



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC APP NO. 332 OF 2019

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....APPLICANT

VERSUS

JOHN OMOLLO T/A GANIJEE & SONS.....RESPONDENT

(An application for seeking for extension of time to put in a Reference challenging

the Ruling on taxation of the Deputy Registrar (Hon. M. Nyariki) dated

the 6th February, 2020 in Misc. Civil Application No. 332 of 2019)

RULING

1. For consideration before this court is a **Chamber Summons** application dated **20th November, 2020**. The same is brought under **Section 3A and 44**, all of the **Civil Procedure Act**, and **Rule 11(4)** of the **Advocates Remuneration Order** and all enabling provisions of the law. By the Application, the Applicant seeks the following orders: -

- 1. THAT this Honorable Court be pleased to enlarge the time within which the Applicant is to file and serve its reference challenging the Ruling delivered by Hon. J. M. Nyariki, Deputy Registrar (“Taxing Master”) on the 6th day of February, 2020 on the taxation of the Respondent’s Party and Party Bill of Costs dated the 30th day of August, 2019.**
- 2. THAT this Honorable Court be pleased to direct the Taxing Master to furnish the Applicant with reasons for the Ruling dated the 6th day of February 2020.**
- 3. THAT this Honorable Court be pleased to issue any further and/or other orders for the ends of justice to be met.**
- 4. THAT the costs of this application be provided for.**

2. The **Chamber Summons** application is supported by the grounds presented on its body and the Affidavit of **Michael Goa**, the Director of Legal and Public Affairs of the Applicant. He avers that on the **3rd September, 2019** the Respondent filed a Party and Party Bill of Costs dated the **30th August, 2019**, which was heard and thereafter a Ruling was delivered by Hon. Nyariki (the Taxing Master) on the **6th February, 2020**, indicating that the Bill of Costs was taxed at **Kshs.5,782,746.39**.

3. **Mr. Goa**, depones that the Applicant’s Advocates on record wrote a letter to the Taxing Master on the **10th February, 2020** seeking reasons for the said Ruling. It is the Applicant’s case that the letter dated **10th February, 2020** has never been responded to and thus a reminder was written on the **27th February, 2020**.

4. The deponent avers that another letter was written to the Taxing Master on **12th March, 2020** requesting for reasons for the Ruling, but despite the numerous requests, the Taxing Master has never furnished the Applicant with reasons for his Ruling of **6th February, 2020** to enable them file a Reference.

5. It has been stated that as a consequence, on the **20th March 2020**, the Applicant filed **Misc. Application No.79 of 2020, Independent Electoral and Boundaries Commission –vs- John Omollo t/a Ganijee and Sons** and sought orders for the enlargement of time within which to file and serve a Reference challenging the Ruling as delivered on the **6th February 2020** but the same was struck out for want of

jurisdiction on the **28th October 2020**.

6. However, it is stated that the court did not delve into the merits of the said application as was filed on the **20th March 2020**, the finding being that **Misc. Application No. 79 of 2020 Independent Electoral and Boundaries Commission –vs- John Omollo T/A Ganijee and Sons** was a fresh suit and the application ought to have been filed under the file herein, **Misc. Civil Application No.332 of 2019**.

7. The deponent states that based on the decision delivered by the court on the **28th October 2020**, the Applicant made the instant Application.

8. It is the Applicant's case that they have been diligent in pursuing reasons for the Ruling from the Taxing Master to enable them file a reference and that they are yet to receive them to date, hence there has been no delay to make the instant Application.

9. That it is in the interest of justice that the Applicant's application seeking enlargement in which to file a Reference challenging the Taxing Master's Ruling dated **6th February, 2020** be allowed.

The Response

10. The Application has been opposed vide an affidavit sworn on **16th April, 2021** by **John Omollo** who avers that the **Chamber Summons** application as filed is incompetent for the reasons that the Applicant did not lodge a Notice of Objection to the decision of the Taxing Master indicating the items of taxation which it intended to object to within 14 days as required under **Paragraph 11(1)** of the **Advocates Remuneration Order**.

