



Vinayak Builders Limited v Lubulellah & Associates Advocates (Miscellaneous Civil Application E187 of 2021) [2022] KEHC 13254 (KLR) (Commercial and Tax) (30 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13254 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E187 OF 2021
DAS MAJANJA, J
SEPTEMBER 30, 2022

BETWEEN

VINAYAK BUILDERS LIMITED CLIENT

AND

LUBULELLAH & ASSOCIATES ADVOCATES ADVOCATE

RULING

Introduction and Background

1. By a ruling dated November 12, 2021, the Deputy Registrar taxed the respondent's advocate-client bill of costs dated March 15, 2021 at Kshs 5,756,023.04. The applicant objected to the Deputy Registrar's ruling through its reference dated February 10, 2022. The court considered the reference and by a ruling dated May 16, 2022 struck it out on the ground that it was time barred under paragraph 11 of the *Advocates Remuneration Order*. The court also entered judgment against the applicant for the taxed amount under section 51(1) of the *Advocates Act* (chapter 16 of the Laws of Kenya).
2. The applicant then filed an application dated May 27, 2022 seeking to review the order striking out the reference on the ground that the court did not consider the evidence that the sum claimed as fees had already been settled in full. By a ruling dated June 10, 2022, the court dismissed the application and held that the reasons advanced by the applicant did not fall within the grounds permitted for review under order 45 of the *Civil Procedure Rules*.
3. Since the respondent is in the process of executing the resulting decree, the applicant has now approached the court by the notice of motion dated June 14, 2022 made under article 50 and 159 of the *Constitution*, section 4 (1) and 26 of the *Limitation of Actions Act*, section 1A, 1B, and 3A of the *Civil Procedure Act* and order 42 rule 6, order 45, order 50 rule 5 of the *Civil Procedure Rules* seeking leave of the court to file a reference against the ruling of the Deputy Registrar out of time and that



the court allow the draft reference filed herein as duly filed and served. It has also filed an application dated June 23, 2022 seeking to stay execution of the decree pending hearing and determination of that application. The application for stay has since been spent as the court granted the stay pending the ruling of the application for leave to file the reference out of time. The respondent has opposed both applications through the replying affidavit of its Managing Partner, Anthony Milimu Lubulellah, sworn on June 29, 2022.

Analysis and Determination

4. The main issue for determination is whether the court ought to enlarge time for filing the applicant's reference. Under paragraph 11(4) of the *Advocates Remuneration Order*, the court has the discretion to enlarge time to file a reference as the said provision provides that

“The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (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 the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

5. The Supreme Court, in *County Executive of Kisumu v County Government of Kisumu & 8 others* SCK Civil Application No 3 of 2016 [2017] eKLR held that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court and it reiterated the principles it had earlier delineated in *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others*, [2014] eKLR that a court, in its determination of such an application is guided by:

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.

6. The applicant states that the delay in filing the reference was not deliberate but inadvertent and was occasioned by the fact that the applicant received the Deputy Registrar's reasons for taxing two months later after requesting the same. It further states that it honestly believed that the respondent was going to use the fees already paid to defray the bill of costs amount since it already paid an amount that exceeded the award in the taxation of the bill of costs. The applicant admits that the 14-day period has since lapsed, and prays that it is in the interest of justice that the extension of time to file the reference as sought be granted.



