



**Monyo & 2 others v Ngige (Miscellaneous Civil Application
E07 of 2020) [2023] KEHC 817 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 817 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E07 OF 2020
PJO OTIENO, J
FEBRUARY 10, 2023**

BETWEEN

TEDDY MULEHI MONYO & 2 OTHERS APPLICANT

AND

PETER GICHARU NGIGE RESPONDENT

RULING

1. Strangely three different files were opened being same serial case number and with the same application. Even though counsel for the applicant did indicate to court that the files had been duplicated, no administrative steps were taken to destroy or otherwise remove the duplicate files. That notwithstanding, the application before court is one seeking leave to file a reference out of time and to deem the reference filed, Notice of Motion equally dated October 9, 2020, duly filed.
2. The grounds put forth to premise the applications were that the time prescribed for filing reference lapsed during the COVID 19 period while the applicant wishes to challenge the taxing master's decision on the basis that it was guided upon wrong provisions of the law. The affidavit in support of that application, sworn by counsel for the applicant reveals that the items for contestation are only item 1, instructions fees, which was taxed at Kshs 3,000/= and item 10, attendance fees, which was taxed off.
3. It is alleged that on the bill being taxed at Kshs 23,075/=, the applicant's counsel on January 7, 2020, wrote to the taxing master requesting for reasons but the request was never acknowledged save that the taxing officer issued certificate of taxation on a date not disclosed, but at time the prescribed time for lodging the reference had lapsed.
4. On the merits of the intended reference the applicant contends that in taxing the instructions fees as he did, the court relied on paragraph 6A (1) (e) (viii) regarding appeals as if the matter was an appeal, which it was not, hence the ultimate costs awarded were too low compared to the nature of the case and the minimum fees prescribed and schedule 6 (A) (1) (a) (j).



5. Even though the affidavit alludes to some four documents, the bill of costs, notice of taxation and affidavit of service, letter requesting for reasons for taxation and the certificate of costs, having been exhibited, none of those documents are in any of the duplicated files.
6. In resisting the application, the respondent filed not only grounds of opposition but also a replying affidavit. In the grounds of opposition, it is alleged that the Court lacks the jurisdiction to entertain an application which is unknown to law for being filed unprocedurally, fatally defective and otherwise vexatious, frivolous and an abuse of the court process.
7. In the replying affidavit, it is contended that the application is defective for want of form and substance for seeking to change the rules of procedure in that it was filed belatedly and outside the time prescribed and that no reasons had been offered for the delay of more than one year. On the blame on COVID 19 pandemic, it was asserted that by the time the pandemic set in, the ruling was about four months old and that even after filing the same was served after one month further showing the laxity and indolence on the part of the applicant.
8. When parties attend court on the February 11, 2021 it was directed and agreed that, on the basis of the grounds of opposition challenging jurisdiction, the application and preliminary objection be heard together and parties were directed to file and exchange submissions.
9. Pursuant to such directions only the applicant filed submissions dated March 8, 2021 on the March 16, 2021. In these submissions there is an undesirable ambivalence where the applicant contends on one hand that there is a draft notice of motion for leave but on the same breath saying that the prayer is that notice of motion for reference are also due for consideration. for good order, the court deems the only application for its consideration to be that seeking extension of time and the other with prayers for setting aside and stay is treated as a draft just showing what would be filed if leave is granted.
10. The submissions then disclose that the intended reference would be ground and brought pursuant to rule (1) (2) [Advocate Remuneration Order](#). The submissions identify three issues to fall for determination being:-
 - (i) Whether the court has jurisdiction to handle the matter,
 - (ii) Whether time may be extended to file reference and
 - (iii) Whether stay maybe granted against the certificate of costs.
11. On whether the court has jurisdiction to extend time, counsel relied on rule 11 (4) to grant mandatory powers to the court and on whether the delay was inordinate and if plausible reasons had been preferred to merit enlargement of time, the counsel set out the determinative dates to have been the delivery of the ruling on November 28, 2020, objection to taxation by a letter of December 4, 2020, issuance of a certificate of taxation on January 7, 2021 before the reasons had been given, and the filing of the application on October 13, 2020.
12. Based on that calendar of events, the applicant contends that there was no inordinate delay and that the delay has been explained well. The decisions in [Mumias Sugar Co Limited v Tom Ojienda](#) [2018] eKLR and [Thomas Kibalati v Janendra Reindard Shah](#) [2018] eKLR were cited for the proposition of the law that whether or not to enlarge time is a discretionary matter and that that discretion is exercised judiciously by the court seeking to find out if the delay was not inordinate, reasons for delay, chances of success in the reference and the extent of prejudice to visit the Respondent in the event the time is enlarged.



