



**Kenyatta National Hospital v Momanyi t/a Nchogu, Omwanza and Nyasimi Advocates
(Miscellaneous Application 21 of 2019) [2024] KEELRC 2644 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2644 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION 21 OF 2019**

**BOM MANANI, J
OCTOBER 31, 2024**

BETWEEN

KENYATTA NATIONAL HOSPITAL APPLICANT

AND

**JOB NYASIMI MOMANYI T/A NCHOGU, OMWANZA AND NYASIMI
ADVOCATES RESPONDENT**

RULING

Background

1. The Respondent/Applicant has filed the application dated 9th April 2024 seeking inter alia, the following orders:-
 - a. That the court grants it leave to file a Reference out of time against the decision of the Taxing Master which was rendered on 22nd January 2024.
 - b. That upon the grant of such leave, the Reference dated 20th February 2024 be deemed as having been filed and served within the timelines prescribed by law.
 - c. That costs of the application be in the Reference.
2. The basis for the application is that:-
 - a. The Respondent/Applicant was notified of the ruling which necessitated the proposed Reference on 2nd February 2024, just a few days before the lapse of the fourteen days within which it (the Reference) ought to have been filed.
 - b. The Respondent/Applicant spent some time procuring the services of the lawyers who were to represent it thus delaying instructions to them.



- c. By the time the lawyers were instructed on 5th February 2024, the time for presenting the Reference was running out as this was the last day for the exercise.
 - d. It was therefore not possible to lodge the Reference before the close of 5th February 2024.
 - e. The reason for the delay by the lawyers on record to notify the Respondent/Applicant of the ruling of 22nd January 2024 was that the Taxing Master took time to correct typographical errors in the ruling and release the fair copy to the parties.
 - f. The process of correcting errors in the ruling took up to 2nd February 2024, the day the lawyers were given the corrected copy of the ruling.
3. The application is opposed. The Applicant/Respondent contends that the impugned ruling was delivered in the presence of the lawyers for the Respondent/Applicant. Therefore, they had the opportunity to file the Reference within the timelines stipulated in law.
 4. The Applicant/Respondent further contends that the court is *Functus Officio*, the Reference having been filed in a matter which is closed. As such, the instant application should be rejected.
 5. The Applicant/Respondent contends that the application was presented only after he filed a preliminary objection to the Reference. As such, it is intended to defeat the preliminary objection.
 6. The Applicant/Respondent avers that the Respondent/Applicant has not provided plausible reasons for the delay in filing the Reference. As such, the application is devoid of merit.
 7. Further, the Applicant/Respondent argues that the instant application was filed outside time. As such, the court lacks jurisdiction to entertain it.
 8. In addition to the replying affidavit, the Applicant/Respondent filed a Notice of Preliminary Objection. A careful examination of the said objection reveals that it raises the same issues which have been raised in the replying affidavit.
 9. As such, I will consider and treat it (the objection) as part of the response to the application. In effect, I will combine the ruling on both the application and objection without the necessity of drawing a demarcation between the two.

Analysis

10. Rule 11 of the Advocates (Remuneration) Order provides as follows:-
 - i. 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.
 - ii. 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.
 - iii. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - iv. 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.

11. Evidently, if a party to a cause for taxation of costs wishes to challenge the decision of the Taxing Master, he is required to file a Reference against it to the High Court within fourteen days of receipt of the reasons for the decision from the Taxing Master. However, where the reasons for the decision are apparent in the ruling, such Reference must be presented within fourteen days of receipt of the ruling.
12. Despite the foregoing, the High Court has discretion to enlarge the time for filing the Reference. However, this discretion must be exercised judiciously.
13. The Respondent/Applicant has explained the circumstances which resulted in the delay in filing the Reference in question. It appears that the challenges in meeting the timelines set by law commenced with the delay by the Taxing Master in releasing the certified ruling to the parties.
14. Although the ruling was read on 22nd January 2024, copies of it were not available for collection by the parties until 2nd February 2024 approximately ten days down the line. This left the Respondent's/Applicant's lawyers only four days to notify their client of the outcome of the taxation and seek its instructions in the matter.
15. Although the lawyers were present when the ruling was delivered on 22nd January 2024, they were obligated to share a copy of the decision with their client in order for the latter to digest its content and determine how to proceed with the matter. The record shows that the lawyers discharged this duty on 2nd February 2024, the very day they got a copy of the ruling.
16. It is not in dispute that the Respondent/Applicant is a public body which is governed by provisions of the [Public Procurement and Asset Disposal Act](#). Therefore, it was not unreasonable for it to have sought quotations from providers of legal services regarding the fees they would charge to handle the case before settling for one of them.
17. The court takes judicial notice of the fact that the process of competitive procuring for services takes some while. It cannot be a day's activity. It was therefore not unreasonable for the Respondent/Applicant to have taken up to 5th February 2024 to instruct counsel on record.
18. Having regard to the totality of the aforesaid circumstances, I do not think that the failure by the Respondent/Applicant to file the Reference within the timelines provided in law was out of reckless abandon by either it (the Respondent/Applicant) or its lawyers. It appears to me that there were justifiable reasons for the delay. As such, I am satisfied that the Respondent/Applicant is justified to seek enlargement of time to file the Reference.
19. I have considered the objection by the Applicant/Respondent regarding whether the court is functus officio. Although it would have been desirable for the Respondent/Applicant to file a separate Reference, the fact that it presented the Reference in an earlier file does not render the court functus officio in respect of the new Reference. This is because the new Reference is based on an entirely distinct taxation order.
20. I have also considered the Applicant's/Respondent's contention that the court lacks jurisdiction to entertain the application since it was filed outside time. In my view, the answer to this objection lies in rule 11(4) of the Advocates Remuneration Order. This provision allows the court to consider such application notwithstanding that it has been filed after the time which is sought to be enlarged has expired. As such, the instant application was properly filed and the court has jurisdiction to entertain it.



Determination

- 21. Having regard to the foregoing, I arrive at the conclusion that the application dated April 9, 2024 is merited.
- 22. As such, I allow the motion as presented.
- 23. Costs of the application shall abide the outcome of the Reference.

DATED, SIGNED AND DELIVERED ON THE 31ST DAY OF OCTOBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant/Respondent

.....for the Respondent/Applicant

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

