



**Great Rift Express Shuttle Limited & another v Onjete (Miscellaneous Reference Application 101 of 2023) [2024] KEHC 4523 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4523 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
MISCELLANEOUS REFERENCE APPLICATION 101 OF 2023**

**REA OUGO, J**

**MARCH 20, 2024**

**BETWEEN**

**GREAT RIFT EXPRESS SHUTTLE LIMITED ..... 1<sup>ST</sup> APPLICANT**

**JAMES MWAURA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BRAMWEL MULELI ONJETE ..... RESPONDENT**

**RULING**

1. This application has been brought under sections 27 and 89 of the *Civil Procedure Act*, paragraph 49 of the *Advocates Remuneration Order*, Order 51 Rule 1, sections 3A of the *Civil Procedure Act*, Article 50 and 159 of the *Constitution*, schedule 7 of the *Advocates Remuneration order* (2014) and section 11 (4) of the *Advocates remuneration order*. The applicants seek the following orders:
  1. Spent
  2. Spent
  3. That the applicant be granted leave to file an Objection and a Taxation Reference to This Honourable Court against the Ruling of the assessed costs delivered on 3/8/2023.
  4. That the Objection to the Taxing Officer and the Application for Reference annexed hereto be deemed as duly filed and served upon payment of requisite fees.
  5. That costs of this application be borne by the Respondent.
2. The application was based on the grounds that the respondent had his Bill of costs in Bungoma CMCC No. 442 of 2018 Bramwell Millimo Onjete v Greatrift Express Shuttle Limited & James Mwaura assessed in the registry ex-parte and thereafter he served the Applicants with the Bill of costs on 7/8/287023. On 14<sup>th</sup> August 2023, the respondent's advocate served the applicants with a



letter indicating that his Bill of costs was assessed at Kshs 207,874/- and demanded payment while threatening execution. The applicants were unable to file a notice of objection within 14 days and reference as specified under sections 11 (1) and (2) of the Advocates Remuneration Order, 2014. They filed an application dated 16<sup>th</sup> August 2023 seeking inter-alia to set aside the ex-parte assessment of costs in the registry but the court delivered its ruling on 11/10/2023 and directed that if they felt aggrieved by the assessment then they should file a reference. They contend that there is a delay in filing the reference which delay is only 3 months. The delay is not inordinate and, in any case, can genuinely be explained.

3. In the supporting affidavit of Everlyne Ogato, it was deposed that the Bill of Costs was assessed ex-parte in the registry on 03/08/2023. Later, the respondent served the applicants via email with a bill of costs dated 21/7/2023. On 14/8/2023 the respondent served the applicants with a letter indicating that the Bill of costs was assessed at Kshs 207,874/- and demanded payment while threatening execution. They filed an application dated 16/8/2023 seeking inter-alia to set aside the ex-parte assessment of costs in the registry but the court delivered its ruling on 11/10/2023 and directed that if the applicants were aggrieved then they should file a reference.
4. The applicant's advocate was unable to file a notice of objection within 14 days as specified under sections 11 (1) and (2) of the Advocates Remuneration Order, 2014 since they had filed an application dated 16/8/2023 seeking the setting aside of the ex-parte assessment of costs in the registry but the court delivered its ruling and failed to set aside the assessment. There is no stay of execution and there is the imminent threat of execution against the applicants as they have been served with a decree. The applicants wish to file a reference against the decision of the executive officer to assess the bill of costs as he is unqualified to assess a bill of costs also the assessed costs are manifestly excessive and contrary to the law and principle and the same has not been subjected to 10% partial contribution. They contend that the applicants were condemned unheard and that if the stay of execution is not granted the applicants are apprehensive that the respondent will proceed and attach his properties.
5. The application was opposed. The respondent filed a replying affidavit dated 21<sup>st</sup> November 2023. The respondent averred that judgment was entered in Bungoma CMCC No. 442 of 2018 on 20/7/2023. The applicants were served with the Bill of Costs and the Bill was immediately assessed and the applicants notified. The applicants sought an order of Stay of execution before the Hon. Magistrate and stay of execution pending determination of the High Court in Bungoma Civil Appeal No. E081 of 2023 vide the application dated 16/8/2023. In an application dated 1/9/2023, the applicants moved the magistrate's court in CMCC No. 442 of 2018 for an order of stay. The respondent opposed all these applications. Vide a ruling delivered on 11/10/2023 the applicants were granted a stay of execution of both the decree and taxed costs on condition that they deposit half of the decretal sum in a joint account of both counsel and pay the other half to the respondent.
6. It was further deposed that the application herein has been filed in contravention of paragraph 11 of the Advocates (Remuneration) Order. They also contend that the leave sought by the applicants will be an exercise in futility as the applicants have failed to apply for the reasons of the decision from the Hon. Magistrate in Bungoma CMCC No. 442 of 2018 as stipulated under the provisions of Rule 11(2) of the Advocates (Remuneration) Order. They explained that the applicants had already been granted an order of stay in Bungoma CMCC No. 442 of 2018 and the same cannot be granted by this court.
7. They also averred that the costs were not taxed by the executive officer but the same were taxed by the Hon. Magistrate. They contend that the applicants have not approached the court with clean hands and are not entitled to the equitable reliefs sought
8. At the hearing of the application, Miss Yesot who was holding brief for Miss Bill submitted that the reason for filing the application out of time is advanced in the affidavit in support. They relied on the



