James Njoroge sworn on 11/08/2025 is perjurious by virtue of denying incontrovertible facts and should be struck out.*
- g. *That the said James Njoroge Kariuki has not exhibited authority from Anne Wambui Muiruri to swear the affidavit on her behalf.*

4. Directions were taken on disposal of the application by way of written submissions. Only the Applicants complied. That said, the Court has considered the rival material and Applicants submissions, to wit, it postulates that the issues for **determination concern: -**

- a) *Whether the Court ought to enlarge the time within which the Client/Applicants may file a reference under Paragraph 11(1) of the Advocates Remuneration Order against the ruling of the Taxing Officer rendered on 15/08/2024?*
- b) *Whether the Court ought to grant stay of execution of the ruling of the Taxing Officer rendered on 15/08/2024 pending hearing and determination of the intended reference?*
- c) *Who ought to bear the costs of the instant application?*

***Whether the court ought to enlarge the time within which the Client/Applicants may file a reference under paragraph 11(!) of the Advocate Remuneration Order against the ruling of the Taxing Officer rendered on 15/08/2024.***

5. At the outset, in opposition to the motion, the Respondent preferred to file grounds of opposition. This Court has repletely observed that **Order 51 Rule 14 (1)** of the **CPR** recognizes the

*modus*, to wit, a party may oppose an application. Recently, the Court of Appeal in **Blue Thaitian SRL (Owners of the Motor Yacht ‘Sea Jaguar’) v Alpha Logistics Services (EPZ) Limited [2022] KECA 1240 (KLR)** observed that the effect of filing grounds of opposition in response to an application confines a party to issues of law and legal arguments only.

6. That said, the Court has observed that the Respondent’s grounds of opposition alongside raising issues of law and legal arguments has equally raised factual issues. In light of the exhortation in *Blue Thaitian SRL (Owners of the Motor Yacht ‘Sea Jaguar’) (supra)*; firstly, on the question of *res judicata*, though it constitutes a preliminary legal question, establishing its ingredients as set out in **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) (Civ)** and **Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**, requires an interrogation of factual issues.
7. Secondly, as concerns the competency of the affidavit in support of the application, it is apparent that the deponent merely alludes to being the 2<sup>nd</sup> Applicant and thus competent to depose. Therefore, the argument that the deponent failed to exhibit authority from the 1<sup>st</sup> Applicant to depose does not arise. Given that the former portends no insinuations to having authority, in his affidavit, to depose on behalf of the latter.
8. As to the question of enlargement of time within which to file a reference, while presenting the instant applicant, the 1<sup>st</sup> Applicant relies on among other provision **Section 3A of the**

**CPA** which specifically reserves “***the inherent power of the court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court”***”, to wit, this Court’s inherent powers was judiciously addressed by the Court of Appeal in **Rose Njoki King’au & Another v Shaba Trustees Limited & Another [2018] eKLR** and requires no restatement.

9. Alongside the above, the 1st Applicant has equally cited 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 arising from an impugned decision of the Taxing Officer. The applicable principles as may concern the instant application would thus not be dissimilar to those applicable when seeking leave to lodge an appeal out of time and or enlargement of time within which to lodge an appeal. The applicable principles with respect to the latter are since 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 Ltd [2003] KECA 201 (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.
- 13.** The circumstances that led to delay in filing the reference have been explained in the 1st Applicant's affidavit at Paragraph 5 and 6 therein, to constitute the misapprehension of the statutory procedure prescribed under Paragraph 11(1) of the Advocates Remuneration Order
- 14.** It would be remiss not to state, at this juncture, that the Applicants had indeed filed a reference in respect of the Taxing Officer's decision rendered on 15/08/2024 however the same was struck out by this Court vide a ruling delivered on 31/07/2025 for having been filed without leave. I find it useful to set out in part the relevant facets of my ruling rendered in **Njeru Nyaga & Company Advocates LLP v Muiruri & another [2025] KEHC 11401 (KLR)**. This Court observed in part as follows-;

*11.....From the record before the Court, it can be gathered or rather it is not in dispute that the taxing officer delivered her ruling on 15/08/2024. There was no activity in the matter up until 29/08/2024 when the Applicants lodged a letter pursuant to Paragraph 11(2) of the ARO, requesting for reasons for the ruling despite acknowledging in the very same letter of being dissatisfied by the taxing*

*officer's decision in respect of Items 2, 3, 4, 5, 6, 7 & 8. That said, it was not until 13/11/2024 that the Applicants lodged the instant reference without seeking any leave and or enlargement of time within which to lodge a reference.*

*This Court's understanding of Paragraph 11(1) & (2) of the ARO, is that time begins running upon delivery of the taxing officer's ruling. Upon delivery, it is incumbent upon the Applicants to have complied with Paragraph 11(1) of the ARO, it appears that they did so. However, notwithstanding the wording in first limb of Paragraph 11(2) of the ARO and the contents of the Applicants letter lodged on 29/08/2024, firstly it would seem that the Applicants were alive to the contents of the impugned ruling and had sufficiently digested its constituent elements.*

*Secondly, a perfunctory review of the impugned ruling that is the subject of the reference reveals that the taxation ruling is substantive, complete and contains reasons for the taxing officers' decision on the taxed items. Thus, if the Applicants were alive to the aggrieving facets of the ruling they ought to have, within fourteen (14) days, applied to this Court by way of a reference setting out their grounds.*

*In the Court's view, it was unnecessary, in the circumstances, for the Applicants to request and or wait to receive written reasons from the taxing officer to enable them to lodge their reference, as the ruling by design or form provided the reasons for the taxing on the items in the Bill of Costs.*

15....

