



Mungai v Kimanu (Civil Appeal 42 of 2004) [2025] KEHC 568 (KLR) (28 January 2025) (Ruling)

Neutral citation: [2025] KEHC 568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 42 OF 2004
HI ONG'UDI, J
JANUARY 28, 2025**

BETWEEN

SAMUEL NDUN'GU MUNGAI APPELLANT

AND

PAPIUS GAITHU KIMANU RESPONDENT

RULING

1. In the notice of motion dated 28th July 2022 brought under Article 159 of *the Constitution*, order 51 Rule 1 *Civil Procedure Rules*, and sections 1A & B 3A of the *Civil Procedure Act* the applicant prays for the following orders;
 - i. Spent.
 - ii. The respondent/applicant be granted leave to have his bill of costs taxed out of time.
 - iii. The intended application and the bill of costs annexed herein be deemed to have been filed within the time specified.
 - iv. Costs of the application be borne by the respondent/applicant.
2. The application is premised on the grounds on its face as well as the affidavit sworn on even date by applicant. He deponed that upon being awarded costs he instructed his advocates to file the bill of costs and follow up on settlement of the same by the appellant/respondent. Further, that the said advocates persisted in their failure to act on his instructions prompting him to report them to the Advocates Complaints Commission.
3. He deponed further that delay in presenting his bill of costs had not been occasioned by any unwillingness on his part to pursue the same but by the professional negligence of his previous advocates. He urged the court to grant him leave to allow his bill of costs to be taxed.
4. The appellant/respondent did not file any response to the application;



5. The application was canvassed by way of written submissions

Respondent/applicant's submissions

6. These were filed by Kairu Mbuthia Law advocates and are dated 8th November 2024. Counsel identified one issue for determination which is whether the respondent's filing of bill of costs is merited. Counsel submitted that the court should take into account that the delay in this matter was caused by the professional negligence of the applicant's previous advocates. He urged the court to exercise its discretion in considering the circumstances of this case.
7. He placed reliance on the decision in *Republic v Kenya Revenue Authority Ex-parte Stanley Mombo Amuti* [2018] eKLR, where the applicant commenced Judicial Review Proceedings after time had passed and argued that the court had jurisdiction to exercise time elongation.
8. He submitted further that the application was unchallenged and uncontroverted since the appellant/respondent failed to file a replying affidavit. In support of this position he placed reliance on two decisions one of them being the case of *Kennedy Otieno Odiyo & 12 others v Kenya Electricity Generating Company Limited* [2010] eKLR where the court held as follows:

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus, what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant’.
9. In conclusion, he urged the court to allow the application which was unopposed.

Appellant/respondent's submissions

10. These were filed by Mirugi Kariuki & Company advocates and are dated 25th October, 2023, whereby counsel identified three issues for determination.
11. The first issue is whether the notice of motion dated 28th July 2022 and filed on 19th September 2022 and the advocates-client bill of costs dated 28th July 2022, are incompetent, bad in law, fatally defective and an abuse of the court process for non-compliance with mandatory provisions of the law by the applicant. Counsel submitted that the applicant had exhibited considerable delay in presenting his bill of costs. That his desperate attempt to resurrect an already statute barred bill of costs through this application was an exercise in futility.
12. He placed reliance on section 4 (1) (a) of the Limitations of Actions Act, section 51 (1) of the *Advocates Act*, paragraph 13 (3) of the *Advocates (Remuneration) Order*, Halsbury's Laws of England 4th Edition Vol. 28 at page 452 paragraph 879 and several decisions among them *Monarch Insurance Co. Ltd v Parbat Siyani Construction Co. Ltd* [2016] eKLR where the court adopted with approval the decision of Lord Denning in the case of *Letang v Cooper* [1994]2 ALL ER 929 (CA) (at page 936) stated:

“The Act is a Limitation Act; it relates only to procedure.

It does not divest any person of rights recognized by law; it limits the period within which a person can obtain a remedy from the courts for infringement of them. The mischief against which all Limitation Acts are directed is delay in commencing legal proceedings; for delay



may lead to injustice, particularly where the ascertainment of the relevant facts depends on oral testimony. This mischief, the only mischief against which the section is directed is the same in all actions in which damages are claimed in respect of personal injuries.”

13. The second issue is whether the reasons put forth by the applicant for the delay in the filing and taxation of the bill of costs, warrant an extension or permission for the bill of costs to be taxed out of time. Counsel submitted in the negative and cited several decisions among *Benjob Amalgated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR where court held as follows;

“63. In dealing with laches, Halsbury’s Laws of England, 4th ed. Vol. 16(2) at 910 has this to say;

“A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent’ or ‘delay defeats equities. A Court of equity, refuses its aid to stale demands where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (laches’). (Emphasis ours)”

14. In conclusion, he urged the court to dismiss the applicant’s application.

Analysis and determination

15. I have carefully considered the application, affidavit in support and submissions by the parties. I find the issue arising for determination to be whether the application herein is merited.

16. It is the applicant’s case that the delay in presenting his bill of costs had not been occasioned by any unwillingness on his part to pursue the same but by the professional negligence of his previous advocates. On his part the appellant/ respondent argued that the respondent/applicant had exhibited considerable delay in presenting his bill of costs. He further argued that his desperate attempt to resurrect an already statute barred bill of costs through his application was an exercise in futility. He added that both the application and the Advocate-Client bill of costs should be struck out with costs to the appellant/respondent for non-compliance with Section 4(1)(a) of the *Limitations of Actions Act* and section 51(1) of the Advocates Act and Paragraph 13(3) of the *Advocates (Remuneration) Order*.

17. Section 51 of The *Advocates Act* provides as follows:

General provisions as to taxation:

1. Every application for an order for the taxation of an advocate’s bill or for delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.
 2. The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court makes such an order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that the judgment be entered for the sum certified to be due with costs.
18. Section 51 of the Act makes general provisions as to taxation and it is this court’s considered view that there are no two separate regimes for taxation of party/party costs and advocate/client costs. Further, there is no separate regime for enforcement and recovery of the taxed costs and the certificate



of costs is the final determination of costs by the taxing master be it party/party or advocate/client. The consequences of such taxation fall within the ambit of this court either by way of reference or adoption of the certificate.

19. Before this court is the application seeking leave for the applicant to file his bill of costs for taxation. He claims to have been let down by his then advocates. The judgment herein was delivered on 20th December, 2007. The application seeking leave is dated 28th July, 2022 and filed on 19th September, 2022. This is fifteen (15) years plus three (3) months, since delivery of the Judgment. This long delay has not been satisfactorily explained by the applicants. Even if his former advocates had let him down he had all the opportunities to engage other counsel to file the application for him or even himself. He has not shown anywhere any efforts to get briefs from his then advocates.
20. Upon considering Article 159 of *the Constitution* I find no justification in the failure to file the bill of costs within the timelines provided under section 4(1) of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya. The period of delay herein is too inordinate.
20. The upshot is that there is no merit in this application which I hereby dismiss with no order as to costs. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 28TH DAY OF JANUARY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

