Mbithi v BM Mungata & Company Advocates & another (Miscellaneous Application 348 of 2018) [2023] KEHC 18439 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18439 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS APPLICATION 348 OF 2018

FR OLEL, J

MAY 31, 2023

BETWEEN

MARGARET MWIKALI MBITHI ..... APPLICANT

AND

BM MUNGATA & COMPANY ADVOCATES ..... 1ST RESPONDENT

EASTERN KENYA AUCTIONEERS ..... 2ND RESPONDENT

RULING

1. Before court is the amended notice of motion dated February 18, 2020, filed under provision of section 1A, 1B and 3A of the *Civil Procedure Act*, order 22 rule 22(1), order 40 rule 1 and order 51 rule 1 of the *Civil Procedure Rules* and article 48, 50, 159(2)(d) and 165 of the *Constitution* of Kenya 2010. Prayers 1,2,3,4 & 5 are basically spent and the prayers remain for determination are 6,7 & 8 herein the applicant seeks for orders that

    i. This honourable court be pleased to set aside the taxing masters decisions and the certificate of taxation. Leave to be granted to the applicant to defend the advocate/client bill of costs and the bill of costs be taxed afresh.

    ii. This honourable court in the alternative be pleased to grant leave to the applicant and/or extend time within which to file a reference to the taxation.

    iii. This honourable court does orders that the fresh taxed amount be set off from the fees deducted from the balance of the fees deducted from the settlement of civil case number 57 of 2007.

2. The application was supported by the grounds on the face of the said application and affidavit of Margaret Mwikali Mbithi dated January 21, 2020 (which was filed with the original notice of motion application dated January 21, 2020, which motion was amended on February 18, 2020). The respondent filed a replying affidavit dated February 27, 2020 opposing the said application.

Brief Facts

3. The applicant alleged that she was not served with the advocates -client bill of costs and only became aware when her property was proclaimed on July 4, 2020. She states that she would wish to challenge the said advocate-client bill of costs as she had settled all the legal fees due to her then advocates and thus should be given leave to file a reference pronto. The applicant reiterated that she was never served with the taxation notice and had never met the process sever one Alex Wambua Muthenya who is alleged to have effected service upon her. She applied to have him cross examined.

4. Further the applicant averred that the costs as taxed were excessive and unreasonable and needed to be relooked at. The procedure used by the 1st respondent in executing the decree was also flawed and needed to be stopped as the respondent had come to court with unclean hands. Finally the applicant also stated that she had a right to be heard and access court to ventilate all issues relating to the filed and taxed advocate –client bill of costs.

5. The respondent did oppose this application and stated that the same is frivolous, vexatious and is an abuse of the court process. Further the grounds on the face of the application and supporting affidavit did not reveal grounds to warrant setting aside of the orders sought as the applicant had been fully aware of the existence of the advocate- client bill of costs having been personally served with the same and the taxation notice but chose not to participate in the proceedings. The applicant actions was calculated and aimed at denying the 1st respondent from enjoying the fruits of taxation.

6. The 1st respondent further stated that the delay of one year was not explained from date of taxation to when the applicant filed this application. The delay was unreasonable and therefore discretion should not be exercised in the applicant favour. Further if the respondent had paid any legal fee, it was upon her to furnish proof of such payment to be given credit. Also if the applicant had written proof that the advocate fee would be paid by deducting it from the decretal sum in CMCC 57 of 2007 as alleged, it was upon her to proof the same.

7. The 1st respondent stated that the advocate-client bill of costs was properly taxed and should be settled by the client-applicant. Her application was frivolous and should have been struck out/dismissed with costs.

Analysis and Determination

8. The two main issues for determination which arise from the pleadings and prayers sought are;

    a. Should this honourable court set aside the taxing master's decision and the certificate of costs issued on March 28, 2019 and should this court grant the applicant leave to defend the same and/or it be re taxed afresh and the advocate be ordered to give the client/applicant credit for fee's deducted from the settlement of civil suit number 57 of 2007.

    b. Should this court in the alternative extend time within which the applicant can file a reference challenging the taxation of the Advocate -client bill of costs.

9. Rule 11(1) and (2) of the *Advocates Remuneration Order* provides that;

    i. 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.

    ii. 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 receipt of the reasons apply to

a judge by chamber summons, which shall be served on all the parties concerning setting out the grounds of his objection.

