



REPUBLIC OF KENYA



KENYA LAW
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**Kunjuga v Kangaru (Miscellaneous Application E011 of 2022)
[2023] KEELC 246 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 246 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
MISCELLANEOUS APPLICATION E011 OF 2022
LN GACHERU, J
JANUARY 26, 2023**

BETWEEN

EDWIN RUBANDI KUNJUGA PLAINTIFF

AND

HUMPHERY KANGARU DEFENDANT

RULING

1. Vide a chamber summons application dated April 13, 2022, and filed in court on June 14, 2022, the defendant/applicant moved this court for Orders;
 1. That the honourable court be pleased to vacate and set aside in its entirety the ruling of the Honorable S.K Nyaga, Deputy Registrar, dated and delivered on the March 28, 2022.
 2. That the court be pleased to refer the defendant's/ applicant's Bill of Costs dated February 4, 2022, for fresh taxation before a different Taxing Master with suitable directions.
 3. That in the alternative to (2) above, this honorable court be pleased to exercise its discretion and do tax the Bill of Costs dated February 4, 2022, itself.
 4. That the costs of this application be provided for.
2. The Application is premised on Nineteen grounds set on the face of the said Application and the supporting affidavit of Patrick Maguta Kimemia. It is the applicant's averment that the taxing master in her ruling of March 28, 2022, taxed off his Bill of Costs of Kshs. 181,365/= and awarded Kshs. 1,300/= an amount which he argues is manifestly low. The applicant contends that the taxing master misdirected herself by taxing off the respective sums in items Nos. 1, 2, 4-8, 10-11. He raised an issue with the manner in which the respondent withdrew his case that gave rise to the Bill of Costs. Thus, that the taxing master misdirected herself on points of law and the ruling should be set aside.



3. In opposing the application, the plaintiff through his advocate filed a replying affidavit sworn on the July 8, 2022. It is the plaintiff's contestation that the application is incompetent and void ab initio, having been filed way beyond the stipulated time. That there having been duplication of files, the respondent sought to have one file closed with no orders as to costs. He deponed that items Nos. 1, 2, 4-8, 10-11, were not in the court file and the documents attached herein were obtained from the lower court file. As a result thereof, there is no evidence that the applicant paid filing fees in both files. He further deponed that the attachments in the application are in respect of the lower court matter. He sought to have the matter dismissed.
4. The application was dispensed by way of written submissions. The applicant filed his submissions giving a brief history that gave rise to the Bill of Costs.
5. In submitting that the Costs were inordinately too low, the applicant relied on the case of *Republic vs Ministry of Agriculture & 2 others ex parte Muchiri W'njuguna & 6 others*, where the court held that the discretion of a taxing officer cannot be interfered with, unless the award is so low or so high. It was the applicant's submissions that he ought not to be penalized for the missing court file documents and urged this court to be guided by the case of *Vise vs Gubb* 1981(3) SA 753(c) – 754H-755C, where the court elaborated circumstances when a court can interfere with a taxing master's discretion including where it is evident that the taxing master was clearly wrong. The applicant relied on some South African cases to persuade this court to find that the taxing master misdirected herself on the law and principles of taxation.
6. The plaintiff/respondent filed his written submissions on the September 19, 2022. He maintained that the application was filed 77 days, beyond the required statutory period. In persuading this Court that the application ought to be declined, the respondent invited this court to the holding of the court in *Twiga Motors Limited vs Hon. Dalmas Otieno Onyango*(2015)eKLR, where the court held that failure to adhere to the timelines in Rule 11 of the *Advocates Remuneration Order*, renders an application incompetent. Further, he submitted that the withdrawal of the suit was precipitated by duplicity of suits and affirmed that the suit is still pending in court
7. By a ruling of March 28, 2022, the taxing master in considering the applicant's Bill of Costs dated February 4, 2022, awarded Kshs.1,300/= against Kshs. 180,065/= sought. The applicant being dissatisfied filed the instant application. It appears from the patchy documents that the respondent filed a suit against the applicant in murang'a ELC No. 14 of 2020, and the applicant entered appearance and filed a defence thereto. Further, this court notes that the respondent withdrew the foregoing suit and which withdrawal culminated to the filing of the Bill of Costs. This court draws from the parties hereto that there exists a similar suit between the parties herein in the lower court. This court has not had a chance to peruse the said Bill of Costs. The respondent objected to the application on the premise that the same was filed 77 Days, from the date of the taxing master's decision.
8. The court has considered the application and the annexures thereto, the response, the written submissions together with the cited authorities and the relevant provisions of law. It is important for this court to first determine whether the instant reference can be sustained before it can proceed to determine the merits of the application.

i. Whether the Reference can be sustained?

