



**M'Ibere v Marete & another (Miscellaneous Application
E022 of 2023) [2024] KEELC 1726 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
MISCELLANEOUS APPLICATION E022 OF 2023**

CK NZILI, J

MARCH 20, 2024

BETWEEN

FREDRICK MUTHAMIA M'IBERE APPLICANT

AND

EVANGELINE KAJUJU MARETE 1ST RESPONDENT

SIMON MUGAMBI MARETE 2ND RESPONDENT

RULING

1. The applicant prays for leave to file a reference out of time against an assessment of costs pursuant to a certificate of stated costs dated 3.2.2023 in respect of the bill of costs filed on October 28, 2022 in Nkubu PMC ELC No. 81 of 2018. Once leave is granted, the court is asked to deem the reference as duly filed to reassess it or make findings on the same or, in the alternative remit it for re-assessment by a different taxing master.
2. The reasons are contained on the face of the application and a supporting affidavit of David Pius Mugambi sworn on November 15, 2023. Briefly the applicant avers the subject suit was compromised by way of consent with costs to the applicant, then the defendant to be agreed or taxed in default of an agreement. The applicant avers he filed a bill on October 25, 2022 and served it upon the respondent, who filed an objection dated 6.12.2022, eliciting his rejoinder dated January 25, 2023, based on a valuation report showing the subject matter as valued at Kshs.21,000,000/=. The applicant avers the bill was taxed at Kshs.141,530/= without disclosure of any reason or rationale applied to the said taxation. Further, the applicant avers the ruling was delivered in his absence or without notice against his right to a fair trial. He says there will be no prejudice to the opposite side if the application is allowed.
3. The applicant has attached copies of the order dated May 23, 2022, a copy of the bill, copy of the objection. Reply to the objection and a valuation report, the certificate of stated costs, and a copy of the



- bill as annexures marked DPM 1-6, respectively. He termed the assessment as against Schedule 7 of the [Advocate's Remuneration Order](#), the valuation report, a travesty to justice and a grave prejudice to him.
4. The application is opposed through a replying affidavit sworn by Leonard Ondari Advocate on February 12, 2024, for being filed after an inordinate delay which is not explained delay for lack of a letter to the taxing master requesting for the reasons before coming to court and for introducing a valuation report without leave of court against rules of fair play.
 5. Further, the respondents aver that the valuation report was wanting since it did not form part of the court record and lastly, that the decision by the taxing master was right and fair. Additionally, the respondents aver that the applicant has not attached the proceedings to this application for the court to determine the application reasonably.
 6. With leave of court, the applicant filed written submissions dated 22.2.2024. The applicant submitted that his application is premised on Rule 11 (1) & (4) of the [Advocates Remuneration Order](#). Regarding whether the lower court had jurisdiction to hear and determine the suit filed by the respondent against him on L.R No. Abogeta/Upper Kiungone/1727 & 1728, it was submitted that the two parcels of land were beyond the pecuniary jurisdiction of the Principal Magistrate under Section 7 & 9 of the [Magistrates Act](#), as read together with Section 4 of the [Civil Procedure Act](#) going by the valuation report attached as DPM – 04. Consequently, the applicant submitted the entire proceedings at the lower court and the certificate of costs was ab initio null and void. Reliance was placed on [S.K Macharia & another v KCB Ltd & others](#) [2012] eKLR, [Jamal Salim v Yusuf Abdullahi Abdi & another](#) [2018] eKLR, [National Social Security Fund Board of Trustees v Kenya Tea Growers Association & others](#) [2023] KECA 80 (KLR) C.A No. 656 of 2023.
 7. The applicant submitted that the only applicable remedy in law would have been for the trial court to remit the taxation of the party-to-party bill of costs to a taxing master with the requisite jurisdiction or, in the alternative, this court to undertake the said exercise.
 8. On the ability of this court to issue the reliefs sought, it was submitted that under Rule 11 (4) of the [Advocate's Remuneration Order](#). It has unfettered jurisdiction to grant leave, in line also with Sections 1A & 3A of the [Civil Procedure Act](#), more so since the certificate of stated costs was a nullity.
 9. The applicant submitted the need imperatively to request for the reasons the assessment was extinguished as no legitimacy could be drawn nor inferred from the said certificate of costs and that such illegality can only be purged by this court by either taxing or remitting the bill of costs to a competent taxing master under Schedule vi of the [Advocate's Remuneration Order](#) whose summation for fees based on Kshs.21,000,000/= would be Kshs.120,000/= plus Kshs.380,000/= and Kshs.15,000/= totaling to Kshs.515,000/=.
 10. What the applicant is principally seeking is leave to file a reference against the assessed party to party costs as per the certificate of stated costs dated February 3, 2023, pursuant to Order 22 Rule 8 of the [Civil Procedure Rules](#) and a decree dated April 27, 2022. In [Joreth Ltd v Kigano & Associates](#) [2022] 1 E.A 93, the court said the value of a subject matter of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment, or settlement (if such be the case, but if the same was not ascertainable, the taxing master was entitled to use his discretion to assess such instruction fees as he considers just, taking into account amongst other things, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings and any directions by the trial court and all other relevant circumstances.



