



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISCELLANEOUS CIVIL APPLICATION NO.141 OF 2018**

**BEING AN ADVOCATE/CLIENT BILL OF COSTS**

**BETWEEN**

**SPIRE BANK LIMITED.....CLIENT/APPLICANT**

**AND**

**NAMICHA & CO. ADVOCATES**

**NDERITU & PARTNERS ADVOCATES.....ADVOCATES/RESPONDENTS**

**RULING**

1. Pursuant to a ruling on reference dated the 29/10/2020 which remitted the bill of costs for taxation by the Deputy Registrar, the bill was taxed for the second time in the sum of Kshs 26,376,652.50 on the 4/3/2021. That decision apparently aggrieved the Client /applicant who then moved the court by the application dated 27.04.2021 and filed on the 28/4/2021 seeking orders that time for lodging a reference be extended, the execution of the decision be stayed and the decision on taxation be set aside and the bill be re-remitted back for a fresh taxation.

2. When served with the application, the advocate/ respondent took out and filed a Notice of Preliminary Objection dated 29/06/2021 seeking that the application be dismissed on the grounds it was filed and not served till two months had passed a fact the advocate views to demonstrate utmost bad faith on the part of the client. The advocates contend that the spirit of Rule 11(1) of the Advocates (Remuneration) Order does not contemplate the filing, *ad infinitum*, of references before the court, as there must be an end to litigation. They then contended that application is *res judicata*, having been substantially and directly determined by a court of competent jurisdiction, it cannot be re-litigated by way of a second reference. They view the application as tantamount to asking the court to sit on appeal over its own decision. The advocate then faults the client's failure to have its supporting affidavit dated, signed and/or witnessed by a commissioner for oaths and view it as undeserving of the court's discretion, as its application is fatally defective, having been brought under the wrong provisions of the law.

3. Even though the response and opposition was fronted as a preliminary objection, I see the matters raised to pass as grounds of opposition. I will thus deem it such opposition and thus seek to determine the application for extension of time on the merits. Once I decide on the extension of time is when it would be pertinent whether to consider the prayers for stay of execution and setting aside the order on taxation.

4. The court on 8/07/2021 heard lengthy oral submissions from Miss. Wangui for the client and Mr. Nderitu for the advocates. Miss Wangui while admitting that she did not prepare or file a notice of objection under the rules submitted that she indeed sent an application for reference to court on the 27/3/2021 but did not get any response as the court had been closed down due to Covid19 prevalence on the 15/04/2021. A document marked MWK3 was exhibited to show that an application was sent to court for filling. It is indeed a draft and neither signed, dated nor is the affidavit sworn. Counsel then faulted the contention that there can be only one reference to taxation for being founded upon no provision of the law. In her view, the matter was not *res judicata*, because the bill arose from matters which are still pending conclusion and determination.

5. Mr. Nderitu on his part expressed his displeasure with the client's adamancy in not settling the sum it conceded, as reasonable for instructions fees, before the initial taxation in the sum of Kshs 6,707,374. He took issue with the client's insistence of filing references *ad infinitum* and in blatant disregard to the provisions of Rule 11(3) of the Order. He disputed the assertion that this taxation regards HCC NO. 27 and 28 both of 2014 and asserted that this taxation only regards HCC No. 4 of 2014 and that there are other two files concerning HCC 27 and 28 of 2014. Accordingly, the counsel asserted, the reasons advanced now are the very same ones the court resolved on 29/10/2020. He took issue with the unexplained delay in filing the application and submitted that where there is no explanation, there is no discretion upon the court and urged the court to dismiss the application with costs.

## **Determination**

6. Even though parties delved in great length on issues like *res judicata*, which would go to the merits of the intended reference, I will remain focused on the dispute as disclosed in the application, being the request to extend time to lodge a reference out of time. The principles applicable on applications for enlargement of time are now settled and clear. An applicant must give at least one plausible reason for delay and the delay must not be inordinate. In addition, the applicant must demonstrate that he has an arguable matter to merit not being shut out<sup>[1]</sup>.

7. Put in the context of the matter it is noted that the ruling having been rendered on the 4/3/2021, the reference was due for institution by the 14<sup>th</sup> day thereafter being the 18<sup>th</sup> March 2021, by the client giving notice to the Taxing master of the items to which objects<sup>[2]</sup>. That was never done and has not been done. Instead, what I am shown is a draft Notice of Motion, so headed as draft, not ready for filling and an Affidavit that is neither signed by the deponent nor sworn. I take the view that by the 17<sup>th</sup> March 2021, the client was not ready with any Notice of objection to taxation and even the Notice of motion exhibited was itself not ready. I also find that an objection to taxation is initiated by a Notice and not by notice of motion hence even if there had been a proper notice of motion the same would have been premature.

8. More importantly, supposing there had been a proper application sent by the mail of 17/3/2021, which was not received and filed by the 17<sup>th</sup> of March on the basis of court closure, the court having opened its door on the 22<sup>nd</sup> March, what steps did the client take to pursue the matter? I see no efforts until the current application was filed on the 28<sup>th</sup> April 2021. I do consider that the applicant has failed to demonstrate eagerness to pursue the matter and failed to explain the delay.

9. I find that the applicant had his options wide open to give notice of objection then open his doors open and have a period of up to 14 days after the receipt of the reasons by the registrar to file the Notice of motion.

10. Whether or not to extend time is a matter of judicial discretion and a judicial discretion must be exercised only upon valid reasons. In **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR**, the court of appeal reinstated the instance of judicial discretion in the following words

**“...a discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning.”**

11. In this matter no explanation was given for the delay and that the court was closed for seven days is more of an excuse than a reason. I find that the delay has not been explained. When no explanation is offered it matters not the length of delay. For that reason, I find no merit in the application to set aside and order that the same be dismissed with costs.

12. Having so dismissed the application for extension of time, the other prayers deserve no consideration at all, have become moot. It is however, important to observe that a certificate of taxation in itself is incapable of grounding any execution for an application because an application for judgment must be filed, prosecuted with notice to the client and a judgment entered before any execution can be pursued.

**DATED SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS THIS 30TH DAY OF SEPTEMBER, 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**In presence of**

**MR. KAMUNYA FOR APPLICANT/CLIENT**

**MR. NDEIRUTU FOR THE RESPONDENT/ADVOCATE**

**PATRICK J.O OTIENO**

**JUDGE**

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<sup>[1]</sup> **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**

<sup>[2]</sup> **Rule 11 of the Advocates (Remuneration) Order**