



REPUBLIC OF KENYA



Migori County Government & another v Tom Ojienda & Associates (Miscellaneous Case E049 of 2025) [2025] KEELRC 2244 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2244 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CASE E049 OF 2025**

**JK GAKERI, J
JULY 29, 2025**

BETWEEN

MIGORI COUNTY GOVERNMENT 1ST APPLICANT

MIGORI COUNTY PUBLIC SERVICE BOARD 2ND APPLICANT

AND

PROF TOM OJIENDA & ASSOCIATES RESPONDENT

RULING

1. Before the court for determination is the Applicant's Chamber Summons dated 30th May, 2025 filed under Certificate of Urgency seeking Orders that: -
 1. Spent.
 2. The Applicant be granted leave to file a Taxation Reference to this Honourable Court against the Ruling of the Taxing Officer delivered on 13th May, 2025 in Kisumu ELRC Misc. No. E016 of 2025.
 3. Spent.
 4. The Honourable Court be pleased to issue an Order of stay of execution of the Ruling of the Taxing Officer pending the determination of the Taxation Reference herein.
 5. The Application for Reference annexed hereto be deemed as duly filed and served upon payment of requisite fees.
 6. Costs of this application be provided for.
2. The Chamber Summons is based on the grounds set out on its face and the Supporting Affidavit sworn by Gideon O. Orimbo on 3th May, 2025.



3. The applicant avers that it was notified of the Ruling by the Taxing Officer vide email dated 16th May, 2025 by which counsel sought written instructions to file a taxation reference and notified the applicant that time was of the essence and instructions were received on 19th May, 2025, but counsel was unable to file the reference within 14 days as provided by the [Advocates Remuneration Order, 2014](#), due to an inadvertent mistake and on 27th May, 2025 the advocate could not file the same on account of a power blackout in Migori town and its environs had no prior notice of the black out, the 3 days delay was not inordinate and mistake of counsel should not be visited on the client.
4. That the applicant was contesting several items of the Bill of Kshs.1,652,306.00.

Response

5. By a Replying Affidavit sworn by Professor Tom Ojienda SC on 11th July, 2025, the affiant deposed that the instant application was misconceived, lacked merit and disclosed no reason to warrant the grant of the orders sought.
6. The affiant further deposed that the applicant's counsel had sufficient time to file the reference having received instructions on 19th May, 2025, about 8 days to do so, and no concrete justification had been availed why the application was not filed.
7. That the Kenya Power and Lighting Co. power outage Notice was on Wednesday 28th May, 2025 from 8:00am to 5:00pm as opposed to 27th May, 2025 as alleged and the outage on 28th had no effect on the filing of the reference.
8. The affiant deposed that the applicant had not demonstrated sufficient cause or satisfactory explanation as to why the reference was not filed on time.
9. On the delay, the affiant deposed that it was dependent on the circumstances of every case.
10. That the applicant had a 30 days stay of execution granted earlier and the execution process was protracted and there was no threat of execution.

Applicant' Submissions

11. As to whether the applicant had demonstrated a case for issuance of the orders sought, counsel relied on the provisions of paragraph 11(1) and (2) of the [Advocates Remuneration Order](#) to urge that the court's discretion is exercisable on the basis of whether the failure is excusable.
12. Counsel submitted that the 14 days lapsed on 28th May, 2025 and the failure was unintentional and justifiable and in any case it was on account of counsel's inadvertence as the application was ready but for power outage on 28th May, 2025, to urge the court to find that it was an excusable mistake and the intended application raised pertinent questions and had chances of success.

Respondent's Submissions

13. The respondent's counsel relied on the sentiments of the Supreme Court in [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others](#) [2014] eKLR to urge the applicant had not satisfactorily explained the failure to file the reference application on time.
14. Reliance was also made on the decision in [County Executive of Kisumu v County Government of Kisumu](#) on the burden of the applicant to explain the delay satisfactorily to the court.
15. Counsel, further submitted that the applicant's advocate had sufficient time to file the application after receiving instructions on 19th May, 2025.



