



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MISC. APPLICATION NO. 10 OF 2018
IN THE MATTER OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA
AND
IN THE MATTER OF AN APPLICATION FOR THE TAXATION OF
COSTS AS BETWEEN ADVOCATE AND CLIENT
BETWEEN
PROF. TOM OJIENDA & ASSOCIATES ADVOCATES.....ADVOCATE/RESPONDENT
VERSUS
COUNTY GOVERNMENT OF MERU.....CLIENT/APPLICANT
RULING

APPLICANT'S APPLICATION

1. The Applicant herein filed an application via Chamber Summons dated 11th October 2019 under **Rule 11 (4) of the Advocates Remuneration Order**. The Applicant seeks the following orders:-

a. This application be certified urgent for hearing on a priority basis.

b. This Honourable Court enlarges the time within which to file a reference out of the decision by the Taxing Officer delivered on 14th December 2018.

c. There be a stay of execution of the certificate of taxation arising out of the ruling on taxation of costs on this matter delivered on 14th December, 2018.

d. That the costs of this application be provided for.

2. The application is brought against the ruling dated 14th December, 2018 in which the Taxing Officer taxed the Bill of Costs at Kshs 35,046,245/-. The Applicant claims that they were unaware of the Ruling of the Court and only came to know of its existence on 3rd September 2019. They claim to be aggrieved by the decision of the Taxing Officer who allegedly committed an error of principle in her taxation thereby taxing the bill at Kshs 35,046,245/- an amount that is manifestly excessive to justify interference by this Honourable Court.

3. The Applicant further claims that the Taxing Officer overlooked the fact that the petition before the court involved public law proceedings and was to be considered entirely free from any practice obtaining in the private law domain.

4. The applicant contends that the Respondent shall not suffer any prejudice if this application is allowed since the Applicant's gravamen is on the quantum of costs and the results of the reference may lead to the affirmation of the decision or reduction of costs.

THE ADVOCATE/ RESPONDENT'S CASE

5. The Respondent, by way of a Replying Affidavit dated 21st December 2020, asserts that the Applicant filed its reference 10 months out of time, as **Paragraph 11 (2) of the Advocates (Remuneration) Order** provides that a reference in opposition to the decision of the Taxing Master must be put forward within 14 days.

6. The Respondent contends that the Applicant was aware of the Ruling as he communicated the same to them through several letters to settle their legal fees. Following the letters, in particular, the Respondent's letter dated 26th February 2020, the Respondent alleges that he was invited by the Applicant to a meeting on 4th March 2020 with the sole purpose of settling the unpaid legal fees.

7. The Respondent claims that an agreement was reached on how the said unpaid fees were to be paid, and therefore the action taken by the Applicant to pursue their reference was an afterthought, and their actions are mischievous and bad in law.

THE APPLICANT'S SUBMISSIONS

8. The Applicant through their Submissions dated 9th October 2020, aver that the Court has the discretion to extend the time for lodging a reference notwithstanding the expiry of the 14 days period prescribed for the filing of a reference from the Taxing Master's decision on costs. The Applicant rely on **Paragraph 11 (4) and (5) of the Advocate's Remuneration Order**, as well as the decision of the Supreme Court in **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR; and George Kagima & 2 others v George M. Gichimu & 2 others [2014] eKLR**.

9. The Applicant's reason for the delay in filing its reference is that the ruling was to be delivered on notice, however, the Court did not issue the notice and the Applicant only became aware of the ruling upon perusal of the Court file on 3rd September 2019. The Applicant submits that its reasons for the delay are reasonable and plausible.

THE ADVOCATE/RESPONDENT'S SUBMISSIONS

10. The Respondent filed Submissions dated 21st December 2020, claiming that the application for extension of time should not be allowed as the Applicant did not file their reference within the prescribed 14 days period, and has not advanced any reasons to explain the delay. Reliance is placed on paragraph 11 of the Advocate Remuneration Order, and the case of **Twiga Motor Limited v Hon. Dalmas Otieno Onyango [2015] eKLR**.

11. The Respondent further avers that it is mischievous and bad in law for the Applicant to proceed by way of reference while going against their part of the agreement set out on 4th March 2020.

