



REPUBLIC OF KENYA



Gitau & 6 others v Attorney General for Commissioner of Lands & another (Environment & Land Case 120 of 2008) [2024] KEELC 5516 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5516 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 120 OF 2008**

OA ANGOTE, J

JULY 18, 2024

BETWEEN

MARION GITAU 1ST PLAINTIFF
AGNES KAGIRA 2ND PLAINTIFF
BEATRICE KANYURU 3RD PLAINTIFF
ROLAND KIOGORA 4TH PLAINTIFF
WANJIRU KIONGO 5TH PLAINTIFF
SYLVIA MUTHONI 6TH PLAINTIFF
LISA MWAKAZI 7TH PLAINTIFF

AND

**THE ATTORNEY GENERAL FOR COMMISSIONER OF
LANDS 1ST DEFENDANT**
**KIPCHOGE KEINO, TOM O'MWOMBO, FRIDAH SHIROYA (JOINTLY BEING
SUED AS THE TRUSTEES OF THE NATIONAL OLYMPIC COMMITTEE-
KENYA 2ND DEFENDANT**

RULING

1. The Plaintiffs in this suit have filed a Chamber Summons application under sections 1A, 1B and 3A of the *Civil Procedure Act*, and rules 11(1) and (2) of the *Advocates Remuneration order 2009* dated November 2, 2023. In the application, the Plaintiffs have sought for the following orders:
 - a. That the Plaintiffs be granted leave to file an objection and a taxation reference to this Honourable Court against the ruling of the Honourable Court's Taxing Officer delivered on October 21, 2022, by Hon. I.N. Barasa Deputy Registrar.



- b. That the leave granted in prayer (a) above do operate as stay of execution of the ruling of the taxing officer aforesaid and other consequential proceedings.
 - c. That the objection to the Taxing Officer and the application for Reference dated January 19, 2023 be deemed as duly filed and served having paid the requisite charges.
 - d. That the costs of this application be provided for.
2. The application is based on the grounds set out in the application and the Supporting Affidavit sworn by Mr. Byaruhanga McRonald, the Plaintiff's Advocate, who deposed that on October 21, 2022, Deputy Registrar, Hon. I.N. Barasa delivered a ruling on the taxation of the Party and Party Bill of Costs dated May 4, 2022 and that upon delivery of the ruling, he wrote to the Taxing Officer requesting for a copy of the ruling and reasons vide a letter dated October 21, 2022.
 3. The Applicant's advocate deposed that unfortunately, before a copy of the ruling could be obtained, he proceeded for sick leave and annual leave in November and December 2022 and was only able to resume working from January 10, 2023. Consequently, he deposed, when he resumed working, the fourteen days within which to file the Reference had already lapsed, and was not able to file the Reference within time.
 4. The Plaintiff's counsel deposed that the two month's delay in filing the reference is not inordinate and can be genuinely explained; that the failure to file the Reference within the set timelines was not deliberate or intentional and that when he proceeded for leave in November 2022, his health was fragile and he was not in a state of mind to work on the file or to delegate to a colleague to take over the conduct of the matter.
 5. Counsel relied on the principle that the mistake of an advocate should not be visited upon an innocent litigant and that the delay was caused by circumstances beyond his control.
 6. The 2nd Defendant has opposed the application *vide* the Grounds of Opposition dated November 17, 2023. These grounds are that the Plaintiffs slept on their rights for a long time; that the ruling on taxation on 21st October 2022 was delivered in the presence of the Plaintiff's Counsel, B. McRonald; that the medical document annexed to the application dated 7th November 2022 was well outside the 14 days prescribed by rule 11(1) of the [Advocates Remuneration Order](#) and that the law firm has other advocates, including the advocate who has been signing all the pleadings which were filed in court.
 7. The 2nd Defendant deposed that the Plaintiffs have not demonstrated why they deserve a favourable exercise of discretion of the court and that the application dated November 2, 2023 is ripe for striking out. The parties filed submissions which I have considered.