case of *Nicholas Kiptoo Salat v IEBC and 7 Others* 2014 eKLR which talks of delay in meeting statutory timelines. They contend that no prejudice will arise to the respondent if the application is allowed. They also cited the case of *Charles Murunga v Mercy Gathogo & others* 2019 eKLR where the court dealt with a similar application.

9. Mr. Bw'onchiri for the Respondent, submitted that the application offends Order 11 Rule 1 of the Advocates Remuneration Order. It was argued that if the applicants were aggrieved by the assessment of the bill of costs, they ought to have pointed that out and the magistrate to give his reasons. Thereafter they file objection proceedings.

### **Analysis And Determination**

10. I have considered the application before me, the rival submissions by the parties and the main issue before the court is whether this court should enlarge time to enable the applicants file an objection and taxation reference. The court shall therefore be guided by the provisions of Rule 11 of the *Advocates Remuneration Order* which provides as follows:

“ 11. 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.”

11. In this case, the plaintiff's (now respondent) bill of costs had been taxed on 03/08/2023 and a certificate of taxation was issued by the taxing master dated 30<sup>th</sup> August 2023. The applicants' application to file the reference out of time was filed on 2<sup>nd</sup> November 2023, almost 3 months after the respondent's bill was taxed. The applicants' reason for the delay is captured in paragraph 8 of the supporting affidavit:

“ 8. That I was unable to file notice of objection within 14 days and reference within 14 (sic) specified under section 11(1) and (2) of the Advocates



Remuneration Order, 2014 since I filed an Application dated 16<sup>th</sup> August 2023...”

12. The applicants were informed by the respondents on 12/8/2023 that the bill of costs was assessed at Kshs 207,874/- but they opted to file an application dated 16/8/2023 to set aside the assessment of the bill of costs. Their application was dismissed on 11/10/2023. It is clear that the applicants were aware of the decision of the taxing master but elected not to file an appeal under Rule 11 of the Advocates Remuneration Order. The applicants have not shown that the failure to file Chamber Summons within the stipulated period was unintentional and justifiable. In *County Executive of Kisumu v County Government of Kisumu and 8 Others* [2017] eKLR 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.”

13. The applicants have not afforded the court a reasonable explanation for the delay in filing the chamber summons. Therefore, it is my finding that the Applicants' application for enlargement of time is not merited and the same is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20<sup>TH</sup> DAY OF MARCH 2024**

**R.E. OUGO**

**JUDGE**

In the presence of:

Miss Ongongo'a For the Applicants

Miss Wanyama For the Respondent



