



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.317 OF 2014

AL YUSRA RESTAURANT LIMITED.....PETITIONER/RESPONDENT/APPLICANT

VERSUS

KENYA CONFERENCE OF CATHOLIC BISHOP.....1ST RESPONDENT/ APPLICANT/RESPONDENT

KNIGHT FRANT KENYA LIMITED2ND RESPONDENT

R U L I N G

1. Vide a Notice of Motion dated 9th June, 2020 the petitioner/applicant moved this court seeking the following orders:

(i) This honourable court be pleased to convert the certificate of taxation dated 21st May, 2020 into a decree and judgment of the court.

(ii) That interest on taxed costs be awarded at 14% per annum from 30th October, 2018 until payment in full.

2. The application is premised on the grounds on the face of the application plus the supporting affidavit of Ralima Adan Jillo an advocate of the High Court of Kenya sworn on 9th June, 2020. It is the petitioner/applicant's averment that it has a valid certificate of taxation duly issued by the Deputy Registrar and which certificate has not been set aside or altered. In applying for interest at 14% p.a. it relies on the provisions of Rule 7 of the Advocates Remuneration Order which states:

“An advocate may charge interest @ 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill, to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.”

According to the petitioner/applicant the interest is chargeable from 30th October, 2018 since that was the date of the bill of costs.

3. There is nothing on record to show that the respondents responded to the application dated 9th June, 2020 either by grounds of opposition or replying affidavit.

4. The 2nd application is dated 6th January, 2021 – filed by the 1st respondent, who seeks the following orders:

(i) Spent

(ii) That the Honourable Court be pleased to enlarge the time for filing the instant application.

(iii) That the Honourable Court be pleased to issue a stay of execution of the Ruling and/or Order of the Deputy Registrar dated 29th March, 2019 pending the hearing and determination of the instant application.

(iv) That the Honourable Court be pleased to set aside and/or review the determination of the Deputy Registrar on 29th March, 2020 being the award of KShs.1,822,425.00.

(v) Spent.

(vi) *That the Honourable Court be pleased to grant any other orders it deems fit, just and expedient.*

(vii) *That the costs of this Reference awarded the Applicant.*

5. This application is premised on the grounds on its face plus the supporting affidavits of very reverend Father Daniel Rono and Veronica Kangara. A summary of all this is that the ruling on taxation was delivered on 29th March, 2019 while they were supplied with a copy of the ruling and reasons on 3rd April, 2019, following their request vide their letter dated 1st April, 2019. (KCCB 1). Following these events they filed a Reference vide a chamber summons dated 15th April, 2019. The same was struck out for having been filed out of time without the leave of the court.

6. The deponent averred that the mistakes of the advocate should not be loaded on the client. He therefore urged the court to set aside the certificate of the Taxation dated 21st May, 2020.

7. In response to this application the petitioner/respondent, filed grounds of opposition dated 3rd February, 2021, which are as follows:

(i) That the application as laid is incompetent, misconceived and incurably defective as same is an afterthought; is made/filed after ***undue and unmitigated delay***.

(ii) That the Applicant's Advocate's mistake in computing timeframe for lodging a Reference cannot constitute a reasonable excuse as ignorance/mistake of law is not a ground for the court to exercise its discretion to enlarge time;

(iii) That the application is incompetent, defective, unknown in law, vexatious, frivolous and scandalous;

(iv) That the application is an abuse of court process as the same is simply purposed to delay, scuttle, prejudice and bring hardship to the Petitioner's entitlement to the costs; and

(v) That the application is vexatious and craves to be dismissed ***ex-debito justitiae***.

8. The replying affidavit was sworn by Bakai Maalim Kulumia on 21st January, 2021. He opposed the application and referred to the grounds of opposition. He averred that the costs were based on awards that were made by the trial Judge Hon. Justice Lenaola (as he then was). It is his averment that the taxation should not be set aside.

9. Both applications were argued simultaneously and by way of written submissions.

10. The petitioner's submissions dated 1st November, 2021 were filed by Rahma Jillo advocate. Counsel submits that the 1st respondent's application seeks an avalanche of other key prayers. He identifies them as:

(i) An unqualified order of stay of execution of the ruling/order of the D.R. dated 29th March, 2019.

(ii) Setting aside and/or review of the determination of the DR being the award of KShs.1,822,425/-.

(iii) The application be admitted for hearing during the courts December recess.

(iv) Seeks an order, the court deems fit, just and expedient to grant.

11. Counsel argues that following the ruling by Justice Korir of 30th April, 2020 the 1st respondent could not come up with a similar application. It should have sought for extension of time before filing the reference. He cited paragraph 11 of the Advocates Remuneration Order as the provisions for enlargement of time. It provides as follows:

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 which he objects to.

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 will 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.