Analysis and Determination

8. The background to this application is that Hon. I.N Barasa delivered a ruling on the 2nd Defendant's Party and Party Bill of Costs dated 4th May 2022, on October 21, 2022. Being dissatisfied with this ruling, the Plaintiffs, through their Advocate, Mr. Gatheru Gathemia, sent a letter to the Deputy Registrar requesting for reasons on the taxed items 1 and 2 of the Party & Party Bill of Costs.
9. Counsel Byaruhanga McRonald asserts that he subsequently fell sick and took sick leave and annual leave between November and December 2022. It is his claim that he could only file the application on January 13, 2023 when he resumed to perform his duties.



10. Paragraph 11 of the *Advocates (Remuneration) Order* provides a detailed process of objection to taxation of costs as follows:

- “ 11. Objection to decision on taxation and appeal to Court of Appeal.
- (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.
 - (3) 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.
 - (4) 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. It is trite that enlargement of time is a discretionary remedy. In the Supreme Court case of *Nicholas Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR, the court outlined the following as the under-lying principles that a court should consider in the exercise of its discretion:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



12. In the case of *Johana Kipkemei Too v Hellen Tum* [2014] eKLR, the court considered the circumstances under which a court may consider filing of a document filed out of time. It stated as follows:

“The court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules. This was indeed the reasoning of the Supreme Court in the case of *Raila Odinga & 5 others v IEBC & 3 others*, Supreme Court of Kenya, Petitions Nos 3,4 and 5 of 2013 [2013] eKLR, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.

This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of article 159(2)(d) of the *Constitution*. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules.

The question that now arises is whether it will be in the interests of justice, given the circumstances of this case, to allow the application by the defendant to adduce the additional witnesses and documents.”

13. In the suit herein, the impugned ruling against which the Plaintiffs seek to file a reference is dated October 21, 2022. The Plaintiffs’ advocate promptly sought for reasons for the said ruling by a letter that was sent on the same day. There is no indication by either party whether there was any response by the Deputy Registry to this later.
14. In any case, it is evident to this court that the reasons for the taxation of Items 1 and 2 on the Party and Party Bill of Costs, are in the body of the ruling dated October 21, 2022.
15. In accordance with rule 11 of the *Advocates Remuneration Order*, the reference challenging the Ruling of the Taxing Master ought to have been filed within fourteen days, that is on November 4, 2022. However, the Plaintiff, through their advocate Gatheru Gathemia, filed a reference *vide* the Notice of Motion application dated January 23, 2023.
16. The current application, which is seeking leave to file the said application out of time, was filed on 2nd November 2023. Therefore, on computation of time, there is an overreach of about one year from the date of the decision.
17. The reasons given for the delay in filing is that the Plaintiff’s Counsel, Byaruhanga McRonald, was unwell and took leave between November and December 2022. This court notes that in this matter, Mr. Byaruhanga McRonald has represented the Plaintiff’s case together with Mr. Gatheru Gathemia. In fact, it is Mr. Gathemia who filed the reference application in January 2023.



18. From the record of this court, after filing the reference application in January 2023, on 10th May 2023, Mr. McDonald sought two days to make a formal application for leave to file the reference out of time, which this court granted. However, when the matter then came up for mention on 11th October 2023, Mr. McDonald had not filed the application and sought a further fourteen days to do so.
19. It was not until 2nd November 2023 that the application was filed, many months after counsel was given an opportunity to file the application. Indeed, by May, 2023 when the court directed the Applicant's counsel to file the application, counsel had recovered from his illness.
20. In the circumstances, it is the finding of this court that the Plaintiffs and their counsel have failed to satisfactorily lay a basis for this court to exercise its discretion in their favour.
21. Considering the long delay in filing this application, the 2nd Defendant would undoubtedly suffer prejudice because he would be restrained from enjoying the fruits of the Judgement of the court due to laches on the part of the Plaintiffs.
22. The upshot of the foregoing is that this court is not persuaded to exercise its discretion in favour of the Plaintiffs.
23. The application dated 2nd November 2023 is therefore dismissed with no order as to costs.

Dated, signed and delivered virtually in Nairobi this 18th day of July, 2024.

O. A. Angote

Judge

In the presence of;

Mr. Kuria for the Plaintiff

Mr. Arusei for 2nd Defendant

Court Assistant: Tracy