7. On its part, the respondent states that the orders sought have been overtaken by events as this court has already entered judgment on the certificate of taxation on May 16, 2022 and issued a decree on May 17, 2022, hence the applicant's only recourse, if it were genuinely aggrieved by this court's dismissal of its demised applications, would be to appeal against the same. That it is incomprehensible that the applicant seeks leave to file a reference in a matter after judgment has been entered and has not been set aside.
8. The respondent argues that this court was rendered *functus officio* upon its entry of judgment on the certificate of taxation and issuance of a decree pursuant to section 51(2) of the [Advocates Act](#), and accordingly this court lacks any jurisdiction whatsoever under the [Advocates Act](#) or the [Advocates Remuneration Order](#) to interfere with the demised taxation, incompetent reference and entry of judgment, especially in a manner not provided for under the [Advocates Act](#) or the [Advocates Remuneration Order](#).
9. As regards the issue of time, the respondent avers that the application is made with inordinate and unexplained delay, coming 210 days after the filing an incompetent notice of objection to taxation over half a year ago on the November 17, 2021 which is contrary to the spirit and objectives of the [Advocates Act](#) and the [Advocates Remuneration Order](#) that disputes between advocates and clients regarding bills should be expedited, heard and determined within the specified timelines.
10. I am in agreement with the respondent that indeed the applicant's application for leave to file its reference out of time cannot be granted as the court is now *functus officio*. The court, having entered final judgment for the respondent against the applicant on the strength of the certificate of taxation pronounced itself on the quantum of costs payable to the respondent by the applicant and conclusively settled the dispute of costs between the parties. The court cannot in the circumstances seek to re-open the dispute by granting the applicant leave to file a reference out of time. Whereas the court is clothed with jurisdiction and discretion under paragraph 11(4) of the [Advocates Remuneration Order](#) above to enlarge the time prescribed for filing of references, that power can only be exercised by the court before a judgment on costs has been entered and a decree issued to that effect. Once the court enters judgment on the quantum of costs payable to an advocate under the [Advocates Act](#), the window of filing a reference to challenge the ruling on taxation or the certificate of taxation as envisaged in paragraph 11 of the [Advocates Remuneration Order](#) is shut. Such a judgment can only be challenged on appeal to the Court of Appeal or in appropriate cases, the court can exercise its powers of review under section 80 of the [Civil Procedure Act](#) as read with order 45 of the [Rules](#) (see [George Miyare t/a Miyare & Co Advocates v Evans Gor Semelang'o t/a Talanta Africa Media Limited](#) NRB Misc Civil Application No 358 of 2015 [2019] eKLR)
11. Even if I was to assume that no judgment had been entered on the respondent's certificate of taxation, the reasons advanced by the applicant for the delay to file the reference in time could not hold. The ruling by the Deputy Registrar clearly stated and indicated in bold and capital letters that it contained the reasons for the ruling thus there was no need for the applicant to seek for any more 'reasons' as time started running the moment they were in receipt of the ruling which contained and stated on its fact that it contained, "the reasons for the ruling." I therefore hold that the reasons for the taxation decision were contained in the ruling which was delivered in presence of the parties (see [Abmednasir Abdikadir and Co Advocates v National Bank of Kenya](#) [2006] 2 EA 5, [Evans Thiga Gaturu v Kenya Commercial Bank](#) NRB Misc Appl No 343 of 2011 [2012] eKLR, [Mumias Sugar Company Limited v Professor Tom Ojienda and Associates](#) KSM HC Misc No 279 of 2017 [2018] eKLR and [Kenya Railways Golf Club v Evans Thiga Gaturu](#) NRB Misc Appl E072 of 2019 [2020] eKLR). The applicant cannot thus rely on the reason that it sat and waited for the reasons for the ruling to be supplied to them when the said reasons were right there in the Ruling itself.



Deposition

12. I do not find any merit in the applicant's application as the court is now *functus officio* and is without jurisdiction to determine any dispute between the parties on the issue of quantum of costs, having already issued a judgment and decree on the same. The plaintiff's applications dated June 14, 2022 and June 23, 2022 lack merit and are dismissed with costs. The costs are assessed at Kshs 30,000.00.
13. The interim orders staying execution of the decree are hereby discharged.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2022.

D. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Lubullelah instructed by Lubullelah and Associates Advocates for the Advocates/Applicants.

Ms Masengeli instructed by Migele and Company Advocates for the Client/Respondent.