12. It is his submission that the 1st respondent has not demonstrated any viable reason why the reference was not filed in time. He cited the **Supreme Court case of County Executive Officer Kisumu Vs. County Government of Kisumu & 8 others [2017] eKLR** where the

court set out what an applicant should demonstrate in an application for enlargement of time. This is what the court stated: -

"23 It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The court delineated the following as: "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."**

13. Counsel has submitted that the long delay of nine months before filing of this application has not been explained. He referred to paragraph (b) (ii) of the grounds in support of the 1st respondents chambers summons and paragraphs 9-12 of the respondents supporting affidavit, and paragraph 5 of the Ruling striking out the 1st respondents previous chamber summons. It is his submission that the 1st respondent alleged advocate's mistake in computing time is unreliable. He urges the court to find that the delay in filing the reference is unmitigated and inexcusable.

14. Counsel submitted that the taxed bill of costs should not be interfered with as the 1st respondent has not given any good reason for such an order to be given. He instead urges the court to allow the Notice of Motion dated 9th June, 2020 for the reason that they have not asked for anything that is outside the Advocates Remuneration Order.

15. He referred to the case of **Musyoka & Wambua Advocates & Rustam Hira Advocates [2006] eKLR** where it was held:

"Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has discretion to enter judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view, is a mode of recovery of taxed costs provided by law, in addition to filing of suit,"

16. It is his submissions that the Notice of Motion dated 9th June, 2020 meets the legal threshold for a Certificate of Taxation to be issued. He therefore urged the court to allow the said application.

17. The 1st respondent filed its submissions dated 19th May, 2021 through Numa & Kanjama Advocates. Counsel gave a background of the matter and identified the issues for determination to be as follows:

B. ISSUES FOR DETERMINATION

- a) *Whether the court may extend the time for filing of a reference under the Advocates Remuneration Order in the circumstances of this case.*
- b) *Whether the court may stay execution of certificate of taxation of costs pending the hearing of the reference.*
- c) *Whether the 1st Respondent has an arguable Application with high likelihood of success*
 - (i) *Whether the amounts awarded by the Deputy Registrar as instruction and getting up fees respectively were excessive.*
 - (ii) *Whether getting up fees was awardable.*

18. He submitted that the court has discretion to extend time for lodging a reference notwithstanding the expiry of the 14 day period. On this he relied on paragraph 11 of the Advocates Remuneration Order, already cited above. He explained the reason for the late filing of the reference to be his receipt of the ruling and reasons for Taxation on 3rd April, 2019 and presumed that the 14 days period ran from that date, & filed the Reference on 15th April, 2019. The same was struck out and the present application was filed six (6) months later. It is his submission that the late filing was by counsel's mistake which should not be blamed on the client.

19. He placed reliance on the case of **Lucy Bosire Vs. Kehancha Division Land Dispute Tribunal & 2 others [2013] eKLR** where the High Court stated:

"It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Phillip Keipto Chemwolo & Another Vs Augustine Kubende (1986)KLR 492 (1982-88) 1 KLR 492(1982-88)1 KAR 1036 at 1042 (1986-1989)EA 74

He further relied on the case of **Labh Singh Harmern Sing Vs. A-G & 2 others [2016] eKLR** to support the submission.

20. It is counsel's submission that this court is endowed with jurisdiction to stay execution of the certificate of taxation. He argues that if the same is not granted the 1st respondent will face execution without being heard. In arguing this point he relied on the cases of:

- (i) Labh Singh Harman Singh (supra)
- (ii) Musyoka Kimeu & Co-advocate V. Makata Savings & Credit Co-operative Society Ltd. [2019] eKLR.

21. He contends that the 1st respondent has an arguable application with a high likelihood of success. He has referred to the principles guiding the taxing master while exercising his/her discretion in taxation matters. On this he referred to the following:

- (i) **Schedule 6(j)(ii) of the Advocates Remuneration (Amendment) Order 2014.**
- (ii) **Kyalo Mbobu T/A Kyalo & Associates Advocates V. Jacob Juma [2015] eKLR.**
- (iii) **Republic V. National Environmental Tribunal Ex parte Silvestar N. Enterprises Ltd [2010] eKLR**
- (iv) **Republic V. Commissioner of Domestic Taxes Ex-parte Ukwala Supermarket Ltd. & 2 others [2018] eKLR.**

He thus contends that the Taxing Officer grossly violated the principle of fair value upon work and responsibility involved in the matter. He further argues that the matter herein was not a complex one and it did not deserve the increment of the prescribed instruction fee.

22. Referring to schedule vi paragraph 2 of the Advocates Remuneration (Amendment) Order 2014 he submits that this matter did not involve the calling of witnesses and so getting up fees was not called for. The said provision referred to provides thus:

"In any case in which a denial of liability is filed or in which issues for trial are joined by pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one third of the instruction fee allowed in taxation."

23. He further referred to the case of **Kenya Agricultural and Livestock Research Organisation (formerly Kenya Agricultural Research Institute v. Njama Limited[2017] eKLR** where the court stated:

"I am in agreement with those decisions, and hold that because there was no trial; no preparation of witnesses who would have given viva voce evidence; and no witness statements prepared by the advocate, Getting Up fees was not awardable."

