



**Onyango v Tribe Hotel Limited (Civil Appeal (Application)  
282 of 2017) [2024] KECA 766 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 766 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 282 OF 2017  
K M'INOTI, JA  
JULY 5, 2024**

**BETWEEN**

**JOSPHAT COSMAS ONYANGO ..... APPLICANT**

**AND**

**TRIBE HOTEL LIMITED ..... RESPONDENT**

*(Application for extension of time to make a reference to a single judge from the ruling of the taxing officer (Hon. Ogombe) dated 9th November 2022 in C A No. 282 of 2017)*

**RULING**

1. The applicant, Josphat Cosmas Onyango seeks a raft of reliefs in his motion on notice dated 8<sup>th</sup> June 2023, some of which cannot be issued by a single judge. The applicant seeks extension of time to file a reference from the ruling dated 9<sup>th</sup> June 2022 by the Deputy Registrar (Hon. Ogombe) acting as a taxing officer, an order of stay of execution of the said ruling; an order setting said of the said ruling on taxation as regards items Nos. 1, 6, 17, 19, 23 and 25 in the bill of costs dated 28<sup>th</sup> June 2022 and an order for re-taxation of the said items by a different taxing officer.
2. The only prayer, at least for now, which is properly before me, is the prayer for extension of time to make a reference from the decision of the taxing officer. It is the only prayer that I will consider in this ruling.
3. The brief background to the application is that the applicant filed a claim in the Employment and Labour Relations Court at Nairobi (ELRC) against his employer, Tribe Hotel Ltd. (the respondent). On 5<sup>th</sup> May 2016 he obtained some interim orders restraining the respondent from terminating his employment, pending the hearing of the claim. The respondent allowed the applicant back in employment but sent him on leave because he had outstanding leave days. Upon completion of the leave the applicant obtained employment elsewhere and the respondent suspended his salary and benefits.



4. On 22<sup>nd</sup> February 2017, the applicant took out contempt of court proceedings against the directors of the respondent alleging that they had violated the interim orders issued by the ELRC. The application was heard by Mbaru, J. who by a ruling dated 6<sup>th</sup> April 2017 found the directors to be in contempt of court.
5. The respondent was aggrieved and lodged an appeal in this Court.  
By a judgment dated 23<sup>rd</sup> February 2018, the Court allowed the appeal awarded costs to the respondent. On 28<sup>th</sup> June 2022 the respondent lodged its bill of costs claiming a total of Kshs 703, 009.64.
6. By a ruling dated 9<sup>th</sup> November 2022, the taxing officer taxed the respondent's bill of costs at Kshs. 441, 414.75. The applicant was aggrieved by the award of the taxing master as regards item Nos. 1, 6, 17, 19, 23 and 25 in the bill of costs. That when the drama really started.
7. On 16<sup>th</sup> November 2022, the applicant made a taxation reference in the ELRC seeking the setting aside of the decision of the taxing officer of this Court and re-taxation of the said items. How the applicant could challenge in the ELRC the decision of the taxing master of this Court must rank as one of the mysteries of legal practice. Be that as it may, on 8<sup>th</sup> June 2023, Manani, J. struck out the reference for lack of jurisdiction.
8. Finding himself back to square one, on the same day, 8<sup>th</sup> June 2023, the applicant filed the application now before me for extension of time to make a proper reference before the court with jurisdiction over the matter. The applicant has been quite candid that the delay in making the reference was occasioned by the mistake of his counsel who made the reference in the ELRC rather than to a single judge of this Court.
9. The applicant adds in his written submissions dated 20<sup>th</sup> July 2024 that other than the unfortunate mistake of filing the reference in the wrong court, the reference was filed within the prescribed time. He urges that the mistake of his counsel should not be visited on him.
10. The applicant further submits that his intended reference has good chances of success because the taxing officer committed errors of law and principle by failing to take into account the fact that the appeal in question was an interlocutory appeal and by basing the instruction fees on the total amount claimed by the applicant in his claim. He also contends that the taxing officer erred by failing to take into account the fact that he did not participate in the interlocutory appeal, which was not complex.
11. Although the respondent's advocates, Messrs. B. M. Musyoki & Company Advocates were served with a hearing notice on 13<sup>th</sup> May 2024 together with directions to file their written submissions, they did not comply.
12. I have considered the application for extension of time. The factors that guide this Court in an application for extension of time are well settled. In *Imperial Bank Ltd (In Receivership) & Another v Alnashir Popat & 18 others* [2018] the Court identified those facts as follows:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public



interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

(See also *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, CA. No. Nai. 255 of 1997 and *Fakir Mohamed v Joseph Mugambi & 2 Others*, CA. No. Nai 332 of 2004).

13. On length of delay, I note that the ruling of the taxing officer in respect of which the applicant wishes make a reference was rendered on 9<sup>th</sup> November 2022. Under the rules, the applicant had seven days to make a reference. The applicant made a reference within the prescribed period, but to the wrong court. When his reference was struck out by the ELRC for want of jurisdiction on 8<sup>th</sup> June 2023, he promptly filed the current application on the same date. In as far as observing the timelines is concerned, the applicant has not been indolent.
14. Nevertheless, the delay from the date of the ruling of the taxing officer to the filing of the application for extension of time is a period of seven months, which would be inordinate granted that the reference is required to be filed within seven days. The critical issue is the explanation for that delay.
15. As I pointed out earlier, the applicant has been candid that the delay was occasioned by the mistake of his counsel who filed the reference in the wrong court. This Court readily accepts bona fide mistake of counsel, which is candidly explained as a good explanation for delay. In the memorable words of Madan, JA (as he then was) in *Belinda Murai & 9 Others v Amos Wainaina*, CA. No. Nai. 9 of 1978:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so requires. It is all done in the interests of justice.” (Emphasis added).
16. Unless there is lack of candour, intention to overreach or mislead, or dilatoriness, which would disentitle an applicant to an equitable remedy, the Court strives, in so far as it is possible and in the wider interest of justice, to have matters determined on their merits. (See *Tononoka Steels Ltd v The PTA Bank*, CA No. 295 of 1998).
17. I am not persuaded that the applicant’s intended reference is a mere frivolity. I would prefer to err on the side of caution by letting the issues that he wishes to raise to be considered on merit. In the absence of any response by the respondent, I am also not able to say that the respondent will suffer more prejudice than the applicant.
18. For the foregoing reasons, I find merit in the applicant’s application for extension of time. I allow the same and direct the applicant to make the reference from the ruling of the taxing officer dated 9<sup>th</sup> November 2022 within seven (7) days from the date of this ruling. Costs of this application shall abide the outcome of the reference. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY, 2024.**

**K. M’INOTI**



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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**Signed**

**DEPUTY REGISTRAR.**

