



**Kieng & another v Karemi & 5 others (Miscellaneous Civil Application  
E039 of 2022) [2024] KEHC 698 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 698 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS CIVIL APPLICATION E039 OF 2022  
EM MURIITHI, J  
JANUARY 31, 2024**

**BETWEEN**

**KOSKEI KIENG ..... 1<sup>ST</sup> APPLICANT**

**WU XIANG ..... 2<sup>ND</sup> APPLICANT**

**AND**

**EVA KAREMI ..... 1<sup>ST</sup> RESPONDENT**

**REBECCA MWONJA LUMIRI ..... 2<sup>ND</sup> RESPONDENT**

**JUDY LEBUTE ..... 3<sup>RD</sup> RESPONDENT**

**TONNY GITONGA ..... 4<sup>TH</sup> RESPONDENT**

**KENFREY MWITI MBAE ..... 5<sup>TH</sup> RESPONDENT**

**JOHN LUMIRI ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion under certificate of urgency dated 23<sup>rd</sup> June 2022 brought under Order 21 Rule 9 (2), Order 45 Rules 1 & 2 of the [Civil Procedure Rules](#), Section 3A and 80 of the [Civil Procedure Act](#) and other enabling provisions of the law, the Applicants seek that, “This Court does grant leave to the Applicants to file an application for reference for review out of time on the certificate of costs dated 13<sup>th</sup> October, 2020.”
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Mwika R, the Applicants’ advocate sworn on even date. He contends the ruling of 24/1/2022 was delivered without any notice to them, and they only learnt of it vide a letter from the Respondents dated 8/6/2022. There was an error apparent in the certificate of costs thus necessitating the Applicants to file a reference. The delay in filing the reference was not deliberate but inadvertent



as it was occasioned by the fact that the Court did not give notice of the delivery of the ruling. It is in the interest of justice that the application is allowed so as to allow re-taxing of the bill of costs to obviate a miscarriage of just and curb unjust enrichment by the Advocate/Respondents. No prejudice whatsoever will be occasioned on the Respondents if the prayers sought are granted.

3. The Respondents opposed the application vide a replying affidavit sworn by Vivian Loice Aketch, their advocate on 1/11/2022. She contends the ruling on costs and the certificate issued on 13/10/2020, were the basis upon which the Applicants applied for review before the trial court. There has been an appeal in this matter but the Applicants did not raise the issue of the Respondents being awarded costs and therefore she urges the court to dismiss the application with costs. It has been 1 year 10 months since the taxing master issued the ruling, and the Applicants' conduct in this whole affair has been mischievous and in bad faith.

### Submissions

4. The application was canvassed by way of written submissions which were respectively filed on 4/12/2023 and 30/11/2023.
5. The Applicants submit that taxation of bill of costs ought to be ventilated by way of reference to the judge, and cite *Gathoni Supeyo v Yano t/a Yano & Co. Advocates* (2019) eKLR and *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* (2013) eKLR. They relied on *Salat v Independent Electoral & Boundaries Commission & 7 Others* (2014) eKLR on the underlying principles a court should consider while exercising the discretion to extend time.
6. The Respondents urge that the long delay of 21 months has been not been explained, and thus unmitigated and inexcusable, and cite *Machira & Co. Advocates v Arthur K. Magugu & Another* [2012] eKLR, *Evans Gaturu Thiga v Kenya Commercial Bank Limited* [2012] eKLR, *Abmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited (2)* [2006] EA 5 and *Twiga Motor Limited v Hon Dalmas Otieno Anyango* [2015] eKLR. They urge that Rule 62 (2) of the *Advocates Remuneration Rules* requires the taxing master to disallow costs unnecessarily or improperly incurred when the same advocate is employed for 2 or more defendants and separate pleadings are delivered, and cite *Omulele & Tollo Advocates v Mount Holdings Limited* [2016] eKLR, *Shadrack Waigwa Ndung'u & 51 Others v Nyeri County Government & 3 Others* [2018] eKLR, *D. Njogu & Co. Advocates v Panafcon Engineering Ltd* [2006] eKLR and *Anguruman Limited v Kenya Civil Aviation Authority & 3 Others* [2014] eKLR.

### Analysis and Determination

7. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the Applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the respondent will not be unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR.
8. In *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR the Court of Appeal (Otieno-Odek JA) observed that:-

“...I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and



interested parties if the application is granted, and whether the matter raises issues of public importance.”

9. Dissatisfied with the certificate of costs issued on 12/10/2020, the Applicants moved the trial court seeking review thereof, and by its ruling of 24/1/2022, the trial court said:

“ 15. It therefore means that a person who is not satisfied by a decision of a taxing master does not have a remedy under the review provisions (just as the applicants have done) but should file a reference to the High Court as provided under paragraph 11 of the *Advocates Remuneration Order*. An application for review cannot be cured by the provisions of article 159 of the *Constitution of Kenya 2010* as there is a specific procedure which must be followed...It is my view that considering the above legal provisions, that the application before me is misplaced and an abuse of the court process and the same ought to be dismissed. The applicants ought to have challenged the decision of the taxing officer in the High Court and not in this court. I therefore proceed to dismiss the same.”

10. The time frame within which to file a reference is set out under Rule 11 of the [\*Advocates \(Remuneration\) Order\*](#) 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 object 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.”

11. After the issuance of the certificate of costs on 13/10/2020, the Applicants were required to give notice in writing to the taxing master of the items of taxation to which they object, within 14 days. That was not done. They instead filed the application for review in the trial court dated 8/12/2020 which was dismissed by the ruling of 24/1/2022 in the absence of the parties.
12. The application was filed on 27/6/2022 where the Applicants contend that the ruling of 24/1/2022 was belatedly brought to their attention on 13/6/2022. The delay in filing the reference is attributed to the trial court’s failure to give the Applicants’ notice of the delivery of the ruling of 24/1/2022.
13. This court accepts that while the delay from when the certificate of costs was issued on 13/10/2020 to the filing of the instant application on 27/6/2022 is manifestly inordinate, the reason thereof has been satisfactorily explained.



## Orders

14. Accordingly, for the reasons set out above, in the exercise of its inherent powers under Sections 1 (A), 1(B) and 3(A) of the *Civil Procedure Act*, this court allows the application dated 23/6/2022 in the following terms:

1. The Applicants are granted leave of court to file their reference out of time.
2. The Reference shall be filed within 14 days from the date of this ruling.
3. In terms of Order 50 Rule 6 of the *Civil Procedure Rules*, the applicant shall pay the costs of the application to the Respondents to be agreed or taxed in default of agreement.

Order accordingly.

**DATED AND DELIVERED THIS 31ST DAY OF JANUARY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. Mukami for the Applicants.

Ms. Aketch for Respondent.