11. It is the Respondent's case that it was also important that the Applicant seeks for extension of time to file the **Notice of Objection** out of time and thus as it stands there is no **Notice of Objection** that has been filed as required by law.

12. The deponent avers that it is the **Notice of Objection** that initiates a Reference just like a **Notice of Appeal** initiates an Appeal to the Court of Appeal, so that without a **Notice of Objection**, the prayers as sought by the Applicant are misconceived, misguided and untenable.

13. It is stated that in the event that the reasons of the taxing master are on the face of the Ruling dated **6th February, 2020**, thus the formula applied to assess the items is as stated, consequently there was no need for the Applicant to ask for reasons from the Taxing Master.

14. The Respondent further depones that the Reference could have been filed within the prescribed timelines without the Applicant purporting to wait for reasons since the same are on the face of the **Ruling**. It has been stated that in the circumstances, no plausible explanation has been advanced for this court to extend time.

15. Lastly, the Respondent states that the Applicant has failed to satisfy the threshold for this court to grant orders for leave to extend time for filing a Reference out of time. The Respondent states that if the application for extension is allowed, he will be subjected to endless litigation by the Applicant who keeps filing applications to derail the enforcement of the arbitral award.

16. The Respondent avers that in the interest of justice, the **Chamber Summons** application dated **20th November, 2020** should be dismissed with costs to the Respondent.

17. The Applicant filed a **Further Affidavit** in response to the facts deponed to by the Respondent in the **Replying Affidavit**. It is deponed that **Paragraph 11(1)** of the **Advocates Remuneration Order** does not provide for the format of the notice to the Taxing Officer and thus the letters marked as annexed as "**EMM-3**", "**EMM-4**" and "**EMM-5**" were sufficient notice of objection.

18. The Applicant further avers that the Ruling dated the **6th February, 2020** had no reasons to enable the Applicant exercise the right to lodge a Reference.

19. In conclusion, the Applicant submits that the instant application was triggered by the failure of the Taxing Master to furnish the Applicant with reasons and that the Applicant stands to suffer great prejudice if the instant application is not allowed as the amount awarded is manifestly

excessive with no recourse in law.

20. The Application proceeded by way of written submissions pursuant to court's directions on the **19th April, 2021**. The Applicant's submissions were filed on the **19th May, 2021** and respectively the Respondent's submissions were filed on **24th May, 2021**.

The Applicant's Submissions

21. In their submissions, the Applicant has stated that it complied with the requirement of the law that stipulates that vide their letter dated **10th February, 2020**, they raised an objection against the decision of the Taxing Master issued on the **6th February, 2020**.

22. It has been submitted that a letter is sufficient Notice of Objection to fulfill the requirement of **Paragraph 11(1)** of the **Advocates Remuneration Order**. To buttress this argument, reliance has been placed on the cases of **Lubullelah & Associates Advocates –vs- Kenyatta National Hospital [2010]eKLR** and **Hamilton Harrison & Mathews – vs – Mumbi Ngengi [2020] eKLR**.

23. As for whether time should be extended, the Applicant has stated that there is no basis upon which the Bill of Costs was taxed and thus he should be allowed to exercise his right of Appeal. It was the Applicant's submissions that it will be greatly prejudiced if its application is not allowed as it will be condemned to pay an amount manifestly excessive as taxed by the Taxing Master. Reliance was placed on the case of **Evans Thiga Gaturu, Advocate –vs- Kenya Commercial Bank Limited [2021] eKLR** and **Peter Julius Njoroge –vs- Fidelity Commercial Bank Limited & Another [2018] eKLR**.

24. In conclusion, the Applicant has submitted that it is the mandate of the Taxing Master to issue reasons for taxing the Bill of Costs and it is therefore only that fair the court makes a determination on the consequences of such failure. The Applicant has referred the Court to the cases of **Pyramid Motors Limited –vs- Langata Gardens Limited [2015]eKLR** and **In Re Estate of Gatumu Kamanja (Deceased) [2016]eKLR**, where the Court held that the Taxing Master is under an obligation to provide reasons and such failure is viewed as an abdication of responsibility on his/her part.

