



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Odunga, J

MISC. APPLICATION NO. 416 OF 2019

C.N KIHARA & COMPANY ADVOCATES.....APPLICANT

VERSUS

MAENDELEO YA WANAWAKE

ORGANIZATION (MYWO).....RESPONDENT

RULING

1. By Chamber Summons dated 9th November, 2020 the Applicant herein seeks the following orders:

- (1) THAT the honourable court be pleased to certify this application as urgent and allocate it an early hearing date.**
- (2) THAT the honourable court be pleased to grant leave to extend time limited for filing the application to review, vary, increase and/or set aside the decision of the Deputy Registrar- High Court of Kenya at Machakos (Hon. E.M. Analo) dated 22nd October, 2020.**
- (3) THAT corollary to the foregoing this application seeking to review, vary increase and/or set aside the decision of the Deputy Registrar- High Court of Kenya at Machakos (Hon. E.M. Analo) dated 22nd October, 2020 be deemed as duly filed.**
- (4) THAT the honourable court be pleased to review, vary increase and/or set aside the decision of the Deputy Registrar- High Court of Kenya at Machakos (Hon. E.M. Analo) dated 22nd October, 2020, when he taxed the Advocate/Applicant's Advocate-Client Bill of Costs dated 17th October, 2019, and allowed a sum of Kshs. 201,751.66/= and failed to take into consideration rules and principles of the taxation of an Advocate-Client Bill of Costs and the Applicant's written submissions on the Bill of Costs.**
- (5) THAT in the alternative and/or, the honourable court do review, vary increase and/or set aside the decision of the Deputy Registrar- High Court of Kenya at Machakos (Hon. E.M. Analo) dated 22nd October, 2020, and do grant an Order that Advocate/Applicant's Advocate-Client Bill of Costs dated 17th October, 2019, be allowed as prayed.**
- (6) THAT in the further alternative to the above, the honourable court do revoke and/or set aside decision on the taxation as concerns the Advocate and Client Bill of Costs dated 17th October, 2019 and directly re-tax item number 1 thereto to such a sum as may meet the interests of justice and/or direct that the Bill of Costs be re-taxed by any other Deputy Registrar (Taxing Master) that the Deputy Registrar Hon. E.M. Analo.**
- (7) THAT the honourable court does not make any further Orders, or directions as it may find necessary, to meet the interest of justice.**
- (8) THAT the costs of this application be provided for.**

2. The said application was supported by the supporting affidavit sworn by **Charles Njuru Kihara**, an advocate of the High Court of Kenya practicing as such in the firm and style of Messrs C. N. Kihara and Company Advocates. According to him, by a ruling delivered on 22nd October, 2020, the Taxing Officer, determined the Advocate-Client costs arising from Constitutional Petition No. 13 of 2014.

3. According to the applicant there has been a three day delay in filing of the application, a delay occasioned by the current ongoing Covid-19 restrictions that has led to shortened working hours and unavailability of the physical presence of the staff in the office. The deponent then

proceeded to set out the background on the factors surrounding the said petition and set out what in his view were the errors made by the Taxing Officer.

4. In response to the application, the Respondent swore a replying affidavit by **Rahab Mwikali Muiu**, the Chairperson of the Respondent herein. After setting out the history of the dispute, she deposed that the Advocate/Applicant filed a Bill of Costs dated 17th October 2019 seeking instruction fees of Kshs 3,500,000/= and other costs incidental thereto which Bill was opposed by the Respondent. In his ruling on 22nd October 2020, the Taxing Officer awarded the Applicant the instruction and getting up fees in the sum of Kshs. 133,333.33, VAT in the sum of Kshs 21,333.33 and attendances, service, drawings copies, receiving & disbursements in the sum of Kshs. 46,135.00 totaling Total Kshs. 201,751.66 an amount which in the Respondent's view was proper and was arrived at after applying the guiding principles.

5. The deponent however took issue with the award of Kshs 33,333.33 as getting up fees, being 1/3 of the instruction fees of Kshs 100,000/= since there was no response to the said petition and that the matter was not confirmed for hearing.

6. He therefore prayed that the application be dismissed.

Determination

7. I have considered the application and the submissions filed. The procedure for objecting to a reference is provided for in rule 11(1) of the **Advocates Remuneration Order** which provides that:

(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.

8. It is therefore clear that a person who intends to challenge the decision of the Taxing Master is required to express such intention by giving notice in writing to the taxing officer of the items of taxation to which he objects. In this case, the only attempt at an explanation as to why the objection was not made within the prescribed time appears in paragraph 6 of the supporting affidavit where it is deposed that:

THAT there has been a three (3) day delay in filing of the Application, which delay has been occasioned by the current ongoing Covid-19 restrictions that has led to shortened working hours and unavailability of the physical presence of the staff in the office.

9. The applicant then proceeded to delve on the reasons why the decision of the Taxing Officer was being challenged as if the time had already been extended to it. With due respect this was a rather casual way of explaining the failure to comply with statutory timelines.

10. On the other hand, the Respondent did not deal with the limb for extension of time and similarly dealt with the issues revolving around the taxation.

11. This Court however appreciates the restrictions that were placed on court proceedings occasioned by the onset of Covid-19 pandemic. I have also noted that the Respondent itself is not satisfied with the decision and intends to challenge part thereof.

12. It is however my view that the Applicant ought not to have jumbled up the relief for extension of time to institute objection to taxation proceedings with the reference itself. To that extent, the reliefs seeking to set aside the Taxing officer's taxation are premature at this stage because no reference has been filed.

13. That the Court is empowered to extend time for filing a reference from the decision of a Taxing Officer under rule 11(4) of the **Advocates (Remuneration) Order** cannot be doubted. The principles upon which the Court acts in applications for extension of time are now well known. First, is the reason for the delay; secondly, the length of the delay; and, thirdly, prejudice, if any, to the respondents. In the absence of any challenge to the reason for the delay, the averments contained in the supporting affidavits relating thereto remain uncontroverted. The length of delay in the circumstances is not so inordinate as to deprive the applicants of the favourable exercise of discretion. Since there is no allegation of prejudice, I do not consider that the grant of this application will cause any prejudice to the respondents.

14. I, accordingly, find merit in prayer 2 of the Chamber Summons dated 9th November, 2020 which I hereby allow and direct the applicant to file the objection within 10 days from the date hereof. The costs of this application are awarded to the Respondent in any event.

15. It is so ordered.

Ruling read, signed and delivered virtually at Machakos this 31st day of May, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Njuru for Mr Kihara for the Advocate/Applicant

Mr Mwangombe for the Respondent/Client

CA Geoffrey