



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL APPLICATION NO. 226 OF 2017

WAIGANJO WACHIRA & CO. ADVOCATES APPLICANT

-VERSUS-

PACIS INSURANCE COMPANY LTD..... RESPONDENT

RULING

1. On 9th November 2017 **Waiganjo Wachira & Co. Advocate** filed a bill of costs for taxation. When it came up for hearing on 22/03/2018 the Advocate applicants were present but **Pacis Insurance Co. Ltd** (the Respondent) did not attend despite notice. The bill was allowed unopposed.

2. On 24th April 2018 the Respondents made an application to this court which is the subject of this ruling was filed 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. The motion was apparently prompted by a demand made upon the Respondent by the Advocate following the taxation of his bill. By 26th October 2018, however, the motion had not been heard and an application for judgment was filed by the Advocate.

3. The application for leave was eventually heard on 20/2/2020 alongside a similar application in Misc. C.C. No. 305 of 2017 between the same parties. Parties adopted their submissions in the latter cause.

4. 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's advocate had erroneously diarized the taxation for 22nd May 2018 rather than 22nd March 2018 and only realized the alleged error when demand for payment was made.

5. 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 are not plausible; that the Respondent is guilty of laches and that the bill of costs was properly drawn and that the Advocate stands to be prejudiced if the application is allowed.

6. The court has considered the matters canvassed in respect of the motion filed on 24th April 2018. 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 taxation.

7. The explanation given by the Respondent's advocate for his failure to attend the taxation appears tenuous at best. The hearing notice served on the Respondent indicated clearly that taxation was slated for 22nd March 2018. The client was served with the notice on 6th December 2017. The counsel who swore the affidavit in support of the motion does not appear to be the one who "mis-diarised" the hearing date and there is no explanation as to how this alleged error occurred.

8. 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 bill herein was taxed in early 2018 and the Respondent only acted after being served with demands for payment. Even so, despite filing its motion on 24th April 2018, the same was not served on the Advocate until 19th November 2018. Again, it took the filing of the application for judgment for the Respondent to seek to prosecute its motion. No explanation has been given for that delay and tardiness. This kind of lethargic conduct on the part of the Respondent cannot be excused.

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 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 24th April 2018 and dismisses it with costs. The Advocate is at liberty to set down for hearing his application for judgment filed on 26th October 2018.

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

C. MEOLI

JUDGE