



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS CIVIL APPLICATION NO 98 OF 2016

IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 LAWS OF KENYA

AND

IN THE MATTER OF THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER

IN THE MATTER OF AN APPLICATION FOR LEAVE OF THE COURT TO FILE AND PREFER A REFERENCE OUT OF TIME

BETWEEN

JOHN BROWN SHILENJE

T/A J. B SHILENJE & COMPANY ADVOCATES

formerly C. BHAKOYA & COMPANY ADVOCATES.....ADVOCATE

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED.....CLIENT

RULING

1. In its Notice of Motion application dated 25th July 2020, the Client sought for stay of any further proceedings and/ or execution as relates to recovery of the taxed costs and/ or the resultant Certificate of costs emanating from the decision of the taxing officer dated 26th April 2018 in respect of the Bill of Costs dated 14th June 2016 pending hearing and determination of the intended reference. It also sought leave to file its notice of objection and reference against the said decision of the taxing officer. Its application was supported by an Affidavit sworn on 25th July 2020 by Josephine Onyambu, a Branch Manager at its Kisumu branch.

2. It averred that it had been dissatisfied with the said Ruling of the Taxing Officer and had intended to lodge a Notice of Objection and a Reference but the time for doing so had lapsed. It asserted that no notice of the date of the Ruling was served upon it contrary to the provisions of the law and that it only learnt of the taxation on 24th July 2020 after its Advocates perused the court file and informed it of the same. It was its averment that it was condemned unheard contrary to the rules of natural justice.

3. It disputed having retained the Advocate herein, having retained M/S C. B. Bhakoya & Company Advocates to handle the primary proceedings, an issue which it asserted it raised before the Taxing Officer but she failed to determine the same.

4. It further contended that the said Bill of Costs having been allowed as drawn meant that the Taxing Officer failed to apply her mind to the items which had been claimed in the Bill of Costs or to take into account relevant factors and circumstances in taxation of bills thereby allowing sums which were undeserved. It was its further averment that the Bill of Costs was not drawn to scale.

5. It added that the Taxing Master was required to record and avail her reasons on the items that had been objected to but the said reasons could not be availed unless time was extended. It further stated that it could only file a reference challenging the Taxing Master's decision on specific items it objected to.

6. It said that an order extending time would cure the flagrant breach of the mandatory procedural rule which accords with fundamental rules of natural justice and therefore safeguard its right to be heard. It contended that the Advocate would not suffer any prejudice as he was not aware of the said Ruling and had not moved to actualise it.

7. It urged this court to order a stay of further proceedings relating to the taxed costs and any resultant certificate of costs to preserve the substratum of the intended reference.

8. In response to the Client's application, on 24th November 2020, the Advocate filed Grounds of Opposition dated 20th November 2020. He termed the present application bad in law, a non-starter, misconceived, misguided, incurably defective, unsustainable, time wasting, an afterthought, frivolous, vexatious and an abuse of the court's process. He urged this court to strike out the same as the Client had not demonstrated sufficient cause to warrant grant of orders sought.

9. In addition to relying to the provisions of Paragraph 11 (1), (2) and (4) of the Advocates Remuneration Order 2009, the Client placed reliance on the cases of **Ngoso General Contractors Ltd vs Jacob Gichunge [2005] KLR** and **Central Bank of Kenya vs Muslim for Human Rights (Muhuri) & 6 Others [2017] eKLR** where the common thread was that a ruling or judgment could only be delivered upon giving of a notice to the parties when the same was to be delivered.

10. It submitted that it filed its present application without undue delay. In this regard, it referred this court to the case of **George Kagima Kariuki & 2 Others vs George M. Gichimu & 2 Others [2014] eKLR** where Mohamed J stated that the law does not set any minimum or maximum period of delay but that all that it stated was that the delay had to be explained.

11. To buttress its submission that it had not retained the Advocate herein, it relied on the case of **Wilfred N. Konosi t/a Konosi & Co Advocates vs Flamco Ltd [2017] eKLR** where the Court of Appeal stated that a taxing master sitting to tax an advocate-client bill of costs had first to determine if he or she had jurisdiction to tax the said bill if a question of wan of advocate/client relationship was raised.

12. On his part, the Advocate placed reliance on the case of **Ochieng Onyango Kibet & Ohaga Advocates vs Akiba Bank Ltd [2008] 1 EA 300** where Warsame J (as he then was) stated that the act of authorising an advocate to act was what constitute the advocates retainer by the client and that it was not necessary for the advocate to obtain written authority before commencing to act for a client. He also referred this court to the cases of **Kinlue Holdings Ltd vs Mint Holdings Ltd & Another [1998] eKLR** and **Zakheem Construction (Kenya) Ltd vs Mereka & Co Advocates [2017] eKLR** where the question of retainer of an advocate was addressed.

