



REPUBLIC OF KENYA



KENYA LAW
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**Nyambariga v Kenya Commercial Bank Ltd & another (Commercial Suit 407 of 2016)
[2025] KEHC 12285 (KLR) (Commercial and Tax) (29 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT 407 OF 2016
H NAMISI, J
AUGUST 29, 2025**

BETWEEN

NEWTON OIRERE NYAMBARIGA APPLICANT

AND

KENYA COMMERCIAL BANK LTD 1ST RESPONDENT

QUITE BRIGHT FILMS LTD 2ND RESPONDENT

RULING

1. Before the Court is Chamber Summons dated 15 April 2024 seeking the following orders:
 - i. (spent)
 - ii. That this Court issues the earliest date for the inter-partes hearing of this Application;
 - iii. That this Honourable Court find it just and fit to extend the time for the filing of a reference out of time;
 - iv. That upon granting leave to file a reference out of time, that this Honourable Court find it just and fit to allow the annexed reference on record, and deem it as duly filed;
 - v. That this Honourable Court be pleased to issue a stay of the ruling issued by HON. Chembeni L. Adisa on 21 March 2024, pending the hearing and final determination of this Application;
 - vi. That in the event this Application is allowed, this Honourable Court be pleased to issue a stay of the ruling issued by Hon. Chembeni L. Adisa on 21 March 2024, pending the filing, hearing and final determination of the reference;
 - vii. That the costs of this Application be provided for.;



- viii. That this Honourable Court see it fit to grant any other orders in exercise of its inherent jurisdiction and in the interests of substantive justice.
2. The Application is supported by the Affidavit sworn by the Applicant and premised on the following grounds:
- i. The Respondents, through their Advocates on record, filed a Bill of Costs dated 16 November 2022;
 - ii. The Applicant, through his Advocates on record, opposed the aforesaid Bill of Costs, leading to the making of written submissions dated 20 September 2023 and filed on 25 September 2023, and pursuant to the Court's directions given on 28 August 2023;
 - iii. Subsequently, a Ruling on the said Bill of Costs was delivered by Hon. Chembeni on 21 March 2024 but whose outcome was erroneous in fact and in law;
 - iv. The Applicant seeks to object to the above said Ruling and have the same set on various grounds;
 - v. That although it seems that this Application has been delayed, the same is not due to the Applicant's indolence in any manner for the Applicant's Advocates, upon delivery of the Ruling on the Bill of Costs, had to await the Court's registry to avail certified copies of the Taxing Master's reasons for their decision, prior to making this application and noting that the same has not been availed to date;
 - vi. The Respondents, who will have their day in Court, stand to suffer no prejudice at all should this Application be allowed;
 - vii. It is fair and just that this Application be allowed as prayed.

The Applicant's Case

3. The Applicant's primary contention is that the Application for enlargement of time is filed out of abundance of caution. The Applicant's substantive position is that the statutory timeline for filing a reference under Paragraph 11 of the Advocates Remuneration Order has not yet commenced. This argument is founded on a two-step interpretation of the said provision: first, a party must give a written notice of Objection of the decision, specifying the items objected to; and, second, the party may then file a reference to a Judge within 14 days of receiving the Taxing Master's reasons for the decision on those items.
4. The Applicant avers that he complied with the first step by dispatching a letter dated 21 March 2024 to the Deputy Registrar, requesting certified copies of the Ruling and the Taxing Master's reason for the decision. To date, no reasons have been furnished. It is, therefore, argued that time has not begun to run, and the Application is not, in fact, time-barred.
5. Regarding the Supplementary Affidavit, the Applicant relies on the constitutional principles of substantive justice under Article 159(2) of *The Constitution*. He argues that the failure to seek prior leave to file the said Affidavit is attributed to technical challenges encountered during a virtual court mention.
6. Regarding the prayer for stay of execution, the Applicant is apprehensive of a premature and unlawful execution, pointing to a draft Certificate of Taxation annexed to the 1st Respondent's Replying Affidavit as evidence of this imminent threat.



