



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MISCELLANEOUS APPLICATION NO. 10 OF 2019

PROF TOM OJIENDA & ASSOCIATES.....ADVOCATE/RESPONDENT

VERSUS

NAIROBI CITY COUNTY.....CLIENT/APPLICANT

ARISING FROM

NAIROBI PETITION NO. 1 OF 2015

(ASSOCIATION OF GAMING OPERATORS & NAIROBI CITY COUNTY)

ASSOCIATION OF GAMING OPERATORS.....PETITIONER

VERSUS

NAIROBI CITY COUNTY.....RESPONDENT

RULING

APPLICATION

1. The Client / Applicant through an application dated 12th September 2019 filed on 16th September 2019 seek the following orders:-

- a) That the decision of the Taxing Officer delivered on 28th August 2019 as far as the same relates to taxation of Item 1 of the Bill of Costs dated 14th February, 2019 and the calculation on V.A.T be and is hereby set aside.*
- b) That the Honourable Court be pleased to refer back the matter to the Taxing Officer for re-taxation of Item 1 of the Bill of Costs aforesaid and the calculation of V.A.T with proper directions thereof.*
- c) That in the alternative to prayer 2 above, the Honourable Court be pleased to re-tax Item 1 of the Advocate/Client Bill of Costs herein and give direction with respect to calculation of the VAT.*
- d) That the costs of this application be borne by the Applicants.*

2. The client/Applicant further through another Chamber summons dated 3rd October 2019 seek the following orders:-

- a) The time limited for filing a Reference under paragraph 11(4) of the Advocates (Remuneration) Order be and is hereby enlarged.*
- b) That the Chamber summons Application dated 12th September, 2019 and filed on 16th September 2019 be deemed having been duly filed within such enlarged time.*
- c) That in the alternative to prayer (2) above the Honourable Court be pleased to grant the Applicant leave to file a fresh Reference within such enlarged time.*

d) That the costs of this Application be in the cause.

ADVOCATES / RESPONDENT RESPONSE

3. The Advocate / Respondent filed a Notice of Preliminary Objection dated 24th September 2019 on Client / Applicant application setting out two main grounds of objection being thus:-

a) That clients / Applicant application is incompetent, misconceived, bad in law and an abuse of the Court process.

b) That Clients / Applicant chamber summons application offends paragraph 11(2) of the Advocates Remuneration Order (2014) as the reference has been filed 16 days later from the date the Taxing Officer delivered her ruling on the 28th of August, 2019.

ANALYSIS AND DETERMINATION

4. I have carefully considered the Client / Applicant applications, the Advocate/Respondent Preliminary Objection, Counsel rival submissions and from the aforesaid the following issues arise for consideration:-

a) Whether the Reference filed by Client / Applicant was filed within time?

b) Whether the Advocate / Respondent's Preliminary Objection has legal backing?

A. WHETHER THE REFERENCE FILED BY CLIENT / APPLICANT WAS FILED WITHIN TIME?

5. In the instant petition the taxing master delivered her ruling on 28th August 2019 taxing the Bill of Costs at Kshs.3,809,469/=. The Court record show that the Ruling was delivered in presence of parties Counsel. The client / Applicant had knowledge of the fact that having been dissatisfied by the Court's said decision it had 14 days therein to file a reference in opposition of the taxed costs.

6. **Rule 11 of the Advocates (Remuneration) Order 1962** provides for the procedure of objection of the Taxing Officer's decision thus:-

a) 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.

b) 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 the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

7. Any party aggrieved by Taxing Officer's decision may within 14 days after the decision given notice in writing to the Taxing Officer of items of taxation to which he objects. The party upon receipt of Taxing Officer's reasons for decision may within 14 days from receipt of reasons apply to a Judge by Chamber Summons.

8. In the instant application the reference filed on 16th September 2019 was not filed out of time, since on 2nd September 2019, the Client / Applicant filed a Notice of Objection which was within the 14 days stipulated under **Rule 11(1) of the Advocates (Remuneration) Order 1962**. However it turns out the Client / Applicant proceed to file its reference without awaiting the Taxing Officer's Response as her time had lapsed.

