



**Humphrey & Company LLP v Mbingi (Miscellaneous Application E822 of 2024)  
[2025] KEHC 11371 (KLR) (Commercial and Tax) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11371 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E822 OF 2024**

**PJO OTIENO, J  
JULY 29, 2025**

**BETWEEN**

**HUMPRHEY & COMPANY LLP ..... APPLICANT**

**AND**

**CHARLES WESONGA MBINGI ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the applicant's Chamber Summons dated 7th October 2024, expressed to be brought pursuant to Order 51 Rule 7, Rule 10(2), and Rule 11(2) of the Advocates (Remuneration) Order, Article 163(3) of *the Constitution* of Kenya, 2010, and Section 3A of the *Civil Procedure Act*.
2. The applicant essentially seeks orders that; the Court grant leave to the firm of Humphrey and Company LLP to file a reference challenging the decision of the taxing officer arising from Milimani HCCOM MISC/E0827/2022, dated the 16<sup>th</sup> November 2022, on the bill of costs dated 23<sup>rd</sup> September 2024, and that the decision of the Registrar be set aside and/or reviewed by the Honourable Court. The application further prays that the costs of the application be provided for.
3. The application is grounded on the reasons disclosed on its face as well as the those deponed in the affidavit sworn on 7th October 2024 by George Mbaye, the advocate.
4. It is the applicant's case that it was duly instructed by the respondent, through agents, to act in an appeal before the Tax Appeals Tribunal. Following the provision of legal services, the applicant filed a bill of costs seeking Kshs. 882,997 in respect of its services rendered in favour of the respondent in Income Tax Appeal No. E094 of 2021.



5. The applicant highlights to court the fact that the respondent contested the bill of costs on the basis that no instructions had ever been given to the applicant, resulting in the dismissal of the bill of costs by the taxing master in the impugned ruling.
6. The applicant now seeks leave to challenge the said ruling out of time, asserting that the dismissal, if left to stand, would occasion grave prejudice and injustice, having rendered services which were, in their view, not only accepted but acted upon by the respondent. There is however nothing said why the objection application was never filed within the timelines set under the law.
7. The application is opposed by the respondent who filed the replying affidavit sworn by Charles Mbingi Wesonga on 24th November 2024. In the affidavit, it is posited that the taxing officer delivered the impugned decision on 20th September 2024 and that, pursuant to Rule 11(1) of the Advocates (Remuneration) Order, any reference therefrom ought to have been filed by 4th October 2024. It is further contended that the applicant has neither provided a plausible explanation for the delay nor discharged the evidentiary burden to warrant the court's exercise of discretion. In addition, it is asserted that there has not been disclosed the basis upon which the decision of the taxing master is contested hence it is difficult and prejudicial for the respondent to offer an appropriate response hence no ground for interfering with the decision has been met to invoke the court's judicial discretion. He reiterates that no advocate-client relationship existed, and that he personally negotiated and settled the dispute with the Kenya Revenue Authority without the involvement of the applicant. He thus urges that the application be dismissed with costs.
8. Parties were directed to file written submissions and both did so comply. The applicant's submissions are dated 7.4.2025 while those of the respondent are dated 28.4.2025.
9. In support of the application, the applicant submits that the respondent was aware of and benefitted from legal representation in the proceedings. It is argued that an advocate-client relationship may be inferred from conduct, citing *Ochieng Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited* for that proposition. The decision in *Mereka & co Advocates vs Zakhem Construction Kenya) ltd (2014) KEHC 1257 (KLR)* was cited for the holding that it is wrong for a client to assume that an advocate shoulders costs attracted by a project that the client stands to benefit from. *Nyauke & Co Advocates vs Trustees of Archdiocese of Kisumu (2023) KEHC 2851 (KLR)* was cited for the holding that while the client has a right to an advocate of choice, it was only fair that while opting to change counsel, it pays the former advocate for the services rendered to it.
10. It is further submitted that the respondent had admitted that the instructions were given by one Caleb and that it never issued a notice of change of advocates or revoked instructions, and that he enjoyed a stay of execution secured by the applicant. The decision in *First Assurance Company Ltd Vs Seascapes Ltd (2018) eKLR* was cited for the law that one should not be allowed to resile from a position created by its representation to the opposite party to which that opposite party had acted to its detriment.
11. The decision in *Mereka's case (supra)* was recited for the proposition that instructions need not be in writing but can be inferred where the client acquiesced to it and adopted the proceedings or where his conduct estops him from denying representation. The applicant lastly cites the decision of *Serah Njeri Mwobi vs John Kimani Njoroge (2013) eKLR* for the principle of estoppel to stop a party from asserting something contrary to what is implied by previous actions or statements by that party. On those facts and law cited the applicant prays that the application be allowed as prayed.
12. On his part the respondent asserts that the applicant dropped his ball by failure to meet the threshold that would satisfy the court to exercise its discretion in his favour. It cites the decision in, *Humphrey M Mungori vs Diamond Trust Bank Ltd (2023) eKLR* which cited the decision of the supreme court



in *Nicholas Kiptoo Arap Salat vs IEBC* for the law that extension of time is not a right but an equitable remedy upon exercise of discretion by the court in favour of a deserving party, who has satisfied court that the delay has been explained plausible and not inordinate.