*16. Undoubtedly, if the Applicants were minded despite the elaborate ruling, to lodge the Notice of Objection as a matter of routine, the Applicant ought to have contemporaneously filed the reference to avert being caught up by limitation.....*

**15.** Here, it is not in dispute that the Applicant timeously preferred to challenge the decision of the taxing officer. And in light of this Court's earlier ruling, the Applicants reference that was eventually struck out for reasons stated therein. That said, juxtaposing the above ruling and the present application, the Court is inclined to accept the explanation advanced by the Applicant. Further, delay in presenting the present application must have obviously been aggravated by the pendency of the ruling of this Court delivered on 31/07/2025.

**16. Makhandia JA in Patrick Wanyonyi Khaemba v Teachers Service Commission, Board of Management, Kapletingi Mixed Day Secondary School & Francis Tanui [2019] KECA 112 (KLR)**, while addressing himself to the question of delay observed that; -

*“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour.”*

**17.** In totality of the forestated there is “good and sufficient cause” for not filing the reference in time. Whereas the delay may appear inordinate it was not deliberate and or occasioned by the

Applicants. Undoubtedly, it would be a travesty of justice for the Court to drive the Applicants from the seat of justice for what appears to be an omission by counsel to properly construe the wording of statute, of which, the Court is inclined to excuse. Besides, it does not seem that the Respondent will suffer any prejudice that cannot be compensated through costs if the application is allowed.

- 18.** Concerning the arguability of the intended reference, based on the language employed in **Mutiso (supra)** the requirement touching on the viability of the intended appeal, is neither mandatory nor sternly applied in an application of this kind. The Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited [2020] eKLR** stated that ***“an arguable appeal need not (be one that will) succeed so long as it raises a bona fide issue for determination by the Court.”*** As is, the Court is concerned with leave to lodge a reference out of time.
- 19.** In the circumstances of the case, the Court is persuaded that to facilitate the Applicants undisputed right of appeal as equally advanced in Vishva (supra), leave ought to be granted to the Applicant to file his reference out of time.

***Whether the Court ought to grant a stay of execution of the ruling of the Taxing Officer rendered on 15/08/2024 pending hearing and determination of the intended reference?***

- 20.** It is evident on a plain reading of **Order 42 Rule 6(1) of the CPR**, that an order to stay of execution pending hearing and determination of an appeal or intended appeal presupposes the

existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this Court's appellate jurisdiction under **Order 42 Rule 6(1) of the CPR**. Notably, what is before the Court is a miscellaneous application seeking stay of execution of a taxation decision arising from the ruling delivered by the learned Taxing Officer on 15/08/2024, pending hearing and determination of the intended reference.

- 21.** Indubitably, a reference has yet to be filed. That said, this Court has observed time without number that the invocation of the jurisdiction of this Court under **Order 42 Rule 6 (1) or 6 (6) of the CPR** must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal. (See Order 42 Rule 1 of the CPR).
- 22.** Here, what is before the Court, concerns filing a reference. Thus deductively, **Order 42 Rule 1 of the CPR**, mutatis mutandis, would be applicable. Thus, where a party specifically seeks stay of execution pending hearing and determination of a reference not yet filed, the Court may be acting in vacuo by considering the Applicant's prayer for stay of execution pending a non-existent reference.
- 23.** The Court of Appeal in **Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] KECA 202 (KLR)** while addressing itself in part on the issue laconically observed:-

*“30. ....However, the learned Judge was correct in holding that in the absence of the appeal there was nothing upon which the stay orders sought under Order 42 of the Civil Procedure Rules could be anchored. Towards that end, we concur and adopt the observations made by Meoli,*

*J. in **Rosalindi Wanjiku Macharia vs. James Kiingati Kimani** (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR .....;*

*The prayer for stay of execution could only be canvassed after the appeal had been filed pursuant to the leave granted by the court. ....*

**24.** Earlier, the Court of Appeal in the case of **Equity Bank Limited v West Link Mbo Limited [2013] KECA 320 (KLR)** while commenting on **Rule 5(2)(b) of the Court of Appeal Rules**, whose wording is substantially similar to **Order 42 Rule 6 (1) of the CPR, and or Order 42 Rule 6(6) of the CPR**, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also **Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR**).

**25.** Paragraph 11(2) of the ARO provides that a party may within fourteen (14) days from the receipt of the reasons for taxation from the Taxing Officer apply to a judge by chamber summons, setting out the grounds of his objection. By reason of the latter provision an appeal by way of reference takes the form of chamber summons. And, as is, a reference chamber summons application, is yet to be filed as such there is no basis upon which this Court could exercise its jurisdiction under the said provision, vide the present proceedings.

**26.** If the Applicants desired to seek an order to stay execution alongside *enlargement of time within which to file a reference*, they ought to have first filed the chamber summons application meanwhile

seeking *inter alia* to have the reference deemed as properly filed though filed out of time. In my considered view, the words that “enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step, appears to admit both retrospective and prospective applications.

**27.** So that enlargement under the **Paragraph 11(4)** of the **ARO** may be sought before or after a reference has been filed. However, it may be more prudent for a party who also seeks stay of execution pending determination of reference, in the same motion for enlargement, to have filed the chamber summons application in advance. Consequently, the prayer for stay of execution is accordingly declined. The upshot is that the Applicants motion partially succeeds in the following terms-;

- a) An order hereby issues enlarging the time within which the Client/Applicants may file a reference under Paragraph 11(1) of the Advocates Remuneration Order against the ruling of the Taxing Officer dated 15/08/2024.**
- b) The reference be filed and served within fourteen (14) days of this ruling.**
- c) Costs of the application are awarded to the Respondent in any event and capped at Kshs. 4,000/-**

**Order accordingly**

**Delivered Dated and Signed at Nairobi this 5<sup>th</sup> March, 2026.**

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**JANET MULWA.**

**JUDGE**

ORIGINAL