



**Ndururi v Judicial Service Commission (Cause 92 of 2019)  
[2023] KEELRC 532 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 532 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 92 OF 2019  
K OCHARO, J  
FEBRUARY 21, 2023**

**BETWEEN**

**JOSEPH RIITHO NDURURI ..... PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**RULING**

**Introduction**

1. Through a Notice of Motion application dated 4<sup>th</sup> March 2022 the Petitioner/Applicant seeks for the following orders:
  - i. The matter be certified urgent and the Honourable Court grant direction on its disposal.
  - ii. That the Honourable court be pleased to grant leave of time within which to lodge the reference against the ruling of the Taxing master delivered on 15<sup>th</sup> February, 2022 and time be extended and the court grant direction for disposal of the reference upon such leave.
  - iii. That the Honourable Court, do set aside /interfere/ substitute the ruling of the Taxing master in respect of item one on instructions fees or remit the same matter to a different Registrar or make a ruling thereof as it deems fit, just and fair.
2. The application is anchored on the grounds obtaining on the face of the application and the affidavit sworn by the Petitioner/Applicant, on 21<sup>st</sup> March, 2022.
3. The application is opposed upon premise of the grounds obtaining on the replying affidavit sworn by Winfreda Mokaya, the Respondent's Registrar.
4. When the application came up for hearing, the parties were directed to file their respective submissions, a direction that they have adhered to.



## **The Application**

5. The applicant states that the ruling on the party and party costs herein was delivered by the Taxing master in his absence and that of his counsel. The absence was as a result of the fact that the Advocate had mis-diarized the matter.
6. That on the 20<sup>th</sup> February, 2021 his counsel made up a follow up on the position of the ruling and on the 4<sup>th</sup> March, 2022, he was given a copy of the ruling for perusal.
7. As at the time counsel was receiving the ruling, time for assailing the same as provided for in the law had lapsed.
8. The Petitioner/Applicant contends that considering the subject matter of Petition herein which is in excess of ksh, 11,000,000 as the Taxing masters'. Decision on item 1 of the Bill of Costs was grossly under assessed.
9. It was further urged that counsel's misbehavior should not be visited on his client.
10. The Taxing master did not consider the effect of the decision of the Court of Appeal in [\*Judicial Service Commission v Joseph Riitho Nduriri\*](#) (2021) eKLR hence missing out on the exact nature of the subject matter.

## **The Response.**

11. The Respondent contends that the application herein is defective and incompetent having invoked the wrong principles of law.
12. The Respondent states that pursuant to a judgment delivered by the court herein on 22<sup>nd</sup> November, 2019, the Applicant herein was awarded costs of the petition. He subsequently filed his party and party Bill of Costs drawn in the sum of ksh949,981.00 on 27<sup>th</sup> July, 2021, which he later amended to ksh829,981.00.
13. Further that pursuant to the ruling delivered on 15<sup>th</sup> February, 2022 the Deputy Registrar correctly taxed the Party and Party Bill of Costs at the sum of ksh349,981.00 for Item 1 which the applicant intends to assail. The decision was based on the subject matter as awarded in the judgment.
14. The Respondent argues that paragraph 11 of the Advocates Remuneration Order provides that the applicant being dissatisfied with the ruling, should have filed the reference within 14 days of 15<sup>th</sup> February, 2022. The Applicant did not comply with the legal timelines.
15. The Respondent asserts that the reason being advanced by the applicant for the failure to lodge the reference within time is incapable of believe. The grounds on the face of his application and those obtaining in the supporting affidavit are contradictory. In the grounds, while he asserts that his counsel only discovered of the ruling on 4<sup>th</sup> March, 2022, the affidavit gives an impression that he was aware of the same as at 20<sup>th</sup> February, 2022. The truth of the matter is that the applicant was informed on the ruling on 20<sup>th</sup> February, 2022, when the statutory period for assailing the taxation had not lapsed.
16. It is contended further that by reason of the premises, the applicant has not sufficiently explained the delay in undertaking the steps towards assailing the Registrar's decision.