13. The respondent then faults the applicant for failure to advance any reason for failure and delay and submits that no basis had been laid to enable the court exercise its judicial discretion in favour of the applicant. Section 109 and 112 of the *Evidence Act* were cited to rest the burden of proof upon the applicant which he had failed to discharge.
14. On the merits, the respondent submits that the taxing officer properly found that no advocate/client relationship existed between the parties then sought reliance on the decision in *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited* [2017] eKLR, where the Court of Appeal held that the burden lies on an advocate to demonstrate the existence of an advocate-client relationship, failure of which justifies the striking out of the bill. It is therefore the prayer of the respondent that the application is a good candidate for dismissal.

### **Issue, Analysis and Determination**

15. The central and only issue for determination is whether the applicant has laid sufficient basis to warrant the exercise of this Court's discretion to enlarge time for filing a reference under Rule 11(4) of the Advocates (Remuneration) Order. The court takes that view well aware that the applicant has equally sought the setting aside of the Taxing officer's decision. The court's appreciation is that the merits of the application for setting aside can only be gone into if the court is minded and extends time to file the reference. It is however, only tidy that an application for setting aside, to be properly before the court, be made after leave is granted.
16. That notwithstanding, whether or not to extend time must take precedence and only if time be extended will the court give attention to the request for setting aside.
17. Rule 11(1) of the Advocates (Remuneration) Order provides that a party objecting to a taxation decision must, within 14 days of the ruling, notify the taxing officer in writing of the items objected to. Where the timelines are not met, Rule 11(4) empowers a judge, upon application, to enlarge the time for such objection.
18. The applicable principles the court must consider in an application for extension of time are now well settled and not in doubt. A long line of authorities by the superior courts of Kenya including the supreme court have made it trite that the decision of whether or not to extend the time for filing any matter in court involves the Judge exercise of an unfettered discretion based upon reason(s) and not on whim or caprice. In general, the court is expected to take into account; the length of delay, the reason for the delay, the chances of the matter succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted.
19. That binding position was firmed up by the Supreme Court in *County Executive of Kisumu v County Government of Kisumu and 8 Others* [2017] eKLR when the court reiterated that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court.
20. In the instant case, the record indicates that the ruling was delivered on 20th September 2024 and the application for extension of time was lodged on 8th October 2024, some seventeen (17) days later. This translates to a delay of just three days outside the prescribed 14-day window.
21. However, crucially, the applicant has not proffered any explanation, plausible or otherwise, for the delay. The application is silent on the reasons for failing to comply with Rule 11(1) within the



prescribed period. There is no iota of material that the applicant gave the notice under Rule 11(1) that would have initiated the objection. Even while pursuing this application for extension of time no attempt has been made to comply with that provision. It is the courts learning that an objection under the rules is initiated by the notice which elicits the reasons for the decision and that before there is served the notice, an objection may not be validly pursued. The effect is that even if the court was to extend time, the resultant objection, if filed would have skipped a crucial step and would not be valid. It would thus be futile to grant the application as presented.

22. Furthermore, the applicant has not annexed or placed before this Court the necessary pleadings or correspondence placed before the Deputy Registrar, as the trier of fact, demonstrating the existence of an advocate-client relationship, so as to convince the court that such facts were ignored or treated in a perverse manner. Without such material, the Court is incapacitated in its duty to reassess and reevaluate the facts even if it was in an appellate realm. It is equally difficult to assess the merits or arguability of the intended objection.
23. It is not lost on the Court that discretion must be exercised in accordance with sound legal principles. A mere lapse of time, however short, must be explained. In the absence of any explanation, the court cannot exercise its discretion in a vacuum. Where the applicant chooses to ignore the fact of delay, however short, the court cannot purport to exercise the discretion unless it wishes to attract the tag of a whimsical or capricious conduct.
24. Flowing from the foregoing discussions and conclusions, the Court finds no basis upon which to exercise its discretion under Rule 11(4) of the Advocates (Remuneration) Order. The applicant has failed to account for the delay, and has not established the threshold to warrant an enlargement of time. Without an enlarged time, the application for setting aside of the taxing master's ruling aborts and stands unavailable for consideration by the court.
25. Consequently, the application dated 7th October 2024 is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF JULY, 2025**

**PATRICK J O OTIENO**

**JUDGE**

