



REPUBLIC OF KENYA



**Ashiruma t/a Ashiruma & Co Advocates v Maingi & another (Miscellaneous Application 20 of 2019) [2025] KEHC 263 (KLR) (Family) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 263 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION 20 OF 2019  
H NAMISI, J  
JANUARY 23, 2025**

**BETWEEN**

**HERBERT ASHIRUMA T/A ASHIRUMA & CO ADVOCATES ..... APPLICANT**

**AND**

**SUSAN MUENI MAINGI ..... 1<sup>ST</sup> RESPONDENT**

**ANDREW MAKAU MAINGI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the Court is a Notice of Motion dated 8 February 2024 filed by the Respondents seeking the following orders:
  - i. That the Honourable Court do enlarge time for filing of this Objection and it be deemed to have been filed timeously under Rule 11 (2) of the Advocates (Remuneration) Order;
  - ii. That this Honourable Court do reverse the part of the decision of the Honourable Deputy Registrar dated 9 December 2022 dismissing its Application dated 4 April 2022 and do grant said Application;
  - iii. That the costs of this Application be provided for
2. The Application is filed under Rules 11 (2) and (4) of the Advocates (Remuneration) Order and supported by Affidavit dated 8 February 2024 sworn by the 2nd Respondent as well as Affidavits of the Respondents filed in support of the Chamber Summons dated 4 April 2022.
3. The Application is premised on the following grounds:
  - a. The 2nd Respondent filed an application dated 4 April 2022 seeking that the Bill of Costs dated 15 February 2019 be dismissed as against him on the grounds that there was no Advocate-



Client relationship between the Applicant/Advocate and himself in HCCC No. 426 of 2012 – In the Matter of the Estate of Joseph Makau Maingi;

- b. The Honourable Deputy Registrar in Ruling dated 9 December 2022 inter alia dismissed the Application dated 4 April 2022;
  - c. That an objection to the Judge was on 22 December 2022 filed vide Chamber Summons dated 21 December 2022;
  - d. On December 19, 2023, the said Chamber Summons was struck out and expunged from the record for failure to attach a Supporting Affidavit;
  - e. There has been no inordinate delay in re-filing this Objection;
  - f. The Honourable Deputy Registrar failed to take into account the evidence in the Affidavits of both Respondents that the 2nd Respondent did not at any one time grant the Applicant/ Advocate written, oral nor implied instructions to act for him in HCCC No. 426 of 2012 – In the Matter of the Estate of Joseph Makau Maingi;
  - g. The Honourable Deputy Registrar erred in law in finding that the filing of a Notice of Change of Advocate by an Advocate establishes retainer;
  - h. The Honourable Deputy Registrar erred in law by not finding that a severely impugned retainer must result in the dismissal of the Bill of Costs pending the filing of suit to establish an Advocate-Client relationship.
4. In response thereto, the Applicant filed Grounds of Opposition as follows:
- i. That the Chamber Summons Application herein by the 2nd Respondent is misconceived, lacks merit and is an abuse of the court process and should be dismissed with costs.
  - ii. That the Court record in HCFA NO. 426 OF 2012 in the matter of the Estate of Joseph Makau Maingi speaks for itself and the 2nd Respondent's attempts to rewrite the same is an exercise in futility and therefore null and void.
  - iii. That this Honourable Court has already pronounced itself and made a determination on the issue of representation in HCFA NO. 426 OF 2012 and the 2nd Respondent is legally estopped from litigating on the same issue while what is pending before this Honourable Court is taxation of Advocate/Client Bill of Costs.
  - iv. That the 2nd Respondent's numerous Applications are in bad faith and meant to delay the taxation of the Bill of Costs herein which has been pending since 2019 and the current Application should be dismissed with costs and the Bill of Costs set down for taxation.
5. Parties filed their respective submissions.
6. The 2nd Respondent submitted that an objection must be filed within 14 days of the reasoned decision. Sec 11 (2) Advocates (Remuneration) Order. 2 In this case, the ruling of the Honourable Registrar was delivered December 9 2022 hence the prayer for this present objection to be deemed to have been filed timeously given the striking out on December 19 2023 of the initial objection filed December 21 2022.
7. On the issue of reviewing the order of the Deputy Registrar, the 2nd Respondent relied on the case of Mbogo v Shah (1968) EA which stated that a higher Court will reverse the decision by an inferior court when it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has



acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It was the 2nd Respondent's contention that the Ruling of 9 December 2022 committed all these errors and ought to be set aside.

8. The rest of the 2nd Respondent's submissions focussed on the existence or lack thereof of an Advocate-Client relationship.
9. On their part, the Applicant submitted that the Application herein by the 2nd Respondent is misconceived, lacks merit and is an abuse of the court process and should be dismissed with costs. They argued that the Application does not seek to review and it is not an Appeal against the Ruling of 19th December, 2024 and it is therefore misconceived, lacks merit and it is an abuse of the Court Process.
10. In his submission, the Applicant, who had filed Grounds of Opposition, chose to rely on Advocate's Replying Affidavit sworn on 27th May, 2022, Supplementary Affidavit sworn on 15th July, 2022, Submissions dated 15th July, 2022 and List of Authorities dated 15th July, 2022. This did not sit well with the 2nd Respondent who filed Further Submissions objecting to this. The 2nd Respondent, submitted that submissions can only be filed in respect of specific pleadings filed, in this case the Grounds of Opposition dated June 20 2024. Further, 2nd Respondent was unable at this stage respond to the new evidence Advocate now belatedly sought to rely upon.