He further urges the court to set aside the decision of the Taxing Master.

Analysis and Determination

24. I have duly considered both applications, affidavits, submissions, authorities and the law. The issue I find to be falling for determination is whether the two applications have merit. I will first deal with the application dated 9th January, 2021 for the reason that its determination will guide the court on how to move on with the application dated 9th June, 2020.

25. The facts leading to these two applications are on record and well known to both parties so I will not reproduce them here. This court vide a ruling delivered on 30th April, 2020 through email, struck out the 1st respondent's Reference dated 15th April, 2019. The reason was that it had been filed out of the period of 14 days as provided under paragraph 11(2) of the Advocates Remuneration Order.

26. The 1st respondent did not appeal against the Order striking out the reference nor seek enlargement of time to file a reference as provided for under paragraph 11 (3) and (4) of the Advocates Remuneration Act. He waited upto January 2021 when the application dated 9th January, 2021 was filed. This was exactly eight months plus ten (10) days after the striking out of the chamber summons dated 15th April, 2019, and exactly nine (9) months eleven (11) days after delivery of the ruling on taxation by the Deputy Registrar.

27. The application dated 9th June, 2021 is indeed a Reference plus an extra prayer seeking enlargement of time for filing a Reference. This clearly confirms that the Applicant has not done what it ought to have done within 14 days after the Taxing Master's Ruling. Even after the striking out of its reference on 30th April, 2020 the Applicant did not take immediate action. Before being granted leave to file a Reference out of time one cannot file a valid one. This is what the 1st respondent/applicant has done which is inappropriate. In the instant case instead of striking out the application I will only deal with the prayer which states:

"The honourable court be pleased to enlarge the time for filing the instant application"

28. The issue for determination is whether the 1st respondent/applicant has satisfied the criteria for enlargement of time for filing a Reference. The principles for issuance of such orders have been set out in the case of **County Executive of Kisumu** (supra). It is the duty of an applicant in a matter of this nature to satisfy the court that he/she has good reasons for the delay in filing the Reference.

29. The 1st respondent/applicant has in its grounds in support of the application stated thus:

(iii) The advocate in conduct of this matter believed that he was within the stipulated timeline for filing of the Reference and proceeded to do so on 16th April, 2019.

(iv) It was only after the High Court's Ruling was delivered on 30th April, 2020 that the Applicants' advocate realized that despite his estimation, he was out of time in filing of the Reference.

(v) The applicant now done due diligence by seeking leave to file the Reference out of time, and issued 3 days noticed dated 15th May, 2020 to all interested parties involved in this matter as informing them of the intention to institute the instant application in accordance with Rule 11(4) of the Advocates Remuneration Order.

(vi) Even after sending the Notice to all parties, counsel in charge of this matter unintentionally delayed in filing this application and prays that mistake of counsel is not visited on the 1st respondent.

30. Supporting affidavits by Veronica Kanyara and the Very Reverend Father Daniel Rono sworn on 6th January, 2020 (this date is an error), state that Counsel Veronica Kanyara unintentionally failed to file this application and so asked the court not to penalize the 1st respondent/applicant for the mistake.

31. The ruling by the Deputy Registrar on taxation delivered on 29th March, 2019 clearly stated the reasons for the decision she made. It therefore means that from the time of receipt of the ruling and reasons on 3rd April, 2019 the 1st respondent/applicant and its advocate became aware of the reasons behind the taxation and time had already started running. The ruling by Justice Korir on 30th April, 2020 clearly states that the application was filed out of time, and what the 1st respondent/applicant ought to have done.

32. Instead of seeking leave in line with the provisions of paragraph 11(4) of the Advocates Remuneration Order, the 1st respondent/applicant and its advocate went to sleep. Counsel talks of having served parties with a Notice for filing an application for extension of time dated 15th May, 2020. Besides doing that, he did not take any steps to file a Reference

33. The Reference ought to have been filed within 14 days of delivery of the ruling on taxation. The application for enlargement of time has been made nine (9) months + (10) days after delivery of the Ruling. All that counsel says is that she unintentionally failed to file the application. That could have worked if the period of delay was a much lesser one.

34. After analyzing all the material before me, I find that the 1st respondent/applicant has not given any satisfactory basis for enlargement of the period required for filing a Reference. That being the case I do not see any reason for diverging into the other prayers sought. The application dated 9th January, 2021 is dismissed with costs.

35. There is therefore nothing to challenge the conversion of the Certificate of Taxation dated 21st May, 2020 into a judgement and decree of this court. I allow the application dated 9th June, 2020 as prayed with costs.

Orders accordingly.

DELIVERED ONLINE THIS 16TH DAY OF DECEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

HEDWIG I. ONG'UDI

JUDGE OF THE HIGH COURT