



**Said & 2 others v Schering (Civil Appeal (Application)  
142 of 2019) [2023] KECA 770 (KLR) (23 June 2023) (Ruling)**

Neutral citation: [2023] KECA 770 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) 142 OF 2019  
SG KAIRU, JA  
JUNE 23, 2023**

**BETWEEN**

**NEREAH MICHAEL SAID ..... 1<sup>ST</sup> APPELLANT**

**GERHARD HEIDUK ..... 2<sup>ND</sup> APPELLANT**

**WOLFGANG GEORG JOHAN EHGARTNER ..... 3<sup>RD</sup> APPELLANT**

**AND**

**THOMAS SCHERING ..... RESPONDENT**

*(Being an application for extension of time for the filing of a reference from the decision of the Taxing Master made on 27th February 2023 in an appeal against the ruling and order of the Environment and Land Court at Mombasa (Yano, J.) delivered in 16th September 2019 in Environment & Land Court Case No. 442 of 2017)*

**RULING**

1. In their application dated March 15, 2023, the applicants, Nereah Michael Said, Gerhard Heiduk and Wolfgang Georg Johan Ehgartner seek an order against the respondent Thomas Schering for extension of time for the filing of a reference from the decision of the Taxing Master made on February 27, 2023.
2. Mr Abidha Nicholus, learned counsel for the applicants urged the application before me on the June 13, 2023. In support of the application, he referred to the grounds on the face of the application; the supporting and further affidavits sworn by Nereah Said Michael; and the applicants written submissions dated May 26, 2023.
3. The applicants intend to file a reference on taxation under Rule 117 of the [Court of Appeal Rules](#). It is there case that the parties appeared before the Deputy Registrar on 13<sup>th</sup> and February 14, 2023 to confirm filing of submissions in favour of and against the respondent's bill of costs dated November 14, 2022 and a ruling was reserved for March 6, 2023; that without notice to the parties, the date for



delivery of the ruling was brought forward to February 27, 2023 and the applicants' advocates only got to know of the ruling when the advocates for the respondent contacted them on March 8, 2023 for payment of taxed costs; that the following day, namely March 9, 2023, the advocates made a request to the Court to be supplied with the ruling on taxation which was sent to them by the court on March 10, 2023 by which time the seven days prescribed under Rule 117(4) of the Court of Appeal Rules had lapsed; and that the present application dated March 15, 2023 was then promptly filed.

4. On the strength of the decision of the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others [2014] KESC 12 (KLR)*, Counsel urged, that the applicants are deserving of the exercise of the court's discretion.
5. In opposing the application, Mr Masore drew the Court's attention to the replying affidavit sworn by Thomas Schiering and the respondent's written submissions dated June 12, 2023 on which he relied entirely.
6. It was urged for the respondent that the delay involved is inordinate and not excusable; that the applicants' attempt to blame the court is absurd; that counsel for the applicant did not appear on the scheduled date for ruling and neither did they seek to find out the outcome of the taxation until after receiving a demand from the respondent's counsel; and that it was incumbent upon counsel for the applicant to follow up on the matter which they did not.
7. I have considered prayer 1 of the application dated March 15, 2023 only to the extent of the request for extension of time for the filing of the reference on taxation. Extension of time, as stated by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others*, Supreme Court Application No 16 of 2014[2014] eKLR is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; extension of time is a consideration on a case to case basis; and delay should be explained to the satisfaction of the court. Other considerations include whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration. See also decision of the Court in *Fakir Mohamed vs Joseph Mugambi & 2 others [2005] eKLR*.
8. It is deposed in the replying affidavit of Thomas Schiering that the matter was before the Deputy Registrar on 13<sup>th</sup> and February 14, 2023; that a ruling date was given for March 6, 2023; that there was no date for February 27, 2023 and that the ruling was delivered on March 6, 2023. However, the ruling of the Deputy Registrar exhibited to the supporting affidavit shows that it is 'dated and delivered at Mombasa this February 27, 2023' which gives credence to the claim by counsel for the applicants that the date for delivery of the ruling was brought forward to February 27, 2023 without notice to the parties.
9. Upon becoming aware of delivery of the ruling, counsel for the applicants applied to court for the ruling which was then transmitted to counsel under cover of an email from the office of the Deputy Registrar dated March 10, 2023.
10. Taking the date of the ruling as it appears on the face of the ruling as February 27, 2023, the applicants should have made the application for a reference on or before March 6, 2023 to comply with Rule 117(4). If on the other hand the ruling on taxation was delivered on March 6, 2023 as the respondent asserts, then the application for reference should have been made on or before March 13, 2023 in which event the present application dated March 15, 2023 was late by two days. In the foregoing circumstances, a satisfactory explanation for the delay has been given and I do not consider the delay involved to be inordinate.



11. I accordingly grant the applicant's application for extension of time and order the applicants to file and serve their reference within 14 days from the date of delivery of this Ruling.
12. I make no orders as to costs.

**DATED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF JUNE 2023.**

**S. GATEMBU KAIRU, FCIarb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

