



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CIVIL APPLICATION NO. 305 OF 2017

WAIGANJO WACHIRA & CO. ADVOCATES....APPLICANT

-VERSUS-

PACIS INSURANCE COMPANY LTD.....RESPONDENT

RULING

1. On 9th December 2017 **Waiganjo Wachira & Co. Advocate** filed a bill of costs for taxation. When it came up for hearing on 17/05/2018 the advocate applicants were present but **Pacis Insurance Co. Ltd** (the Respondent) did not attend despite notice. The bill was allowed unopposed.
2. On 26/10/2018 the Advocate applied for judgment to be entered pursuant to the certificate of taxation. The Respondent's application to this court which is the subject of this ruling was apparently prompted by the service of the hearing notice upon them concerning the application for judgment, set for hearing on 20th May, 2018.
3. Thus, on 13th February 2019, the Respondent filed a motion under certificate of urgency under Section 1A, 1B and 3A of the Civil Procedure Act and Section 51 of the Advocates Act and Rule 11(2) of the Advocates (Remuneration) Order, seeking leave to file a reference to challenge the ruling of the taxing master.
4. This application was set down for hearing on 15/10/2019 together with the judgment application. The court granted the application for judgment as it was not opposed and counsel for the advocate had no instructions relating to the same, only seeking to canvass the application filed on 13/02/2019 by way of written submission. The court having allowed the judgment application directed that the application for leave be canvassed orally on 20/02/2020.
5. The parties, in urging the said application relied on their respective affidavits. The key grounds in support of the application are that the Respondent is aggrieved with the taxation ruling as some items therein were not drawn to scale and that the Respondent had been unable to appoint an advocate in time to represent it at the hearing despite having been served with a notice.
6. In their replying affidavit, the advocates reiterated that the respondent had notice of the hearing date for the taxation but did not attend; that the reasons for the failure to attend have not been authenticated; that the bill of costs was properly drawn and that the Advocate stands to be prejudiced if the application is allowed.
7. The court has considered the matters canvassed in respect of the motion filed on 13th February, 2019. The bill of costs in this case was taxed *ex parte* and any notice of objection thereto should have been filed within 14 days pursuant to the provisions of Rule 11(1) of the Advocates (Remuneration Order). There is no dispute that the Respondent was served with a hearing notice but they neither attended nor followed up in good time to find out the outcome of the hearing. No evidence has been placed before the court to explain the delay by the Respondent to take action between the date of service of the hearing notice on 15th May 2018 and the receipt of service of the hearing notice for the judgment application on 29th January 2019.
8. References in the supporting affidavit of the Respondent to "bureaucratic processes" within the Respondent do not amount to a proper explanation of this lengthy period of delay. It seems that having been served with the taxation notice, the Respondents went into slumber and only took steps when they were served with the application to enter judgment. The provisions of Rule 11(4) of the Advocates (Remuneration) order are almost in similar terms with the provisions of order 50 Rule 6 of the Civil Procedure Rules and the applicable principles therefore not dissimilar.
9. In **Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission and 7 Others [2014] e KLR**, the Supreme Court while considering the principles applicable in the extension of time stated that:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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;

A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

Whether there will be any prejudice suffered by the respondents if the extension is granted;

Whether the application has been brought without undue delay; and

Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.

10. Similarly, the case of **John Tomno Cheserem v Sammy Kipketer Cheruiyot [2018] e KLR** in which a motion was brought under Rule 4 of the Court of Appeal Rules appears to have specific relevance to the instant matter before the Court as Rule 4 of the Court of Appeal Rules is in *pari materia* with the provisions of Order 50 Rule 6 of the Civil Procedure Rules.

11. The application in that case was for enlargement of time or leave to file a record of appeal out of time. The court (**Mohammed J**) observed that:

“7. The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour. In exercising my discretion, I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance. In the case of Fakir Mohammed V Joseph Mugambi & 2 Others, Civil Appln No. Nai 332/04 (unreported) this Court rendered itself thus:-

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

[8] The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In Mwangi V. Kenya Airways Ltd, [2003] KLR 48, the Court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4, went on to hold;-

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

12. The delay in this case is almost one year. No explanation has been given for the delay beyond casual and unsupported statements regarding the respondent’s “bureaucratic processes” which I understand to mean tardiness. This tardiness carried on even after the Respondent filed its instant application, as evidenced by failure to give proper instructions to counsel appearing on 15/10/2019 and evident unpreparedness to canvass the instant application on the said date.

13. The Advocates have indicated that they stand to be prejudiced if the application is delayed and it is easy to see why. The matter has dragged on since 2018 and their fees remain unpaid. They now have a judgment in their favor and in the circumstances of this case, the court finds no justifiable cause to delay the matter any further. In the result the court declines the application filed on 13th February 2019 and dismisses it with costs.

Dated, signed, and delivered electronically this 19th Day of February 2021.

C. MEOLI

JUDGE