### **Analysis & Determination**

11. I have considered the Application, various Affidavits filed herein and the respective submissions by the parties. The issues for determination are:
  - i. Whether or not to enlarge time for filing of the objection;
  - ii. Whether to reverse the decision of the Honourable Deputy Registrar dated 9 December 2022 dismissing its Application dated 4 April 2022 and do grant said Application
12. On first issue, first thing to note is that the Bill of Costs herein is pending taxation.
13. Paragraph 11 of the Advocates Remuneration Order provides as follows;
  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.



14. The import of paragraph 11(1) and (2) above is that a party aggrieved by a Taxing Officer's decision may within 14 days after the decision give notice in writing to the Taxing Officer of items of taxation to which he objects. The party upon receipt of Taxing Officer's reasons for decision may within 14 days from receipt of reasons apply to a Judge by Chamber Summons. Courts have numerously stated that where reasons for taxation on disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reason simply because the wording of sub Rule (2) of Rule 11 of Advocates Remuneration Order demands so. For instance, in the case of National Oil Corporation Limited v Real Energy Limited & another [2016] eKLR, it was held that:

“In my view, there is no magic in requiring the Taxing Master to furnish reasons before making a reference. Where reasons are contained in the decision, a party ought not seek the same simply because it is fashionable to do so. Accordingly, nothing turns the issue that the Applicant did not seek the reasons for the decision before filing the reference.”

15. In *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others* [2015] eKLR the Supreme Court, laid out the general principles governing extension of time thus: -

“As regards extension of time, this Court has already laid down certain guiding principles. In the *Nick Salat* case, it was thus held:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if 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”.

16. The 2nd Respondent herein seeks enlargement of time in order to file an Objection. The actual wording of the prayer is “That the Honourable Court do enlarge time for filing of this Objection and it be deemed to have been filed timeously under Rule 11 (2) of the Advocates (Remuneration) order”. I am unable to decipher whether the 2nd Applicant meant to file an Objection to the decision of the Deputy Registrar dated 9 December 2022 or an Objection to the Bill of Costs that is yet to be taxed.



The Supporting Affidavit does not lend any clarity to the confusion since it focussed mostly on the non-existence of an Advocate – Client relationship between the parties.

17. Notably, in the impugned Ruling, the Deputy Registrar addressed the issue of the Advocate-Client relationship and held thus:

“In this case, the argument by the 2nd Respondent that there is no Advocate-Client relationship between the Applicant and the 2nd Respondent holds no water as the record speaks for itself that the 1st and 2nd Respondents as Administrators of the Estate of Joseph Makau Maingi appointed the Applicant’s firm of Advocates to act on their behalf on 15 October 2013.”

18. If the 2nd Respondent’s intention is to file a response to the Bill of Costs, then the factors to consider in determining whether or not to enlarge time are those that were enumerated in the Nick Salat case (supra). The Bill of Costs is dated 15 February 2019. The 2nd Respondent had not advanced any reason as to why he has not filed his response thereto in over four (4) years. Definitely the delay herein cannot be said to be inordinate.

19. In short, it is difficult to comprehend what orders the 2nd Respondent seeks herein. If at all he seeks to file an Objection under Paragraph 11 of the Advocates Remuneration Order, then the same is premature.

20. On the second issue, looking at the nature of prayer (ii) herein, the 2nd Respondent prays for reversal of part of the decision of the Honourable Deputy Registrar. It is not clear whether the 2nd Respondent is seeking a review of the order or he is appealing against the Order.

21. In his submissions, the 2nd Respondent relied on the case of Mbogo -vs- Shah [1968]. In the said case, Sir Charles Newbold P expressly approved Harris J’s test of the principles it was necessary to consider in the exercise of the judicial discretion as to whether to set aside a judgment or not, as follows:

A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifestation from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”

22. Discretion should not be exercised capriciously or with a view to rewarding an indolent party. It is exercised to meet the end as Justice M. Koome, J (as she then was) in *Alloys Kaveen Chepkwony Vs. Development Bani of Kenya & 2 others Nairobi HCCC No. 387 of 2008 Milimani* cited with approval the decision in *Patel Vs. Cargo Handling Services Ltd. [1975] EA 75* as follows:-

“The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. *Shah Vs. Mbogo [1967] EA 116*. In exercising the discretion the court should consider among other things, the facts and circumstances both prior and subsequent, and all the respective parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by setting aside the judgment should be considered and it should always be remembered that to deny a person a hearing should be the last resort of the court.”



23. I have come to a conclusion that the 2nd Respondent has not demonstrated why the Ruling should be set aside and/or varied, if at all. I, therefore, find no merit in this Application and hereby dismiss the same with costs to the Applicant/ Advocate.

**DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF JANUARY 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

.....for the Applicant

.....for the Respondents

Libertine Achieng.....Court Assistant