The Respondent's Submissions

25. The Respondent on the other hand has submitted that the letters dated **10th February, 2020, 27th February, 2020 and 12th March, 2020** for reasons to the Taxing Master as sent, provide reasons for his/he Ruling are not in conformity with **Paragraph 11 (1) of the Advocates Remuneration Order** to suffice as a Notice of Objection as the same are vague in respect to the items that the Applicant objects to. Reliance has been placed on the Court of Appeal case of **Machira & Co. Advocates –vs- Arthur K. Magugu & Another [2012]eKLR**, where the Court stated that **Notices of Objection** should be specific in nature in terms of

the items a party is objecting to.

26. On whether time should be extended, the Respondent acknowledged that the same is at the discretion of the court and that the Applicant is obliged to adduce material upon which the court can exercise such discretion. The Respondent has relied on the case of **Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR**.

27. It has been submitted that the Applicant has provided the court with sufficient reason to warrant extension of time. It has been stated that the lack of reasons from the Taxing Master is not reason enough to warrant extension of time. The Respondent's case is that the delay to file a Reference has not been sufficiently explained since the reasons for the Ruling by the Taxing master are contained in the **Ruling** dated **6th February 2020**.

28. Further, the Respondent has submitted that it would be prejudiced if the application herein is allowed as it would be subjected to endless and unwarranted litigation by the Applicant who keeps filing multiple applications with a view to derail the execution process. The Respondent prays that the Chamber Summons Application **dated 20th November, 2020** be dismissed with costs.

ANALYSIS AND DETERMINATION

29. I have considered the application dated **20th November, 2020**, the

affidavits in support and against the said application, the submissions by both parties, together with the cited statute and case law. I find the issues for determination being:-

a) Whether a letter is sufficient Notice under Paragraph 11(1) of the Advocates Remuneration Order;

b) Whether the court can extend time for the Applicant to put in reference.

a) Whether a letter is sufficient Notice under Paragraph 11(1) of the Advocates Remuneration Order

30. It is the Respondent's contention that the Applicant did not lodge a Notice of Objection to the decision of the Taxing Master delivered on the **6th February, 2020**. It is also stated that a letter as claimed by the Applicant is not a Notice of Objection as envisioned under **Paragraph 11(1) of the Advocates Remuneration Order**.

31. In the case herein, the Applicant wrote three letters dated the **10th February, 2020; 27th February, 2020 and 12th March, 2020**, in which they were seeking for reasons from the Taxing Master for the decision delivered on the **6th February, 2020**. The letters which the Applicants relies on requested for reasons for the Taxing Master's decision and more precisely the letter dated **12th March, 2020** which indicated that the Applicant required reasons for the entire Ruling. To the Applicant, the letters were sufficient Notice to show that it objected to the decision of the Taxing Master as required under **Paragraph 11(1) of the Advocates Remuneration Order**.

32. **Paragraph 11** of the **Advocates Remuneration Order** provides that:-

“11. Objection to decision on taxation and appeal to 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 filed 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."

33. The reading of **Paragraph 11(1)** of the **Advocates Remuneration Order** does not give a prescribed format of how one should approach court when objecting to the Taxing Master's decision. The only requirement is that the said objection should be in writing. In this case therefore, a letter is sufficient Notice of Objection. Therefore, the letters dated the **10th February, 2020**, **27th February, 2020** and **12th March, 2020** were a proper format of objecting to the decision of the Taxing Master as there is no reflective statutory format in the **Advocates Remuneration Order** on how a **Notice of Objection** should look like.

34. There being no such set format for what an objection looks like under the **Advocates Remuneration Order**, I find the interpretation by the Respondent that the same ought to have looked like a **Notice of Appeal** as being misguided.

35. Further, the Respondent claims and I must agree, that under **Paragraph 11(1)** of the **Advocates Remuneration Order**, it is a requirement that a party objecting to a decision of the Taxing Master must indicate the items they are objecting to. The Respondent contends that the Applicant did not indicate the items it is objecting to as required. On this, I find that through the follow up letter dated **12th March, 2020**, the Applicant indicated that it required reasons for the entire Ruling as delivered on the **6th February, 2020**. This is sufficient Notice that they intend to object to all the items as taxed.