The 1st Respondent's Case

7. The 1st Respondent vehemently opposes the Application, primarily on the ground that the same is incompetent, having been filed with inordinate and unexplained delay. The 1st Respondent posits that where a Taxing Master issues a considered and reasoned Ruling, as was done on 21 March 2024, that Ruling itself contains the reasons contemplated by the Advocates Remuneration Order. Consequently, the 14-day period for filing a reference begins to run from the date of delivery of such a Ruling. The 1st Respondent further points out that the Ruling was made available on the Judiciary's e-filing portal on the very day it was delivered, obviating any delay in its access.
8. The 1st Respondent also challenges the validity of the Applicant's letter dated 21 March 2024, arguing that it does not comply with Paragraph 11(1) of the Advocates Remuneration Order as it fails to specify the particular items of taxation to which objection is taken.
9. With respect to the prayer for stay of execution, the 1st Respondent submits that the Applicant has failed to satisfy the requisite conditions under Order 42 Rule 6 of the Civil Procedure Rules. It is argued that the Application was not made without unreasonable delay, that the Applicant, an individual, cannot demonstrate that he will suffer substantial loss if required to pay the decretal sum to the 1st Respondent, a large and stable financial institution fully capable of refunding the amount should the Reference succeed, and that the Applicant has conspicuously failed to offer any security for the due performance of the decree.
10. In defence of the Taxing Master's decision, the 1st Respondent maintains that there was no error of principle. It is submitted that the trial Judge, in his judgement, conclusively determined the value of the subject matter for the purposes of costs by quantifying the damages that would have been awardable at Kshs 40 million. Therefore, the Taxing Master was correct in law to adopt this figure as the basis for calculating the instruction fees.
11. The 2nd Respondent did not participate in these proceedings.

Analysis & Determination

12. Having considered the Application, Affidavits and the rival submissions of counsel, the following issues commend themselves for determination by this Court:
 - i. Whether the Applicant's Supplementary Affidavit sworn on 29 May 2024 ought to be admitted to the Court record;
 - ii. Whether the Applicant has established sufficient basis for the Court to exercise its discretion to enlarge time for filing reference against the Taxing Master's decision of 21 March 2024;
 - iii. Whether the Applicant has met the legal threshold for the grant of an order for stay of execution of the Certificate of Taxation pending the hearing and determination of the intended Reference;
 - iv. Who shall bear costs of this application?
13. On the first issue, the Supplementary Affidavit was filed without leave of Court. While the rules of procedure ordinarily require that leave be sought and obtained, the modern approach to civil litigation, underpinned by the overriding objective in section 1A and 1B of the *Civil Procedure Act* demands that the Court's focus remains on the just, expeditious, proportionate and affordable resolution of disputes. This is further fortified by the constitutional command in Articles 159(2)(d) that justice shall be administered without undue regard to procedural technicalities.



14. In the present case, the Applicant has explained that the failure to seek leave was occasioned by technical difficulties in accessing the virtual court platform during a mention. A perusal of the Supplementary Affidavit reveals that its contents are confined to responding to averments made in the 1st Respondent's Replying Affidavit. It does not introduce a new or different issue. The 1st Respondent has had ample opportunity to address the contents of the said Affidavit in its written submissions. Notably, the 1st Respondent did not identify this as an issue for determination nor did they submit on it.
15. To strike out the Affidavit on the sole ground that prior leave was not sought would be to elevate form over substance, a course of action that would be contrary to the constitutional spirit of Article 159. This Court finds that no prejudice will be occasioned to the 1st Respondent by the admission of the Affidavit. Accordingly, the Supplementary Affidavit sworn by the Applicant on 29 May 2024 is hereby admitted to the record.
16. With respect to the prayer for enlargement of time to file an objection and taxation reference, the guiding provision is Rule 11 of the Advocates Remuneration Order which provides as follows:

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 for 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 time fixed by subparagraph (1) or (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 may be so made notwithstanding that the time sought to be enlarged may have already expired.
17. The 1st Respondent's position is that a reasoned Ruling contains the reasons and time runs from its delivery. The Applicant contends that the reasons are a distinct document to be supplied upon request, and time only runs upon their receipt. The Ruling was delivered on 21 March 2024. On the very same day, the Applicant's Advocates wrote to the Taxing Master, giving notice of their objection and requesting the reasons for the decision. This was timely compliance with Paragraph 11(1). The Taxing Master was, thereafter, under a statutory duty to respond. Even a simple endorsement stating that the reasons were fully contained in the Ruling would have constituted a response, as was the case in *Pyramid Motors Ltd -vs- Langata Gardens Limited* [2015] KEHC 5224 (KLR), in which the Court stated thus:

“The intention behind Paragraph 11 of the Advocates Remuneration Order can be gathered from the paragraph itself. The paragraph enables a party dissatisfied with a Taxing Master's decision to decide whether or not to challenge the decision made by the taxing master on



any item of the Bill. The taxing master is obligated to reflect on his decision and advance reasons for such decision. The taxing master has fourteen (14) days from the date of request by either party to state his reasons. It may very well be that the reasons are already stated in the ruling but in my view it is not for the parties to second guess the Taxing Master. The Taxing Master upon receipt of a request from either party under paragraph 11(1) must state explicitly his reasons for the decision on each item of taxation sought to be challenged. If the ruling already contains all reasons then it is for the Taxing Master to state so. That is what paragraph 11 of the Advocates Remuneration Order anticipated. If the ruling contains only some of the reasons then the Taxing Master is obliged to state the other missing reasons.”