12. It is further submitted that as a general rule the High Court will not interfere with the decision of the Taxing Officer unless there exists an error in law or principle. It is further contended that the Applicant contends that the sum awarded ought to be of a much lesser amount, however, they do not give a justifiable reason for the contention. The Respondent asserts that the Applicant has not shown any exceptional circumstances that may allow this Court to interfere with the quantum in the ruling. This is buttressed by the decisions in **Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR; Arthur v Nyeri Electricity Undertaking [1961] E.A.; and Joreth Ltd v Kigano & Associates [2002] 1 E.A.**

ANALYSIS AND DETERMINATION

13. In order to determine the issue herein which is, whether time may be enlarged to allow the Applicant to file its reference out of time, the Court is bound to first look at the provisions of the **Advocates Remuneration Order**. According to paragraph 11 it provides that:-

"11. Objection to decision on taxation and appeal to the Court of Appeal

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." [Emphasis added]

14. From the foregoing, it is clear that where there is an application for the enlargement of time to file an objection to the taxing officer's decision, the High Court has the discretion to allow or deny the same.

15. According to Court record the Taxing Officer on 19th November 2018 in presence of Counsel for both parties set Ruling date on 13th December 2018 at 2.30p.m. It is further as per Court record recorded that the ruling was delivered on 14th December 2018 in absence of both counsel. There is no reason given as to why the ruling was not delivered on 13th December 2018 as earlier on indicated. No evidence of the parties having been notified as to the change of the ruling date from 13th December 2018 to 14th December 2018. Further no notice of delivery of the ruling to the parties was directed to issue.

16. The Applicant in its application aver that neither the Applicant nor its Advocates were aware of the ruling date in this matter and that the Applicant's Advocates come to know of the existence of the Taxing Officer's ruling on 3rd September, 2019 during a routine perusal of the Court file by the firm's clerk in light of the delay that had been experienced since parties last appeared before the Taxing Officer.

17. The Advocate/Respondent filed a Replying Affidavit sworn by Prof. Tom Ojienda on 21st December 2018 in which it is confirmed the Ruling was issued on 14th December 2018 but the Client/Applicant's contention that they were not aware of the ruling date is not controverted. The Client/Applicant's averments are unchallenged and supported by court record which shows that the ruling was set for 13th December 2018, but delivered on 14th December 2018, in absence of parties and the Advocates without notice. I find that the parties in this matter were not aware of the ruling date of 14th December 2018 nor were they subsequently informed of the ruling date. Consequently the delay in Client/Applicant taking action and which explanation has to be given.

18. I am live to the fact that extension of time is not a right of a party in a matter of this nature; as it is an equitable remedy that is only available to a deserving party at the discretion of the Court. The consideration is whether there is a reasonable reason for delay which should be explained to the satisfaction of the Court by the Applicant. The Court should also consider whether there will be any prejudice suffered by the Respondent if the extension is granted. Further the Court should consider whether the application has been brought without undue delay and lastly whether public interest should be considered for extending time.

19. In the instance case, there was no notice issued to the parties and the Client/Applicant contend that it became aware that the ruling was delivered on 14th December 2018 upon perusal of the Court file on 3rd September 2019. There was then a delay which the Client/Applicant is bound to explain. A plausible and satisfactory explanation for delay is key, that is applied to open the Court corridor to justice and Court's flow of discretion favour. The reason has to be valid and clear, upon which discretion can be favourably exercised.

20. Indeed there is no dispute in this matter that the present application is ten (10) months late. The Client/Applicant has advanced reasons for not filing the reference in time which were not caused by the Client/Applicant but by Court's failure to notify parties of the change of the ruling date and notifying them of delivery of the ruling. The client/Applicant was not aware of the delivery of the ruling till upon perusal of the court file on 3rd September 2019 following a prolonged delay in being notified of the ruling. I find the reason for the delay in filing the reference has been laid down to the satisfaction of this Court. The reason for delay are plausible and satisfactory explanation. I further note if the application is declined the Applicant will suffer substantive loss as they would not be in a position to file reference challenging the Taxing Officer's award of Kshs.35,046,245/=. I further find that the Respondent shall not suffer any prejudice if the application is allowed since the Applicant's gravamen is on question of costs and the results of the reference may lead to affirmation of the decision or reduction of costs. Further Justice demands that no party should be condemned unheard.

21. The upshot is that the Client/Applicant application dated 11th October 2019 is allowed in the following terms:-

- a) The time within which to file a reference out of time against the decision by the Taxing Officer delivered on 14th December 2018 be and is hereby enlarged for a period of 14 days from the date of this ruling.***
- b) Stay of execution of the Certificate of Taxation arising out of ruling on taxation of costs in this matter delivered on 14th December 2018 be and is hereby granted pending filing and determination of the reference as directed under (a) above.***
- c) Costs of this application be in cause.***

Dated, Signed and Delivered at Nairobi on this 27th day of May, 2021.

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J. A. MAKAU

JUDGE