36. In view of the above observations, I find that the letters dated **10th February, 2020**; **27th February, 2020** and **12th March, 2020** were sufficient notice by the Applicant against the decision of the Taxing Master.

b) Whether the court can extend time to the Applicant to put in a Reference.

37. As for whether or not the court can extend the time for filing a Reference against the Taxing Master's decision, I wish to state that it is a principle of Law that the applicant must demonstrate good and sufficient reasons as to why he or she was unable to bring the Reference within the set period as provided for under **Paragraph 11** of the **Advocates Remuneration Order** which is fourteen days from the delivery of the Taxing Master's reasons for the decision as delivered. Further, the Supreme Court settled the principles that are to guide the courts in the exercise of its discretion to extend time in the case of **Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral & Boundaries Commission & 7 Others [2014]eKLR**, where it was held:-

“the under-lying principles that a Court should consider in exercise of 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- 5. Whether there will be any prejudice suffered by the respondents if the 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.”*

38. I have read through the Ruling of the Taxing Master delivered on **6th February, 2020** and find that even though the Applicant contends that time should be extended to put in a Reference because the Ruling delivered on the said date simply stipulates the amounts taxed off and those allowed by the Taxing Master in respect to the Party and Party Bill of Costs, it is without giving any reasons and/or justification for allowing the items therein.

39. It is the Applicant's case that time should be extended as the Taxing Master made a decision without giving due regard to its written submissions which occasioned an injustice.

40. Further, The Applicant has stated that time should be extended because despite the numerous requests to the Taxing Master for the

reasons for the Ruling delivered on the **6th February, 2020**, they are yet to receive the same. It is the Applicant's case that as a party that was challenging the decision of the Taxing Master, it is entitled to await communication from the Taxing Master stating the reasons for the said decision. The Applicant indicates that it could not file a Reference without the reasons as required under **Paragraph 11(1)** of the **Advocates Remuneration Order**.

41. The Respondent on other hand states that the Applicant ought to have filed a Reference as per the prescribed timelines under **Paragraph 11** of the **Advocates Remuneration Order** since the reasons for the Ruling delivered on the **6th February, 2020** are on its face. It is therefore not enough for the Applicant to state that the lack of reasons for the Ruling is what occasioned the delay, hence they did not file a Reference on time. The Respondent urged the Court to dismiss the Applicant's application as it

is a delaying tactic to deny him the right to enjoy the fruits of its Judgment.

42. In this case, the Applicant has filed a letter dated **10th February, 2020** and further wrote two follow up letters questioning the decision of **6th February, 2020** dated the **27th February, 2020** and **12th March 2020** and has yet to receive any such reasons from the Taxing Master to enable them file a Reference.

43. Under **Paragraph 11 (2)** of the **Advocates Remuneration Order**, it is a requirement that after a Taxing Master has received an objection from any party, he or she is mandated to respond to the objector and thereafter the objector may file a Reference before a Judge. It is therefore true that the Applicant was under a mandate to wait for such reasons from the Taxing Master which clearly have not been provided to date.

44. It is therefore clear to the court that the Applicant has satisfied the court that the lack of reasons from the Taxing Master occasioned a delay and the Applicant could not have filed a Reference on time. It is thus my view that it would be unfair not to extend time for the Applicant to put in a Reference.

45. In balancing the Applicant's right to Appeal and the Respondent's right to enjoy the fruits of his judgment, this Court finds that it is more persuaded that the Applicant should be allowed to exercise its Constitutional right and be allowed to Appeal the decision delivered on **6th February, 2020** the Deputy Registrar.

46. In view of the above findings, Applicant's application dated **20th November, 2020** is allowed and the time in which to file a Reference as against the Deputy Registrar's decision delivered on **6th February, 2020** be and is hereby extended.

47. Accordingly, the Applicant to file and serve their reference within 14 days.

48. Costs to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF SEPTEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Eugene Mukele counsel holding brief for Mr. Edwin Mukele counsel for Applicant

Mr. Gikandi counsel holding brief for M/S Munge counsel for Respondent

Court Assistant - Winnie