16. Similarly, the power outage in Migori was on 28th May, 2025 not 27th May, 2025 and could not impede the filing.
17. Reliance was placed on the sentiments of the court in [Great Rift Express Shuttle Ltd & another v Onjete](#) [2024] eKLR to underscore the essence of a reasonable explanation for enlargement of time to file a reference.
18. It was further submitted that the delay by the applicant was inordinate as it was dependent on the circumstances and facts of each case as held in [Moses Mwangi Kimani v Shammi Kanjira Parambil Thomas & 2 Others](#) [2014] eKLR. Counsel added that the respondent had already filed an Application seeking entry of Judgment against the applicant, hence the delay was inordinate and could occasion prejudice to the respondent on realization of costs.
19. Finally, counsel submitted that there was no imminent execution on account of the provisions of Section 21 of the [Government Proceedings Act](#) which required a Certificate of Order Against the Government, as explained in [Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security](#) [2012] eKLR.
20. The singular issue for determination is whether the applicants Chamber Summons herein is merited.
21. It is common ground that the applicant did not comply with the provisions of paragraph 11 of the [Advocates Remuneration Order](#), which prescribe timelines within which objections and Reference application ought to be made.

Under Rule 11

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.
22. From the record, it is clear that the applicant did not lodge any objection with the taxing officer, which in essence would have accorded it more time to prepare, file and serve the Reference Application. This is because, once an objection is filed time starts running on the taxing officer and his/her response accords the objector another 14 days to file the reference as necessary.
 23. Undoubtedly, the taxing officer not bound to provide reasons under Rule 11(1) of the [Advocates Remuneration Order](#) if they were already part of the ruling delivered earlier, as held in [Benard Gichohi Njira v Kanini Njira Kathendu](#) [2015] eKLR. See also [Ahmed Nassir v National Bank of Kenya](#) [2006] EA.
 24. As correctly submitted by counsel for the parties, extension of time to enable party institute a reference application involves the exercise of judicial discretion which must be exercised judicially as held in [Mombasa County Government v Kenya Ferry Services & Another](#) [2019] eKLR cited in [Mohammed Ahmed Abdalla & 6 Others v National Environment Management Authority & Another](#) [2024] KEELC 7190 (KLR).



25. In *Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others* (*supra*), the Supreme Court laid down the guiding principles as follows:

...It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

We derive the following as the underlying principles that a Court should consider in exercise of such discretion:

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

26. In the instant application, the application herein was made without undue delay, which is creditable.

27. However, the failure to file the reference application within the prescribed duration has not been satisfactorily explained for the following reasons.

28. First, although the ruling was delivered on 13th May, 2025, the ruling was never brought to the client's notice until 3 days later and instructions sought which took another 3 days. In sum the first one (1) week was spent on Advocate/client communication.

29. Second, after the Advocate received instructions vide email dated 19th May, 2025 at 12:39pm, no action was taken until 27th May, 2025 when the Reference application was drafted eight days after instructions were received and no explanation has been provided.

30. Third, whereas it is true that 3 days may not be inordinate delay, there is no general rule as each case is dependent on its facts and circumstances, as held in *Jaber Mohsen Ali & Another v Priscillah Boit & Another* [2014] eKLR where Munyao Sila J. held

" What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and anys Order given thereafter. In *Christopher Kendagor v Christopher Kipkorir Eldoret E & L 919 of 2012*, the applicant had been given 14 days to vacate the suit land. He filed an application one day after 14 days the application was denied..."



31. Fourth, the Kenya Power & Lighting Co. Ltd's notice of power outage in Migori availed by the applicant, and as contended by the respondent shows that the blackout was scheduled to take place on 28th May, 2025 and although the applicant avers that its counsel was unaware of the scheduled blackout the same had been notified to the public previously by the utility company and it was not on 27th May, 2025 as alleged.
32. Having failed to satisfactorily explain the delay from the date of receipt of instructions and the respondent was likely to suffer prejudice as he had already filed an application for entry of judgment, after having accorded the applicant time to object and/or file a reference application but to no avail, it is the finding of the court that the applicant has failed to provide sufficient explanation to demonstrate why the Chamber Summons was not filed within the prescribed duration.
33. Consequently, the application for enlargement of time is without merit and it is accordingly dismissed with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH DAY OF JULY, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