9. The respondent contends that the application was filed after an inordinate delay of 77 Days, from the date the decision of the taxing master was made. This was a position maintained throughout his submissions. the applicant opted not to address this court on the foregoing.



10. Rule 11 of the *Advocates Remuneration Order* lays down the procedure for appealing against the decision of a taxing master. It provides:

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.
 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. What the above provision contemplates is that the applicant ought to have within 14 days of March 28, 2022, given a notice to the taxing master on the items he objects. A cursory perusal of the file does not inform this court whether the applicants moved the taxing master as required. Once the taxing master receives the notice he/ she is required to give reasons to the objector, whereby the objector, if aggrieved, will have 14 Days from the date of receipt of the reasons to move the High Court accordingly.
12. Presently, the defendant/applicant has moved this court by operation of Rule 11(2), whereby he has filed the chamber summons contemplated thereunder giving reasons for objecting to the decision of the taxing master. There was non-compliance with paragraph 1. A look at the ruling of the taxing master informs this court that the taxing master gave reasons for her decision on every item and it would thus not be necessary for the applicant to seek further reasons.
13. This court agrees with the holding of the court in *Muriu Mungai & Co. Advocates v New Kenya Co-operative Creameries* [2012] eKLR, where the court held
14. It is therefore clear that the interpretation by the courts especially the High Court on this issue is far and varied. In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.
15. However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference”
16. The sequel of the above pronouncement does not however mean that the applicant can randomly move court. It only implies that there should be compliance with other provisions being moving the court within 14 Days of the ruling or seeking leave of court where necessary. Paragraph 4 of the foregoing section gives this court the powers to extend time, subject to an application by an aggrieved party. Indisputably, the applicant filed the instant application beyond the statutory time with no leave from this court. The Application was filed in court on June 14, 2022, that is at least 2 ½ months since the



decision of the taxing master. The probable procedure would have been to first seek the leave of court before filing the instant application. What then happens to the reference?

17. The court in *Mirugi Kariuki & Co Advocates v Andrew Isoe Ocboki* [2022] eKLR, when striking out a Reference filed nineteen(19) days from the date of ruling had this to say:

In the present matter, the ruling by the taxing officer contained the reasons and therefore there was no need for the respondent/applicant to seek for the reasons for the taxation. As noted before, the notice of objection to taxation was filed nineteen days from the date the ruling was delivered and the respondent/applicant did not give any reasons for the delay. In my view there is no competent reference before the court the same having been filed out of time without the leave of the court.”

18. The court further held

The ruling by the taxing officer contained the reasons and the invocation of paragraph 11(2) of the *Advocates Remuneration Order* was unnecessary. If the applicant was dissatisfied with the ruling on taxation delivered on September 29, 2021, he ought to have filed a reference within 14 days of the ruling by the October 14, 2021. The reference was filed on October 19, 2021, clearly out of time and no application to enlarge time was sought by the applicant as provided under paragraph 11 (4) of the *Advocates Remuneration Order*.”

19. Similarly, in *Mario Rossi v Salama Beach Hotel Limited* [2018] eKLR, when considering whether a Reference filed out of time is a nullity within the provisions of Rule 55(1)(b) of the *Court of Appeal Rules*, had this to say:

It is common ground that time lines fixed by Statute or subsidiary legislation made thereunder are of essence since they are designed to achieve an intended purpose and outcome, that is, not only do they ensure procedural order and certainty within the judicial system, but also advance a just, uniform and efficient dispensation of justice. It is for that reason that courts advocate for strict compliance with such time lines.”

20. The applicant chose not to address this court on the competence of the Reference. There is no measure for what constitutes delay, but when it occurs, it will not be difficult to decipher. The procedure required is that the instant application be filed within 14 days of the date of ruling. It is not clear why the applicant had to wait for 77 Days, before filing the instant application. With no reasons for the delay or non-compliance, this court agrees with the findings of the courts in the foregoing cases and proceeds to find and hold that the applicant’s reference cannot be sustained. Therefore, it follows that the Reference filed on the June 14, 2022, should be struck out and is hereby struck out for non-compliance.

21. Consequently, the court finds that the chamber summons application dated April 13, 2022, is not merited for failure to adhere to the laid down procedure. The said reference and/or chamber summons application is hereby struck out entirely with costs to the plaintiff/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 26TH DAY OF JANUARY, 2023.

L. GACHERU

JUDGE



In the presence of;

Plaintiff/Respondent – Absent

Mr. Mumo H/B Mr Kimemia for the Defendant/Applicant

Court Assistant – Joel Njonjo

L. GACHERU

JUDGE

26/1/2023

