

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC CASE NO. 378 OF 2017

MARGARET
.....**PLAINTIFF/APPLICANT**

MWIKALI

NGUNGU

-VERSUS-

CHINA ROAD & BRIDGE
CORPORATION1ST DEFENDANT/RESPONDENT
ANN KANINI MUTISO (Sued as the legal representative of the estate of
ELIJAH NGUNGU MWENGI (Dcsd)2ND DEFENDANT/ RESPONDENT

RULING

1. Before this Court for determination is the Plaintiff/Applicant's Notice of Motion dated 16th June, 2025 brought under the provisions of Article 159 of the Constitution, Sections 1A, 3A and 63(e) of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules.
2. The Plaintiff/Applicant seeks issuance of the following orders: -
 - 1) [SPENT]
 - 2) [SPENT]
 - 3) **THAT this Honourable Court be pleased to enlarge the time within which to file a reference against the decision of the Taxing Master delivered on 17th July, 2023.**
 - 4) **THAT this Honourable Court be pleased to grant an order for stay of execution of the Taxing Master's order issued on 17th July, 2023 pending the hearing and determination of the intended reference.**
 - 5) **THAT this Honourable Court be pleased to compel the 2nd Respondent/Defendant's Advocates to release the death certificate of**

the late Elijah Ngungu Mwengi in the alternative produce the 2nd Defendant in court.

6) THAT the costs of this application be provided for.

3. The application is based on the grounds appearing on its face together with the supporting affidavit of Margaret Mwikali Ngungu sworn on even date. The deponent averred that a judgment was delivered in the present suit on 24/11/2022 dismissing the suit with each party directed to bear its own costs. It was further averred that the 2nd Defendant in utter disregard of the court's judgment proceeded to file a party and party bill of costs which was taxed at Kshs. 235,965/= and a certificate of taxation dated 10th August, 2023 issued thereafter.
4. The Applicant contended that the certificate of taxation had since been converted into a decree and the 2nd Defendant had instructed a firm of auctioneers to proceed with proclamation and attachment. It was contended that the delay in filing the present application had been occasioned by the notion that the Plaintiff could not move the court to challenge the Taxing Master's decision as the 2nd Defendant was yet to be substituted by his lawful beneficiaries.
5. The Applicant urged the court to allow the orders sought in the application so as to avert hardship and injustice resulting from an unlawful process. It was further contended that the orders sought will not occasion prejudice upon the Respondents.
6. Opposing the application, Naomi M. Mutinda advocate for the 2nd Respondent filed a replying affidavit sworn by herself on 14th July, 2025. She averred that the Plaintiff filed a Notice of withdrawal of the suit against the 2nd Defendant on 6th January 2022. That on 14th February, 2022, the suit against the 2nd Defendant was withdrawn and the court further directed the 2nd Defendant to file and serve

his bill of costs. Counsel contended that her law firm had been on record for six years and a lot of work had been done in defending the suit by the time the Notice of withdrawal was being filed.

7. Counsel contended that the judgment delivered on 24th November, 2022 was in respect of the 1st Defendant only after the suit against the 2nd Defendant had already been withdrawn. Counsel further contended that the issues being raised in the present application were dealt with by the court vide the ruling dated 24th April, 2024 and the Applicant had not preferred an appeal to date. Counsel contended that the execution of warrants of attachment and proclamation was done on the instructions of the 2nd Defendant before his demise on 6th January, 2025.
8. Counsel contended that the application herein is merely a delaying tactic to frustrate the execution process. It was further averred that it would be prejudicial upon the 2nd Defendant for the court to enlarge time which had lapsed by one year and eleven months since the decision of the Taxing Master was delivered on 17th July, 2023.
9. The Applicant filed a further affidavit sworn by herself on 25th August, 2025. She averred that to purport to issue instructions for recovery of costs through an auctioneer without the knowledge of the legal administrators of the estate constitutes intermeddling which is illegal. She added that she is ready to offer reasonable security as a condition for stay pending the hearing and determination of the intended reference.
10. The application was canvassed by way of written submissions. In the Applicant's submissions dated 25th August 2025, Counsel adopted the averments made in support of the application to buttress the submission that the Applicant had met the threshold for grant of the orders sought. Counsel further

submitted that the bill of costs was taxed contrary to the decision of the court directing each party to bear its own costs.

11. The 2nd Defendant/Respondent filed its submissions dated 3rd February, 2026. Counsel submitted that the present application had been inordinately delayed without a satisfactory explanation. Counsel contended that the Applicant had failed to establish sufficient cause to be granted the orders sought in the application. Counsel urged the court to dismiss the application with costs.

12. The only apparent issue for determination is whether the Applicant has demonstrated merit in the instant application for enlargement of time to file a reference.

13. Paragraph 11 (4) of the Advocates (Remuneration) Order outlines the powers of the court in respect to an objection to a Taxing officer's ruling and in respect of a reference where time has lapsed in the taking of any steps for either when an Applicant is aggrieved. The law sets out as follows: -

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.

14. Under the provisions of the Advocates (Remuneration) Order, the court has unfettered discretion on whether to enlarge time or not. However, that discretion has to be exercised judiciously, and in accordance with the principles set out in Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. Nai 251 of 1997 where this Court of Appeal held that: -

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

15. Similarly, in Mereka & Company Advocates v Kiereini & another (Miscellaneous Application E113 of 2022) [2023] KEHC 20231 (KLR), the Court stated that: -

“It is common ground that the Court has discretion under Rule 11(4) of the Advocates Remuneration Order to enlarge time for filing of a reference. The principles to guide courts in considering applications of this nature are well articulated by the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the court stated as follows:

- i. 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;*
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;*

- v. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- vi. *Whether the application has been brought without undue delay; and*
- vii. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

16. The present application was filed on 16th June, 2025 whilst the ruling of the Taxing officer was delivered on 17th July, 2023 as shown in Exhibit “MMN001” annexed to the further affidavit. The Advocates (Remuneration) Order gives a timeframe of about 28-days from the lodging of a notice of objection with the Taxing officer and the receipt of reasons for the decision to an Applicant to appeal to this court vide a reference. However, as admitted, the Applicant did not comply with the provisions of Paragraph 11 (1) and (2) of the Advocates (Remuneration) Order.

17. A reference against the Taxing officer’s ruling ought to have been filed in or about 14th August, 2023. The Applicant attributed the delay in filing of a reference to the notion that she could not move the court to challenge the Taxing officer’s decision as Elijah Ngungu Mwengi (Deceased) was yet to be substituted by his lawful beneficiaries.

18. That explanation is highly implausible in view of the fact that Elijah Ngungu Mwengi (Deceased) died on 6th January, 2025. Before the demise of the deceased, the Applicant had already participated in the application dated 29th August, 2023 resulting in the ruling dated 24th April, 2024. Even after delivery of the ruling, the Applicant lingered for about one year and two months before making the present application for enlargement of time to file a reference.

19. Evidently, it is clear that the Applicant is guilty of inordinate delay of about one year and ten months since the Taxing officer delivered her ruling. The said delay has not been satisfactorily explained.

20. In the end, the instant application is devoid of merit and is dismissed with costs. It is so ordered

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS

THIS 12TH DAY OF MARCH, 2026.

IN THE PRESENCE OF:

Ms. Odago for Mr. Mwanza for Plaintiff.

Ms. Muthoki for Mr. Mutinda for 2nd Defendant.

Court assistants – Musyoki and Nyaanga