



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E765 OF 2020

IN THE MATTER OF THE ADVOCATES ACT CAP16 LAWS OF KENYA

IN THE MATTER OF TAXATION OF COSTS BETWEEN THE CLIENT AND THE ADVOCATE

ODERA OBAR & CO. ADVOCATES.....APPLICANT/RESPONDENT

VERSUS

AQUVA AGENCIES LIMITED.....RESPONDENT/ APPLICANT

RULING

1. This ruling is in respect to two applications, namely; the advocate's application dated 19th October 2020 (hereinafter "**the 1st Application**") and the client's application dated 29th October 2020 (hereinafter "**the 2nd Application**"). Directions were issued to the effect that the applications be heard concurrently. I will however consider the 2nd application first as its outcome will have a bearing on the 1st application.

2. The application dated 29th October 2020 is brought under paragraph 11 of the Advocates Remuneration Order (ARO) and Article 50 of the Constitution of Kenya. It seeks the following orders: -

1) Spent.

2) THAT this honourable court be pleased to extend time to file the notice of objection against the decision of the taxing master.

3) THAT the notice of objection dated 28th October 2020 and filed herein be admitted and deemed as duly filed.

4) THAT this honourable court be pleased to issue an order of stay of execution of the certificate of taxation pending the hearing and determination of this application.

5) THAT this honourable court be pleased to set aside the certificate for taxation and proceed to place an order for re-taxation.

3. The application is supported by the affidavit of applicant's Director **Mr. Rajnikant Patel** and is premised on the following grounds: -

1) That the respondent/applicant herein is dissatisfied with the ruling of the bill of costs delivered on 30th September 2020.

2) That the notice of objection herein was not filed within the stipulated time as the respondent/applicant was awaiting response from the taxing master through a letter dated 8th October 2020 seeking for reasons of the decision of taxation.

3) That the respondent applicant wrote to the taxing master indicating intention to file a reference and requested for the ruling which was supplied late.

4) That failure to file notice of objection on time was not intentional as the respondent/applicant has been diligent in seeking to have the dispute on the taxation of costs determined expeditiously.

5) *That the respondent had requested the court for the reasons for taxation which is yet to be given as provided by the law.*

6) *That the respondent/applicant has decided to ahead and pursue the reference pertaining to the decision of the taxing master rendered on 30th September 2020 despite lack of response from the letter dated 8th October 2020.*

7) *That the suit in question is yet to commence for trial hence the reference to re taxation.*

8) *That it is in the interest of justice that the application is allowed to grant the respondent/applicant a chance to exercise his right of appeal*

9) *That unless the court intervenes the respondent/applicant shall suffer irreparable damages.*

4. Counsel for the client submitted that the delay in filing the reference was not deliberate but was occasioned by circumstances beyond the applicant's control. He further stated that the notice of objection was filed within 14 days as required by the law. He faulted the Taxing Master for failing to record or furnish the client with the reasons for her decision. Counsel relied on the decision in **County Executive of Kisumu v County Government of Kisumu & 8 others** [2017] eKLR and **Soulemezis v Dudley Holdings PTY Limited** (1978) 10NS WLR 247, 279 where the court considered the issue of extension of time.

5. Counsel for the advocate/respondent, on the other hand, submitted that the reason advanced the client for the delay was not rational, plausible or logical as the client had already received the ruling containing the reasons as at the time of filing the notice for objection. It was submitted that the client ought to have filed the notice of objection on or before the 14th October 2020.

6. I have carefully considered the rival arguments presented by the parties herein, the authorities cited together with the pleadings. The main issue for determination is whether the applicant is entitled to orders for enlargement of time within which to file a notice of objection.

7. The Client herein concedes that it did not comply with the provisions of Paragraph 11 (1) and (2) of the ARO which spells out the time within which to file an objection. The Client attributes the delay to the alleged failure by the Taxing Master to give reasons for taxation in good time.

8. Paragraph 11 of the Advocates Remuneration Order provides as follows;

1. 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.

2. 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.

3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

4. 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."

9. In **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others** [2015] eKLR the Supreme Court, laid out the general principles governing extension of time thus: -

"As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:

"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

"... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the

Court;

5. *whether there will be any prejudice suffered by the respondents, if 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”.*

10. On the issue of delay, Mohammed J. (as he then was) held as follows in *George Kagima Kariuki & 2 Others v George M. Gichimu & 2 Others* [2014] eKLR: -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”

11. The same position was taken in *Stanley Kahoro Mwangi & 2 Others v Kanyamwi Trading Company Limited* [2015] eKLR where the court was of the view that: -

“A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised.”