9. **Rule 11(4) of the Advocates (Remuneration) Order 1962** is clear that the Court has discretion to extend time for lodging an objection, notwithstanding the expiry of the 14 days period prescribed for the objection of the decision of the Taxing Officer on Costs. The High Court has discretion to enlarge the 14 days period prescribed for filing a reference from the date of Taxing Officer's response on the objection.

10. The Client / Applicant filed the application dated 3/10/2019 to seek extension of time out of abundance of caution for the Advocates / Respondent had filed a Preliminary Objection. The Client / Applicant's application to extend time was filed after the Applicant's had filed its reference. That in essence the application seeks an extension of time within which to file and serve the reference to the taxation herein and that the reference filed on 16th September 2019 be deemed as regularly filed and served.

11. It is further noted the client / Applicant, in the alternative, pray, for an order that time be extended as and at the time when time lapsed.

12. The Advocates/Respondent strongly opposes the application and relies in the case of **Selestica Ltd v Gold Rock Development Ltd**, where Aburili, J held that:-

"In some instances even a delay of a day could be unreasonable. She cited the decision of Sila J. in which the court held that the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."

13. The Client / Applicant on its part finds support in the case of **Republic v. Kenyatta University & another Ex parte Wellington Kihato Wamburu (2018) eKLR** where the court ruled that;

“23...This Court has a discretion to grant an extension of time for filing a reference, provided there are:- (a) good and substantial reasons for the failure to file the reference within the prescribed period, and (b) there are grounds in the application which, prima facie, show good cause why the applicant should be heard.”

14. Whereas there are instances where a delay of even a day may be inordinate I am of the view that each case ought to be decided on its facts as there is no case that is like any other. Cases and situations are different. A decision of Taxing Officer herein was delivered on 28th August 2019. The filing of reference was expected to be filed by 12th September 2019 but the same was not filed till on 16th September 2019 clearly 4 days out of time.

15. It is contended that the delay was caused not by the Client / Applicant but by the missing Court file which could not be traced on neither the 12th or the 13th September 2019; but traced later on 16th September 2019 which was on a Monday as 14th and 15th September 2019 fell on a weekend. I find that the client / Applicant has clearly demonstrated that failure to file the Chamber Summons within the prescribed period was unpremeditated, excusable, and beyond the Applicant’s control. The application was subsequently presented to the court immediately the Court file was traced, and without any undue delay after the mishap. The Applicant has given a good and substantial reason for the delay. This shows a good cause for the delay in filing reference.

16. The delay cannot at any rate be contributed to the client / Applicant and even if any was to be apportioned to the Client / Applicant’s Counsel, the law loudly speaks on that matter, that an error of an Advocate should not be visited on the client as was enunciated in the case of *Lucy Bosire v. Kehancha Dv. Land Dispute Tribunal & 2 others (2013) eKLR that:-*

“It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognised that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits.”

B. WHETHER THE ADVOCATE / RESPONDENT’S PRELIMINARY OBJECTION HAS LEGAL BACKING?

17. The Client / Applicant filed Chamber Summons dated 12th September 2019 on 16th of September 2019. The Advocate / Respondent on its part filed a Preliminary Objection dated 24th September 2019 upon being served with reference urging the reference was filed out of time. It is averred and stated that when the Client / Applicant filed Notice of Objection which was within the time prescribed by the law, the Taxing Officer had the option to respond to the issues raised in the objection and give reasons for taxation of the specified item. The Taxing Officer did not act as required and it is contended that she waived her right, to respond as the prescribed 14 days period to respond had lapsed. The Client / Applicant, I find acted correctly when it proceeded to go ahead and filed a reference 14 days from the date the Notice of Objection was filed thus from 2nd September 2019 and filed the matter on 16th September 2019 as the taxing master had waived her right to respond. In view of the aforesaid, I find that the Advocate / Respondent Preliminary Objection cannot stand and is without merit.

18. The upshot is that I find the client / Applicant’s application is meritorious. I proceed to grant the following orders:-

a) The Client / Applicant alternative prayer (2) in the application dated 3rd October 2019 filed on even date is granted and Applicant granted leave to file a fresh Reference within enlarged time of 14 days from the date of this Ruling.

b) Costs shall be in cause.

Dated, Signed and Delivered at Nairobi on this 25th day of February, 2021.

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J. A. MAKAU

JUDGE