18. In the present matter, there is no evidence that the Taxing Master has, to date, responded to the Applicant’s request. It follows, therefore, that the 14-day period for filing a reference as stipulated in Paragraph 11(2) has not yet commenced. The Application for enlargement of time, as the Applicant correctly submitted, is premature.
19. However, to avoid further delays and for the sake of completeness, this Court will proceed to consider the Application for extension of time on merits, as if it were necessary. The discretion of the Court to enlarge time is elaborately discussed in the case of the County Executive of Kisumu v County Government of Kisumu and 8 Others [2017] eKLR where the Supreme Court of Kenya held thus:

“(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as “the underlying principles that a Court should consider in exercise of 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the 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.”

20. The delay herein is 25 days, which is not inordinate. The reason for the delay is the Applicant’s bona fide belief that he was awaiting the Taxing Master’s reasons, a position which this Court has found to be a reasonable interpretation of the law. The intended reference is arguable; the question of whether a trial Judge’s obiter dictum on a hypothetical quantum of damages in a dismissed suit can constitute



the value of the subject matter for the purpose of taxation is a substantial point of law that warrants consideration. It raises a prima facie error of principle which, if established, would justify interference with the Taxing Master's decision.

21. Finally, the prejudice to the 1st Respondent in having the payment of its costs delayed is outweighed by the prejudice to the Applicant being compelled to pay a sum without an opportunity for review. Any monetary prejudice to the 1st Respondent can be adequately compensated by an award of costs and interest should the reference fail. Therefore, even if time had begun to run, this would be a meritorious case for the Court to exercise its discretion and grant an extension.
22. On the issue of stay of execution, the principles governing the grant of such stay are codified in Order 42 Rule 6 of the Civil Procedure Rules and illuminated by case law (see *Butt vs Rent Restriction Tribunal* KLR 417). The three conditions to be met are: the application must be made without unreasonable delay; the applicant must demonstrate that they stand to suffer substantial loss if the stay is not granted; and, the applicant must provide such security as the court orders for the due performance of the decree.
23. Having found that the Application was brought based on a reasonable interpretation of the law, the Court finds that there was no unreasonable delay. On the question of substantial loss, the Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR) held that substantial loss is the cornerstone of this jurisdiction and involves considering whether, if the decretal sum is paid, the respondent would be in a position to repay it if the appeal succeeds. While the 1st Respondent is a stable financial institution, substantial loss is not merely about the ability to repay. It also encompasses the hardship and disruption that the execution process itself may visit upon an application, particularly an individual litigant. To compel the Applicant to pay over Kshs 1.3 million and then undergo a separate process to recover it if the reference succeeds would, in the circumstances of this case, amount to substantial loss.
24. The final and critical condition is the provision of security. The Applicant has not offered any security in his application. The provision of security is a mandatory requirement under Order 42 Rule 6 of the Civil Procedure Rules and serves to guarantee the respondent's interest in the decree. In balancing the competing interests, the most just order is conditional stay. The Applicant has an arguable reference and ought not to be driven from the seat of judgement. The 1st Respondent is equally entitled to the security of its decree. Therefore, a stay of execution shall be granted, conditional upon the Applicant providing security for the entire taxed sum, i.e Kshs 1,307,656/=.
25. In the premise, the Applicant's Chamber Summons dated 15 April 2024 is allowed and I make the following orders:
 - i. The Taxing Master is hereby directed to furnish the Applicant with written reasons for taxation Ruling delivered on 21 March 2024 within 14 days from the date hereof;
 - ii. The Applicant shall file and serve its Reference, if any, within 14 days from the date of receipt of the said reasons from the Taxing Master;
 - iii. An order of stay of execution of the Certificate of Taxation arising from the Ruling delivered on 21 March 2024 is hereby granted pending the hearing and determination of the intended reference, on condition that the Applicant shall, within 30 days from the date hereof, deposit the sum of Kshs 1,307,656/= into an interest-earning bank account held in the joint names of the Advocates for the Applicant and 1st Respondent, or alternatively, deposit the said sum into Court;



- iv. In default of compliance with order (iii) above, the order of stay of execution shall automatically lapse, and the 1st Respondent shall be at liberty to proceed with execution;
- v. The costs of the Application shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 29 DAY OF AUGUST 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Applicant: Githaiga h/b Mr. Owaga

1st Respondent: Mr. Kimani

2nd Respondent: N/A

Court Assistant: Lucy Mwangi