### **The Applicant's Submission.**

17. The Petitioner/Applicant submits that the ruling of the Deputy Registrar was delivered on the 15<sup>th</sup> February, 2022 when his Counsel was not present in court due to the fact that he had not diarized the matter.
18. It is further submitted that paragraph 11 of the *Advocates Remuneration Order* provides for a period of 14 days for filing of an objection to a taxation. Considering this, the delay in acting pursuant to the Order was one of 3 days. That the delay is reasonable, the petitioner places reliance on the decision in *Mumias Sugar Company Ltd v Tom Ojienda & Associates* (2018) eKLR.
19. The court's power to grant extension of time is unfettered. It is exercised dependent on the peculiar circumstances of each case. The Petitioner/Applicant submits that the Respondent has not demonstrated any prejudice that it will suffer if the orders sought are granted.
20. The replying affidavit is defective and incompetent as the jurat is on a standalone page. He places reliance on the decision in *Simoko Enterprises Ltd v Deposit Protection Fund Board & 2 others* (2000) eKLR to buttress this submission.
21. The Petitioner has made extensive submission as to why the Deputy Registrar's decision should be disturbed. Hereafter, I shall rule that limb 3 of the application is prematurely brought before the Court. Consequently, it shall not be prudent for this court to consider the submissions at this juncture.

### **The Respondent's submissions.**

22. The Respondent submits that the law relating to assailing of decisions on taxation of Bill of Costs obtain in Order 11 of the *Advocates' Remuneration Order* which provides:
  - “(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.
    - i. (2) The taxing Officer shall forthwith record and forward to the objector the reasons for his decision on the items and the objector may within 14 days from receipt of the reasons apply to a judge by Chamber summons which shall be served on all parties concerning, setting out the grounds of his objection.
    - ii. The High Court shall have power in its discretion to enlarge the time fixed by sub paragraph 1 or subparagraph 2 for the taking of any step, application for such an order may be made by Chamber summons upon giving 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.
23. The Respondent submits that the powers under the provisions aforesaid are wide, days, however the same shall be exercised judiciously. In support of this submissions, it places reliance on the decision in *County Government of Tana River v Miller and Company Advocate* and *Paul Wanjohi Mathenge v Duncan Mathenge* (2013) KLR.



24. The Respondent states that, in order to attract an exercise of discretion in favour of a party making an application for extension of time, such a party must establish a couple of conditions as established in the case of *Nickolas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 9 Others* thus:
- “(i) Extension of time is not a right of a party. It is inequitable remedy that is only available to a deserving party at the discretion of the court;
  - (ii) A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court.
  - (iii) Whether the court should exercise discretion to extend time is consideration to be made on a case to case basis.
  - (iv) Where there is a reasonable cause for the delay, the delay should be expressed to the satisfaction of the court.
  - (v) Whether there will be any prejudice suffered by the Respondent if the extension is granted.
  - (vi) Whether the application has been brought without undue delay”
25. The Respondent submits that the date for ruling before the Deputy Registrar i.e. 15<sup>th</sup> February, 2022 was taken by consent of both counsel for the parties. The Petitioner’s allegation that his counsel misdiarized the matter remain unsubstantiated. It should be ignored.
26. The *Advocates Remuneration Order* is a self-reliant legislation that sets out clear procedures and guidelines to be followed by any party aggrieved by the ruling of the Taxing master. The petitioner/applicant has not utilized the procedure. The reliefs sought cannot be available to him.
27. The Respondent contends that the inordinate delay has not been sufficiently explained by the petitioner/applicant.
28. The court notes that the Respondent has extensively submitted on the Taxing master’s decision. I refrain from considering the same for the same reason that I did put forth hereinabove, on the petitioner’s submissions on the aspect of the decision.