10. It is not in disputed that the advocate/client bill of costs was taxed February 28, 2019. The advocate/respondent applied for judgment to be entered as against the client/applicant and a decree be issued for the taxed costs *vide* their application dated March 19, 2019. The same was allowed on September 26, 2019.The advocate applied for warrants of execution and proclaimed on the client/applicant household goods prompting the present application.

11. The prayer sought, specifically prayer (6) and prayer (8) of the amended notice of motion cannot be granted as there is no reference filed and therefor there is no basis to set aside the taxation, or to grant leave to the client/applicant to defend the advocate client. Such order can only be granted upon hearing and determining a reference on merit. Similarly, there is no basis for giving the client credit and or issuing order that the advocate fees be deducted from the balance of settlement of the decree in civil suit No 57 0f 2007.

    Should the client/applicant be granted leave to file a reference out of time.

12. Section 79G of the *Civil Procedure Act* 2010 does provide that

> " Every appeal from a subordinate court to the high court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant a copy of the decree or order;
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> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

13. Order 50 rule 6 provides that;

> " where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge time upon such terms(if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

14. There is no doubt that the discretion to extend time is not a right of the party, but is an equitable remedy that is only available to a deserving party after laying a basis to courts satisfaction that there exists reasonable explanation as to why there has been a delay. The court will also consider if any prejudice will be suffered by the respondent and if the application has been brought without unreasonable delay. See *Nicholas Kiptoo Arap Korir Salat v IEBC and 7 others* eKLR.

15. In *Imperial Bank ltd (in receivership) & Ano v Alnasir popat and 18 others* the court observed that;

> " some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercised it discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a parties opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; public interest issues implicated in the appeal or intended appeal and whether, prima facie, the

intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration it must be born in mind that it is not really the role of a single judge to detriment definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal."

16. In the *Salat case*(supra)the supreme court did observe that;

> " Extension of time being a creature of equity, only enjoy, one can only enjoy if he acts equitably: he who seek s equity must do equity. Hence, one has to lay a basis that he was not at fault so at to let time lapse. Extension of time is not a right of a litigant against court, but a discretionary power of the courts, which litigants have to lay a basis where they seek courts to gran the same.

17. The client/applicant vehemently denies ever being served with any document and only came to realise that the advocate/client bill of costs had been taxed, when her household goods were proclaimed by the 2nd respondent. In the present application she applied to examine the process server one Alex Wambua Muthenya, but abandoned the said prayer midway. The advocate/respondent on the other hand averred that the client was properly served with the advocate client bill of costs and later with a taxation notice dated January 25, 2019 but opted not to attend court and thus the prayers for extension of time were misplaced and erroneously sought.

18. The process server did file three affidavit of service. The first one is dated January 27, 2018, where he states that he received the advocate client bill of cots and the taxation notice on January 25, 2018 from the advocate/respondent, he went and effected service upon the client, who was a nominated MCA. He served her on the same day, but she refused to sign. Subsequently on September 20, 2019 he received the advocates notice of motion application dated March 19, 2019 seeking to enter judgment for the taxed costs, he again effect service upon the client at the county assembly on the same date. The affidavit of service was filed in court on September 26, 2019. The final affidavit of service is dated October 25, 2019, where the said process server avers that he served the client with the draft decree on October 9, 2019 at the county assembly.

19. The court is faced with two conflicting position's as both parties have taken different trajectory on the issue of service. Pursuant to provisions of section 109 and 112 of the *Evidence Act*, cap 80, the evidentiary burden of proof is on the person, who would fail if no further proof is presented to prove a fact that that party alleges. In this instance, it is the client alleging that she was not served and would fail as evidence of proof of service or lack of service is not established.

20. The court of appeal in *Mbuthia Macharia v Annah Mutua & another* referred to *The Halsbury's laws of England*, 4th Edition, Volume 17 at para 13 and 14 where it states that;

> " The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties' case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.
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> {16} the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden.

> Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so, will the evidential burden shift to the party who would fail without further evidence."

21. The provisions of section 3(4) of the *Evidence Act*, cap 80 also come into play as the fact of serve is neither proved nor disapproved.

22. Based on the above finding I do hold that the reason for the delay has not been proved and therefor the court cannot extend its discretion in her favour of the applicant.

Disposition

23. The final order of this court are as follows;

    a. The client amended notice of motion application dated February 18, 2020 is dismissed with costs.

    b. The costs are assessed at Ksh 30,000/= all inclusive

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 31st of May 2023

In the presence of;

.....For Applicant

.....For Respondent

.....Court Assistant