13. The Advocate was emphatic that the Client was duly served with a Ruling Notice for the taxation dated 9th August 2016. It further submitted that it slept on its rights to file a reference as provided for in Paragraph 11(1) of the Advocates Remuneration Order and in this regard, placed reliance on the case of **Alfred Ochieng Opiyo t/a Ochieng Opiyo & Co Advocates vs Export Hydro Pump & Services (Africa) Ltd [2018] eKLR** where the court therein dismissed a client's application for having failed to request for reasons for the decision of the taxing master within fourteen (14) days as provided under Paragraph 11 of the Advocates Remuneration Order.

14. Having considered the present application, the affidavit evidence grounds of opposition and the respective written submissions and the authorities by the parties herein, it was the view of this court that the only issue that had been placed before it for determination was whether or not the Client had demonstrated sufficient cause to justify the granting of the orders sought.

15. In an application such as the one that was present before this court, an applicant was required to demonstrate good and sufficient reasons why it should be allowed to lodge the Notice of Objection and file the reference out of time. Notably, the Advocate did not file an affidavit attaching the Ruling Notice for the Taxation dated 9th August 2016. He only alluded to the same in his Written Submissions. As the Client had denied having been issued with such notice, the court went back to the proceedings by the Taxing Master to establish really what the position was.

16. A perusal of the proceedings shows that on 15th June 2016, the matter was fixed for taxation on 18th July 2016. The Taxing Master directed that a Taxation Notice was to issue. The matter did not appear to have been fixed for the taxation for the reason that on 4th August 2016, the matter was fixed for taxation on 14th September 2019. It was also directed that a taxation notice does issue.

17. The matter was fixed for taxation on 14th September 2016 and 4th October 2016 when the taxation never proceeded. The taxation eventually proceeded on 1st November 2016 and the Ruling reserved for 29th December 2016. The Ruling was read on 26th April 2018 in the absence of the parties herein.

18. There was a Ruling Notice on the file indicating that the Ruling would be delivered on 26th April 2016. However, there was no stamp by the parties acknowledging receipt of the said Notice. There was no evidence of an affidavit of service on record indicating whether service of the said Ruling Notice was effected. Indeed, service of any court process must be confirmed by the filing of an affidavit of service by any process server. Court bailiffs are not excluded from this requirement.

19. The Notice of Taxation the Advocate claimed was served upon the Client was immaterial as the Ruling of the Taxation was delivered almost one and a half years later. It could not reasonably be said to have been the Notice of the Ruling delivered on 26th April 2018.

20. In the absence of proof of service of the Ruling Notice that the decision of the Taxing Master was to be delivered on 26th April 2018, this court was persuaded by the Client's submissions that failure to be notified of the delivery of the said decision prejudiced it as it could not have possibly requested for reasons within fourteen (14) days and lodged a reference as provided in Paragraph 11 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.

4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) far (sic) 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.

21. This court was thus persuaded that the Client had advanced sufficient and plausible reason why it should be granted enlargement of time to enable it request for reasons and lodge a reference as provided in Paragraph 11 (4) of the Advocates Remuneration Order. It would be a travesty of justice for it to be denied an opportunity to seek recourse from the court when it felt so aggrieved by the decision of the Taxing Master. The Advocate would not suffer prejudice as the Client ventilated its grievance for the reason that an award of costs could cushion him in the event the Client's reference was dismissed.

22. Notably, Article 50 (1) of the Constitution of Kenya, 2010 is clear that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

23. Having said so, although this court considered the respective parties' submissions on the issue of retainer, it restrained itself from dealing with the same as analysing there was risk of it getting into the merits or otherwise of the reference, if the same was to be filed.

24. The court noted that the parties did not submit on the issue of stay of proceedings relating to the recovery or execution of the costs. Be that as it may, this court was not satisfied that the Client demonstrated the conditions provided for under Order 42 Rules 6 of the Civil Procedure Rules, 2010. In any case, the Client submitted that the Advocate was yet to take any steps in actualising the impugned Ruling since it was delivered in 2018.

25. In fact, there was no evidence that the Advocate had filed an application for the entry of the certificate of costs as a judgment of the court or that the certificate of costs had been entered as a judgment of the court as provided in Section 51 (2) of the Advocates Act Cap 16 (Laws of Kenya). This prayer was premature and not warranted in the circumstances of the case herein.

DISPOSITION

26. For the foregoing reasons, the upshot of this court's decision was that the Client's application dated 25th July 2020 was partly merited and the same be and is hereby allowed in terms of Prayer No (d) therein. Costs of the application will be in the cause.

27. The Client be and is hereby granted leave to lodge a Notice of Objection and file a Reference out of time for review of the Ruling dated 26th April 2018 in respect of the Advocate-Client Bill of Costs dated 14th June 2016 within the next fourteen (14) days from the date of this Ruling.

28. Either party is at liberty to apply.

29. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH OF JULY 2021

J. KAMAU

JUDGE