### **Analysis and Determination.**

29. In his quest to assail the decision of the Taxing master, the Petitioner/Applicant was bound to adhere to the procedure laid down in paragraph 11 of the *Advocates Remuneration Order* and the timelines set thereunder. The procedure and timelines are mandatory. Where the timelines have not been adhered to by a party who was supposed to undertake an action as contemplated under sub paragraph 1 and 2, the law provides such a party with a window through which to make good the default. The window obtains in subparagraph 4.
30. Paragraph 11(4) bestows upon the court authority to extend time in favour of a party to do that which the law required him to do under subparagraph 1 and 2, but which he did not do within the stipulated time therein, the power is discretionary. As much as it is discretionary, it is not a power at large, it has to



be exercised judiciously. In *Havi Ombongi & Company Advocates v Mary Wanguthi Kamara* (2022) eKLR, cited by Counsel for the Respondent, the court stated on the power:

“The court has the discretion on whether or not to extend time to file a reference outside the stipulated time. The discretion must however be exercised judiciously...”

31. The *Remuneration Order* does not delineate the factors considerable when a court is invited to render itself on an application brought pursuant to the provisions of subparagraph [4]. However, it is worth stating that courts have over time established the conditions for extension of time, which in my view are general to all applications for extension of time in situations where the existing legislation does not delineate the condition. In *County Government of Tana River v Miller G & Company Advocates* (2021) eKLR, the court states and I agree.

“...it is noted that paragraph 11(1) and (2) of the Advocates Remuneration Order do not speak to the relevant factors that the court should consider when exercising its discretion on whether or not an extension of time should be granted. Guidance must therefore be sourced from the case law in *Paul Wanjohi Mathenge* (2013) eKLR the court of appeal while referring to other authorities observed;

“The discretion under rule 4 is unfettered but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion, I ought to be guided by consideration of the factors stated in previous decisions of this court including but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the Respondent and interested parties if the application is granted, and whether the matter raises issues of public interest...”

32. From the material placed before this court, the ruling that the Petitioner/Applicant intends to assail was delivered on the 15<sup>th</sup> February, 2022 while the instant application was filed on the 4<sup>th</sup> March, 2022. Considering that the applicant was supposed to file an objection within 14 days of the date of the ruling, I am persuaded that the delay was one of 3 days. In its submissions, the Respondent terms the delay inordinate. Whether a delay is inordinate or not depends on the circumstances of each case. In the circumstances of this matter, I am not persuaded that the delay of three days was inordinate.
33. The petitioner contends that the failure to undertake the procedure stipulated in the *Advocates Remuneration Order* for challenging the Taxing master’s decision, within the time provided was as result of a mistake of his Counsel. There is firm jurisprudence that an advocate’s mistaken should not be visited on his or her client. However, it is not in every situation that a party is going to raise this shield successfully. In situations for example where it is apparent that the party did not follow up on her or his matter with his or her advocate as would be expected of a reasonable litigant.
34. In this matter, considering the reason expressed for the default and the time between the date of the ruling to the date when the Petitioner’s advocate started following up the matter concerning the ruling, I have no doubt that the Petitioner/Applicant cannot be faulted in any manner on account of inaction. The mistake of his Counsel should not be visited on him.
35. The Respondent’s Counsel argues that the petitioner’s reasons given for the delay is incapable of believe as the contents of the supporting affidavit are contradictory with the grounds put forth on the face of the application. Reading the affidavit as a whole, and not in part, I discern not the contradiction alluded to by the Respondent.



36. The Respondent has not alleged that it will suffer any prejudice if the orders for extension of time are granted. The material placed before court does not suggest any possibility of there being any.
37. I am persuaded that the petitioner has demonstrated a sufficient reason for the default.
38. By reason of the premises foregoing, I allow the petitioner's application herein only to the extent that he is granted leave of 45 days to undertake all the procedural steps leading to the filing of a reference pursuant to the provisions of the [Advocate Remuneration Order](#) and file the reference.
39. In view of the fact that there are procedural steps that must be undertaken before a reference is filed and heard, which steps have not been undertaken, limb 3 of the application is declined.
40. Each party shall bear its own costs.

**READ, SIGNED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF FEBRUARY 2023.**

**OCHARO KEBIRA**

**JUDGE**

In the Presence of

Chelagat for the Respondent.

Okemwa for the Petitioner.

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE

