



Nairobi City water & Sewerage Company Limited v Koceyo & Company Advocates (Civil Miscellaneous Application E438 of 2021) [2024] KEHC 6358 (KLR) (Civ) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS APPLICATION E438 OF 2021

AN ONGERI, J

MAY 31, 2024

BETWEEN

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED APPLICANT

AND

KOCEYO & COMPANY ADVOCATES RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 4/8/2023 brought under sections IA, 1B, 3, 3A and 148 of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 42 rule 6 of the *Civil Procedure Rules* 2010, Paragraph 11 (4) of the *Advocates Remuneration Order*, 2014 and all other enabling laws seeking the following orders:
 - i. That this application be certified as urgent and heard exparte in the first instance and thereafter on priority basis in view of its urgent nature and that service be dispensed within the first instance.
 - ii. That the Applicant be granted leave to file an Objection and a Taxation Reference out of time to this Honorable Court against the Ruling of the Honorable Court's Taxing Officer delivered by Hon. L.A. Mumasabba on 29th March 2022.
 - iii. That the leave granted in prayer (2) above do operate as stay of execution of the Ruling of the Taxing Officer aforesaid and any other consequential proceedings.
 - iv. 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.
 - v. That the costs of this application be in the cause.



2. The application is based on the following grounds;
 - i. That a ruling was delivered by the taxing master on 29th March 2022 based on the Advocate Client bill of costs dated 7th September 2021 and filed by the Respondent herein.
 - ii. That after the ruling we obtained a copy of it and advised our client on the same.
 - iii. That our client, the applicant herein instructed us to file a reference which we did in Milimani HCC Misc Application No. E226 of 2022. However, the Honourable Court directed we comply with the procedure set out in rule 2 of the Remuneration Order.
 - iv. That our notice of objection required under paragraph 11(c) of the [Advocates Remuneration Order](#) was issued vide our letter dated 7th April 2022 (Exhibit DK-2) attached to the supporting affidavit of the application.
 - v. That at the time of obtaining the order, time had already lapsed hence it became necessary to seek for leave before filing the reference.
 - vi. That the mistake of counsel should not to be visited upon innocent litigants who are keen to be heard on merits.
 - vii. That the Applicant stands to suffer substantial loss if the application herein is not allowed as the Respondent will proceed with the process of execution.
 - viii. That there shall be no prejudice to any party if this application is allowed as prayed.
 - ix. That it is fair and just to grant the orders.
 - x. That it is in the interests of justice to allow the present application.
 - xi. That this application is brought in good faith and without any unreasonable delay.
3. It is supported by the supporting affidavit of Dickson Khisa sworn on 4/8/2023 as follows;
 - i. That I am Advocate of the High Court of Kenya practicing law in the law firm of Kiruki & Kayika Advocates and conversant with matters pertaining to this suit which are within my knowledge and therefore I am competent to swear this affidavit.
 - ii. That the firm of Kiruki & Kayika Advocates is on record for the Defendant in this matter.
 - iii. That the taxing master delivered a ruling on 29th March 2022 based on the Advocate Client bill of costs dated 2nd September 2021 and filed by the Respondent herein.
 - iv. That after the ruling we obtained a copy of it and, advised our client on the same. A true copy of the ruling dated 29th March 2022 is annexed herewith and marked as DK-I.
 - v. That vide a letter dated 7th April 2022, we issued Notice of objection as required under paragraph 11(1) of the [Advocates Remuneration Order](#)
 - vi. That our client, the applicant herein instructed us to file a reference which we did in Milimani HCC Misc Application No. E226 of 2022. However,



the Honourable Court directed we comply with Rule 2 of the [Remuneration Order](#).

- vii. That at the time of directions from the Honourable Court, time to file a reference had already lapsed necessitating the filing of the current application.
- viii. That the delay in filing the reference was due to the fact that we had already filed in a different cause when we were directed by the Honourable Court to file in the same cause.
 - i. That the Respondent has already obtained a certificate of taxation and has threatened to proceed with execution.
 - ii. That the mistake of counsel should not to be visited upon innocent litigants who are keen to be heard on merits.
 - iii. That the Applicant stands to suffer substantial loss if the application herein is not allowed as the Respondent will proceed with the process of execution.
 - iv. That there shall be no prejudice to any party if this application is allowed as prayed.
 - v. That it is fair and just to grant the orders.
 - vi. That it is in the interests of justice to allow the present application.
 - vii. That this application is brought in good faith and without any unreasonable delay.”

4. The respondent filed a replying affidavit to oppose the application as follows;

- “i. That I am the managing partner of Koceyo & Company Advocates and well versed with the matter herein hence competent and authorized to swear this Affidavit.
- ii. That the Applications are fatally defective and incurably incompetent and ought to be dismissed with costs.
- iii. That the Applicant’s Chamber Summons Application is an abuse of the Court process and amounts to forum shopping to get an affordable decision from a different Court.
- iv. That the Chamber Summons Application is an outright abuse of the Court process as the Applicant had already filed within Misc. Application No. E226 of 2022 an Application seeking to set aside/vacate the ruling by Honourable L.A. Mumassaba Deputy Registrar which Application was dismissed by the High Court of Kenya at Nairobi, a Court of competent jurisdiction.
- v. That the Application relies on the same grounds as the one which led to the Orders made by Honourable Justice Aleem Visram on 24th April 2023, which Orders dismissed the Applicant’s Chamber Summons Application.



- vi. That as such the instant Application is *res judicata*, a similar one having been filed, heard and ruling delivered. *res judicata* applies even an issue ought to have been raised but was not raised by the parties.
- vii. That the decision was rendered by a Court of competent jurisdiction over the subject matter and the parties, and the Ruling was delivered based on merit. In such Applications, it is mandatory that a decision be made on the merits rendered by a court of competent jurisdiction, one that is conclusive as to the rights of the parties and their privies and constitutes an absolute bar to further actions involving the same claim, demand. or cause of action.
- viii. That all the issues the Applicant is raising in the Chamber Summons Application herein were heard and determined by the Court including the issue of misapprehension and misapplication of the Law by the Taxing Master.
- ix. That the Application is hence frivolous, vexatious, lacks merit and ought to be dismissed.
- x. That the Application is an abuse of precious judicial time and it is in the interests of justice and fairness that it be dismissed with costs to the Respondent.
- xi. That in response to the Applicant's Notice of Motion Application, the *Advocates Remuneration Order* under Rule 11 requires that every Taxation Reference be filed within fourteen (14) days from the date the Taxing Master makes his or her decision, which requirement the Applicant is well aware of and admits to.
- xii. That the Ruling of the Taxing Master was delivered on the 29th day of March, 2022.
- xiii. That the Applicant failed to file a Reference within the stipulated time and thereafter filed an Application for the extension of time more than a year from the date the Taxing Master made his Ruling on 4th August, 2023.
- xiv. That the delay involved herein. of more than a year. is inordinate since the Law has specified a very limited period of time within which to file a Reference.
- xv. That the Applicant admits to delaying in filing the Reference but has without justifiable cause failed to give sufficient and/or enough reasons for the delay to be inordinate. The Applicant has not established any clear reasons for the delay.
- xvi. That the Applicant claims that the delay in filing the Reference was a consequence of the fact that they had not obtained a copy of the Ruling and when they did, they filed the Reference under the wrong file number, which is Misc. Application No. E266 of 2022.
- xvii. That extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, and mistake of law is not a valid ground for extension.



- xviii. That the extension of time sought, if granted will prolong a frivolous and vexatious dispute and cause undue prejudice to the Respondent.
- xix. That further, the prayers in the Application herein seek to stay execution of the Ruling by the Hon. Deputy Registrar L.A. Mumassabba yet no valid grounds for stay have been advanced.
- xx. That the said Application does not raise any arguable grounds and/or points of law that may be rendered nugatory if orders sought are not granted. The Application herein is frivolous, with the intention to waste this Honourable Court's time.
- xxi. That the Reference against the Ruling is not an arguable one with high chances of success as it raises no friable issues that warrant setting aside of the Ruling. The Court cannot grant an order in vain.
- xxii. That if this Court grants the orders prayed for by the Applicant, the instant Applications— filed by the Applicant as a calculated delay tactic—will be successful in preventing the timely, economical, and proportionate resolution of disputes to ensure the parties' access to justice. as required by Article 159 of the Kenyan Constitution.
- xxiii. That contrary to the averments of the Applicant, it is the Respondent who stands to suffer irreparable damage and financial sabotage having rendered its legal services to the satisfaction of the Applicant herein and without payment.
- xxiv. That as the successful litigant, the Respondent is entitled to the fruits of his Ruling and granting the orders sought by the Applicant herein would prolong the suffering that the Respondent has gone through in prosecution this matter.
- xxv. That the Applicant's Application is an abuse of precious judicial time and it is in the interests of justice and fairness that it be dismissed with costs to the Respondent."

5. The parties filed submissions as follows; the applicant submitted that the application herein was filed without undue delay as per the orders granted in Milimani HCC Misc Application No. E226 of 2022 *Nairobi Water & Sewerage Co. Ltd v. Koceyo & Co. Advocates* in which the applicant had filed a reference against the ruling of the Deputy Registrar in Milimani HCC Misc. Application No. E438 of 2021. The reference was to be filed in the same cause and the honorable judge directed that they comply with order 11 of the Advocates Remuneration Order and file a reference.

6. The applicant submitted that the reference was filed on time and that the applicant has a high chance of its reference succeeding. There will be no prejudice to the respondent if the orders sought herein are granted. the applicant cited *County Government of Tana River v Miller and Company Advocates* [2021] eKLR where Hon. R. Naykundi J in allowing an application to file a reference out of time held as follows;

“ In addition, the applicant in his affidavit has explained the reasons which let time to lapse. That hurdle has therefore been satisfied as a sufficient cause for this Court to extend time in favor of the applicant to file a Reference under paragraph 11 (1) (2) of the *Advocates Remuneration Order*.”



7. On the stay of execution, the applicant submitted that order 42 rule 6 (1) of the Civil Procedure Rules gives the court discretion to grant the same. In the case of County Government of Tana River v Miller and Company Advocates [2021] eKLR, in allowing an application for stay held as follows;

“That being the general principles. The question is whether the subject matter of the reference if successful will be rendered nugatory. It has also been stated that the applicant is likely to suffer substantial loss in the event the respondent is allowed to proceed with entry of judgment and subsequent execution.

For the reasons in the affidavit the Court accepts the submissions for counsel for the applicant which discloses material averments necessary for the court to exercise discretion to grant a stay of execution of the Certificate of Cost pending the determination of the reference.”

8. The respondent alternatively submitted that the application herein is res Judicata. The respondent contended that all the issues the applicant is raising were heard and determined by the court including the issue of misapprehension and misapplication of the law by the Taxing Master. All the grounds relied on in the instant application were raised by the applicant in their previous application filed within Misc. Application No. E266 of 2022 Nairobi City Water & Sewerage Company Limited v. Koceyo & Co. Advocates.
9. The respondent submitted that the Advocates Remuneration Order under Rule 11 requires that every Taxation Reference be filed fourteen (14) days from the date the Taxing Master makes his or her decision. The Ruling of the Taxing Master delivered on the 29/3/2022 but the Applicant failed to file a Reference within the stipulated time of fourteen (14) days and thereafter filed an Application for the extension of time more than a year from the date the Taxing Master made his Ruling on 4/8/2023. The delay involved is more than one year therefore inordinate.
10. The respondent on granting of stay of execution argued that the applicant has not met the requirements for granting the same. the reference against the ruling is not an arguable one with high chances of success as it raises no triable issues that warrant the setting aside of the ruling. The respondent further indicated that in the absence of stay the reference will not be rendered nugatory.
11. The sole issue for determination is whether the applicant should be granted leave to file a reference out of time and stay of the ruling on taxation.
12. I find that the court has a discretion to grant extension of time to file a reference.
13. The applicant in his affidavit has explained the reasons which let time to lapse.
14. It is not in dispute that the applicant herein filed a reference in Milimani HCC Misc Application No. E226 of 2022 and that the Court directed the applicant to comply with Rule 2 of the Remuneration Order.
15. In the circumstances, I allow the application dated 4/8/2023 and direct as follows;
- i. That the Applicant be and is hereby granted leave to file an Objection and a Taxation Reference out of time to this Court against the Ruling of the Taxing Officer delivered on 29th March 2022.
 - ii. That the leave granted in prayer (i) above do operate as stay of execution of the Ruling of the Taxing Officer aforesaid and any other consequential proceedings.



- iii. 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.
- iv. That the costs of this application be in the cause.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2024.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