11. The applicant avers that he filed his party-to-party bill specifying the instructions fee discerned under Schedule vi Part B of the *Advocate's Remuneration Order*, but the taxing officer refused to give any basis or reasons for not relying on the valuation report of the subject matter.
12. The applicant, in his written submissions, appears to have expanded his attack of the certificate of stated costs to say that since the suit was filed in a court without jurisdiction, anything else done after the order dated May 23, 2022, was a nullity ab initio. On the other hand, the respondents take the view that the applicant is guilty of laches, the inordinate delay has not been explained, and that the assessment was fair.
13. In determining whether leave can be granted to file a reference out of time, the certificate of stated costs is dated February 3, 2023. This application was filed on November 28, 2023. The applicant has not stated when he became aware of the certificate of stated costs. He has not told the court when the ruling was supposed to be delivered and whether he made any follow-ups to establish the status of the ruling. The applicant has not mentioned when he obtained the certificate of stated costs. It is not clear if the applicant wrote to the taxing court to know why the assessment was taking too long.
14. In *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, the court said some of the factors to consider as the length of the delay, reasons for the delay, degree of prejudice to the opposite party, and whether the matter raises issues of public importance. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral Boundaries Commission & another* [2013] eKLR, the court said the extension of time was not a right of a party but a discretionary power of the court to be exercised on a case-case basis and in the interest of justice.
15. In *Jaber Mohsen Ali & another v Priscillah Boit and another* [2014] eKLR, the court said what is unreasonable delay was dependent on the surrounding circumstances of each case, for even one day delay would be unreasonable. In *Gorge Kagima Kariuki & another v. George Gichima & others* [2014] eKLR, the court said the law had not set any minimum or maximum period of delay. However, there must be a plausible and satisfactory explanation for the discretionary power to be favorably exercised. See also *Stanley Kaboro Mwangi & others v Kanyamwi Trading Co. Ltd* [2015] eKLR and *Alice Wamaitha v Jane Wanjiru* [2018]eKLR.
16. In the *County Executive of Kisumu v County Government of Kisumu & others* [2017] eKLR, the supreme court said the whole period of delay should be declared and explained satisfactorily to the court. The court cited Nicholas salat (supra) that the burden of laying a basis to the satisfaction of the court was on the applicant and that the application should be brought without undue delay.
17. In this application, the applicant has not explained the delay of over nine months. The proposed draft reference has not been attached. Nevertheless, the applicant has raised a fundamental point as to whether a court without jurisdiction can still proceed to tax or assess costs flowing from the proceedings withdrawn as in this case for lack of jurisdictional.
18. In my view, that issue is of public importance. The respondents have not expressed any likely prejudice they may suffer if the reference was made, albeit out of time.
19. The respondents have not stated if they paid the assessed costs, if in their view were fairly assessed.
20. The upshot is that I grant leave to the applicant to file a reference out of time. The same shall be filed within seven days from the date hereof. Costs of this application to the respondents.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU



ON THIS 20th DAY OF MARCH, 2024

In presence of

C.A Kananu

Mr. MUGambi for the applicant

Kava for Ondari for the respondent

HON. C K NZILI

JUDGE

