



REPUBLIC OF KENYA



**PG Kaingu & Co Advocates v Simbah (Cause 2054 of 2016)
[2023] KEELRC 2782 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2782 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2054 OF 2016
MA ONYANGO, J
OCTOBER 31, 2023**

BETWEEN

PG KAINGU & CO ADVOCATES APPLICANT

AND

WILLIAM KAZUNGU SIMBAH RESPONDENT

RULING

1. The applicant *vide* a chamber summons dated November 10, 2021 brought this application under article 162(2) (a) of the Constitution, rule 11(2), (4) of the Advocates Remuneration Order, section 3A of the Civil Procedure Act and all enabling provisions of the law seeking the following orders: -
 - i. Spent
 - ii. That the court be pleased to enlarge the time within which to file a reference to the Employment and Labour Relations Court on the taxation ruling delivered by the Honourable N. Kyanya on November 20, 2022
 - iii. That costs of this application be provided for
 - iv. Any other relief this honourable court may deem just and expedient to grant in the circumstances.
2. The application is supported by the grounds set out in the body of the application and on the affidavit sworn by the applicant. The applicant has set out the following grounds in support of the application;
 - i. The taxing officer rendered a ruling on the Advocates/ Client Bill of Cost dated September 6, 2019 on March 5, 2020
 - ii. The client/respondent herein filed Notice of objection dated March 6, 2020



- iii. Thereafter, the client/respondent filed a notice of motion application for stay of execution dated August 11, 2020 when the law firm/applicant commenced the process of execution of the certificate of taxation
- iv. After filing of submissions on the client's notice of motion, the learned deputy registrar delivered a ruling on November 20, 2020
- v. In her ruling, the Hon. Deputy Registrar inadvertently misapplied the facts of the consent letter which had been agreed upon between the claimant and the respondent in settling the main claim out of court.
- vi. Therefore in her ruling delivered on November 20, 2020, the learned Deputy Registrar erroneously vacated her taxation ruling of March 5, 2020 ostensibly on account that the consent letter filed in court by the claimant and the Respondent provided that each party was to bear its own costs.
- vii. The law firm of P.G. Kaingu which represented the claimant was not a party in the consent to settle the matter out of court
- viii. In any case, the provision in the consent filed in regard to costs were on party to party costs and not advocate/client costs which are payable by the Client to his advocates who rendered service to him and was eventually paid his terminal dues by the Respondent for wrongful termination of his employment contract.
- ix. After delivery of the ruling of the deputy registrar on November 20, 2020 the law firm filled a notice of motion application dated November 30, 2020 seeking for review of the deputy registrar's ruling
- x. On May 11, 2021 this honourable court delivered a ruling in which the court ruled that there was no application for reference before it
- xi. Thereafter, the law firm filed an application dated May 18, 2021 under certificate of urgency, however the said application was not the correct one and on October 25, 2021, the law firm withdrew it
- xii. The delay to file a reference has been inordinate, further, the Applicant has approached this court severally albeit using the wrong approach
- xiii. The bill of cost, the subject of these proceedings was an Advocate/Client bill of costs for work done to the Claimant by the law firm
- xiv. The claimant later received settlement of the claim but he has been dodging to pay the advocates for services rendered to him
- xv. The honourable court is duty bound to ensure that an advocate is paid for services he renders to his client, more so when the client is also an advocate who ought to know better.
- xvi. The taxing officer therefore erred in law and fact when she failed to appreciate that the law firm was not a party to the consent which was filed in court dated March 13, 2023 which was entered into between the claimant and the respondent
- xvii. It is therefore fair and in the interest of justice that the ruling in respect of the bill of costs be set aside and the applicant herein be allowed time to file response to the said bill before taxation by the taxing master.



3. The respondent filed a replying affidavit sworn on June 7, 2022 wherein he depones that the Applicant has not followed the proper steps in filing a reference. That no notice in writing has been given to the taxing master on what is being objected to and that the Applicant has not annexed the proposed reference for this court's consideration as to whether the grounds raised are substantial with a probability of success.
4. The Respondent further depones that the Applicant filed an application for review before this court dated November 30, 2020 which application was dismissed as it was not properly before this court.
5. He contends that the court in the said ruling advised that review should have been before the taxing master. That the applicant however again filed the same application before this court dated 18th May 2021 despite the previous one being dismissed. That he later withdrew the application after the Respondent filed a notice of preliminary objection.
6. According to the Respondent, it is clear from the foregoing that the applicant's actions amount to abuse of the court process as he is busy doing guesswork by filing application after application and that the delay is inordinate and inexcusable.
7. The application was disposed of by way of written submissions. The applicant's submissions dated February 10, 2022 and the Respondent's submissions dated June 14, 2022 are on record.
8. I have considered the application, the rival affidavits and the submissions of the parties. The issue for determination is whether sufficient cause has been given by the applicant for this court to enlarge the time within which to file a reference to this court on taxation.
9. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Appeal No. 255 of 1997, the Court of Appeal held:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”
10. The sentiments in the above case were more succinctly expressed in *National Union of Mineworkers v Council for Mineral Technology*[1998] ZALAC 22 at para 10, where the court stated:

“The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”



11. In the instant case, the ruling of the taxing officer against which the Applicant seeks to file a reference was delivered by Hon. N. Kyanya on 20th November 2020. The instant application was filed on 10th November 2021, that is over one year later. The delay has however in my view, been sufficiently explained, even though the Applicant may be faulted in the manner in which he has handled the issue since the ruling he impugns was delivered.
12. The chances of success of the reference are good as demonstrated in the affidavit filed in support of the application. Further, this is a matter in which the respondent has not paid the Applicant his professional fees and should the applicant not be allowed to file the reference he will lose the fees while the respondent will unjustly benefit from the labours of the advocate. As was stated in *Patel v E.A. Cargo Handling Services Ltd* [1974] E.A. 75, the main concern of the court should be to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.
13. Further, the fact that the applicant made a blunder is no reason to bundle him out of the seat of justice. As was observed by the court in *Philip Chemowolo & another v Augustine Kubende* [1986] KLR:

“I think a distinguished equity Judge has said:

Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer a penalty of not having his case heard on merit...”
14. For the reasons given herein above, I find merit in the application. I accordingly allow the same. The applicant shall however bear the costs of this application in view of the history narrated above.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 31ST DAY OF OCTOBER, 2023.

M. ONYANGO

JUDGE