13. The principles for consideration in every application for enlargement of time are now well crystallised. crystallised that it is discretionary matter calling for the court's judicious mind based upon reasons and settled criteria. The applicant must demonstrate and account for the period of delay to the satisfaction of the court. Where no plausible reason is offered for the delay even if the delay is not inordinate the court would be hard pressed to find a judicious reason to extend time. One of such reasons would be the strength and prospects of success of the reference and the need to protect the right to access justice.
14. To help count weight and approximate the strength of the reference, it is necessary that material pointing to such strength be availed. For taxation matter like this, it would have been necessary to avail a copy of the bill, or for the affidavit to set out what was charged for instructions fees and attendance, for the court to compare with the ruling on taxation and reasons advanced. As said before, the bill of costs and the ruling are alluded to but no copy is exhibited. It is thus impossible for the court to imagine what the strength of the reference would be even in the event it enlarges time.
15. In this matter while the only reason for delay is lack of response with reasons and the pandemic, I find the two reasons not to be plausible for the following reasons.
16. On the pandemic as a reasons for delay, it is common historical knowledge that the scourge set in on the March 15, 2020. As at the date the restrictive measures were announced, the time for lodging the reference had long passed. There is for example no reason why the application for leave would not be brought between January 7, 2020 and the date the scourge set in.
17. On need for reasons for taxation before a reference is filed, the law was settled by the Court of Appeal in *Kipkorir, Titoo and Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR where the court said:-

“ ... We are of the view that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for reference and the absence of reasons would not in itself preclude the objector from filing a competent reference.”
18. In any event the failure to exhibit the ruling sought to be challenged in the intended reference presents an impediment as said before in the courts ability to assess whether or not the ruling proffered any reasons and thus if the reasons were indeed necessary to found the reference. See also *Abmed Nassir Abdikadir & Co Advocates v National Bank of Kenya Ltd* [2006] 1EA 5 where the court held that where there are reasons in the ruling there is no need to seek reasons from the taxing master.
19. It is thus the court finding that failure to receive reasons from the taxing master is not a good reasons to seek extension of time.
20. Effectively therefore, the reasons advanced to justify the delay are found to be implausible. In addition, the period between November 28, 2019 and October 13, 2020, a period of about eleven (11) months is to the court inordinate. When inordinate and coupled with lack of plausible explanations, the court is left with no reason to base its discretion upon. On that basis the application fails and is dismissed.
21. On jurisdiction, it is of note that the proceedings giving rise to the current application were conducted before the Judge sitting and presiding over Environment and Land Court. The jurisdiction of this court is never expected to extend and overlap to the other court.
22. Even though under the *Advocates Act*, the court is defined as the high Court, with the advent of the Constitution 2010, and section 7 of the 6th Schedule, the definition of the court under the *Advocates*



Act must be construed with adaptations, alterations, qualifications and exceptions necessary to bring into conformity with the Constitution.

23. For purposes of taxation of party and party costs, that must be conducted in the suit in which costs were awarded, the act must be construed to vest the jurisdiction upon the judge of the Environment and Land Court to hear reference and even entertain application for extension of time so that the court take full charge of all disputes before it and the related and incidental disputes emanating and flowing therefrom. Like in this matter, there is a prayer for stay of the certificate of taxation. That certificate was issued in the Environment and Land Court file. To issue an order of stay in this matter would not only affront section 34 of the Civil Procedure Act but equally go against the dictates of article 162 (5) of the Constitution and paint the court as being bent on usurping the jurisdiction of that other court. On the basis that the taxation sought to be challenged was conducted and concluded in the Environment and Land Court file, the court determines that it has no jurisdiction to entertain the matter.
24. For avoidance of doubt, this court lacks jurisdiction on disputes as costs between parties litigating before the Environment and Land Court. If however the dispute was to be between counsel and client, wherever the service was offered and applied, the words of the Advocates Act, would have to be applied and construed to vest exclusive jurisdiction in the High Court and not the courts of equal status. The application thus fails and is struck out for want of jurisdiction.
25. On costs, it is noted that even though the respondent was in court when directions for filing of submissions were given, it never filed any submissions within time and now well after a period of one year. For the reasons that counsel abdicated duty to court and failed to comply with directions by the court, and even though it has succeeded, the court order that it shall not get costs. Each party shall therefore bear own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 10TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for Counsel

Court Assistant: Polycap