12. The common thread that runs through the above cited decisions is that the court is clothed with the discretion of allow an application for extension of time where the applicant demonstrates that there was sufficient cause for the delay. In the instant case, it is not in dispute that the Notice of Objection herein was not filed within the stipulated time. The respondent/Client stated that the Notice of Objection was not filed within the stipulated time because it was waiting for the response from the Taxing Master on the reasons for the ruling on taxation.

13. The question which then arises is whether the reasons for the delay advanced by the Client are plausible. I note that the ruling was delivered on 30th September 2020. On 8th October 2020, the respondent/Client wrote to the taxing master asking for reasons for the taxation of the bill of costs. A perusal of the impugned ruling however clearly indicates that the reason for taxation are contained in the ruling. This being the case, I find that it there was therefore no need for the Client to yet again make a request for reasons for taxation. I therefore find that there was no logical reason advanced for the delay.

14. I am guided by the decision in *Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2)* (2006) 1 EA 5 where the court held as follows: -

“Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons. Where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”

15. Similarly, Odunga J. stated as follows in *Evans Thiga Gaturu, Advocate vs.- Kenya Commercial Bank Limited* [2012] eKLR:

“However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference....

16. For the reason that respondent/applicant has failed to sufficiently demonstrate the reason for the delay, I find that it is not entitled to the discretionary orders for the extension of time. Having found that the prayer for extension of time is not merited, it logically follows that there would be no basis for granting the prayer for stay of execution.

17. Turning to the Application dated 19th October 2020, I note that the Advocate seeks orders for entry of judgment in his favour against the respondent for the sum of Kshs 3,533,776.00 together with interest at the rate of 14% per annum from July 2020 until payment in full. The Advocate also seeks the costs of the application.

18. The application is brought pursuant to Section 51(2) of the Advocates Act, Paragraph 7 of the Advocates remuneration order and is based on the grounds that;

1. Aquva agencies Limited, the respondent herein instructed the applicant to represent it in proceedings against Tumaz & Tumaz Enterprises Limited for the recovery of Sums Kshs 143,000,000.00

2. Subsequently the applicant presented a bill of Costs on the 8th Day of June 2020 against the respondent. The said bill was duly delivered to the respondent on the 25th day of June 2020

3. On the 30th day of September 2020, the taxing officer taxed the said bill at the sum of Kshs 3,533,776.00. A certificate of

taxation for the said sum has been issued in the applicants favour certifying the said amount as due to the applicant

4. The Certificate of Taxation has not been set aside or altered by the court. Accordingly, the said certificate is final as to the amount of costs due in the sum of Kshs 3,533,776.00. Additionally, the retainer has not disputed

5. In the Circumstances, this honourable court has jurisdiction to enter judgment for the sum certified due of Kshs 3,533,766.00 together with interest at the rate of 14% per annum from 25th July 2020 until payment in full

19. The respondent/client opposed the application through the replying affidavit of **Rajnikant Patel**. He stated that the Client was dissatisfied with the Taxing Masters ruling and had asked for reasons for the taxation

20. The main issue is for determination is whether judgment should be entered against the respondent/client for Kshs 3,533,776. Having found that the request for the extension of time is not merited, it follows that the application by the advocate automatically succeeds.

21. Section 51(2) of the Advocates Act stipulates as follows: -

“The certificate of the taxing officer by whom any bill has been taxed shall unless it is set aside or altered by the court, be final as to the amount of the costs recovered thereby; and the court may make such order in relation thereto as it thinks fit, including where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

9. In *Lubulellah & Associates Advocates v N K Brothers Limited* [2014] eKLR the court observed that: -

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent herein for the taxed sum indicated in the Certificate of Taxation that was issued on 25th November 2012.”

22. The certificate of taxation dated 19th October 2020 has not been set aside or impugned by this court. I therefore allow the Advocates’ application and enter judgment in favour of the advocate/applicant against the respondent/client for a sum of Kenya shillings three million five hundred and thirty-three thousand and Seven hundred and Seventy-Six (3,533,776/=) together with interest at 14% per annum from July 2020 until payment in full. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF APRIL 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Odero for Migiro for the Advocate

Mr. Gachomo for the client.

Court Assistant: Sylvia.