



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. 232 OF 2019

BETWEEN

SHOWCASE PROPERTY LIMITEDCLIENT/APPLICANT

AND

MUGAMBI & COMPANY ADVOCATES.....ADVOCATES/RESPONDENT

RULING

1. This matter arises from an advocate/client bill of costs dated 17th July 2019. The bill of costs was taxed by the Deputy Registrar who, by a ruling dated 6th November 2019, awarded the advocate Kshs. 23,899,864.40 only. Following certification of the costs, the respondent filed the Notice of Motion dated 25th November 2019 seeking judgment against the Client for the taxed amount.

2. Before the application for judgment could be heard, the Client filed a Chamber Summons dated 17th December 2019 under **Paragraph 11** of the **Advocates Remuneration Order** seeking an order that, “*That this Honourable Court enlarges time within which to file a Reference against the decision of the Taxing Officer delivered on 6th November 2019.*” This application came before me on 15th January 2020 and I made the following order:

1. The Chamber Summons dated 17.12.2019 is allowed on terms that the Respondent/Client shall pay costs of Kshs. 15,000/- only within 7 days.
2. The Reference in this case shall be filed and served within 7 days.
3. Mention on 28.01.2020 for further orders/directions.

3. When the matter came up on 28th January 2020, I recorded that the reference had not been filed as directed. It appears that the reason why the reference had not been filed was because counsel for the client had written to the Deputy Registrar a letter dated 17th January 2020 referring to the proceedings of 15th January 2020 and requesting, “the reasons as to how the Advocate-Client Bill of Costs dated 17th July 2019 was taxed to enable us file a reference objecting against your ruling on the taxation dated 6th November 2019” “

4. Nevertheless, the applicant filed a Chamber Summons dated 29th January 2020 under **Paragraph 11(2)** of the **Advocates Remuneration Order** seeking an order that, “*THAT the Taxing Officer’s decision dated 6th November 2016 with respect to the taxation of the Advocate/Client Bill of Costs dated 17th July 2019 be set aside and substituted with an order striking out the bill of costs.*”

5. Thereafter the Client filed the application which is under consideration that is the Chamber Summons dated 30th January 2020 made under **Paragraph 11** of the **Advocates Remuneration Order**, **section 3A** of the **Civil Procedure Act** and other enabling provisions of the law. In the application, the applicant/client seeks the following orders:

[1] That this application be certified as urgent and heard ex-parte in the first instance.

[2] That this Honourable Court do enlarge time for filing a Reference against the decision of the Taxing Officer delivered on 6th November 2019.

[3] That the ruling on taxation dated 6th November 2019 be deemed to be the reasons given for the taxation in compliance with Paragraph 11 of the Advocates Remuneration Order.

[4] That the Reference filed by the Client on 30th January 2020 be deemed as properly filed.

[5] That there be a stay of execution of the Certificate of Taxation dated 7th November 2019 pending hearing and determination of the reference dated 29th January 2019.

[6] That the costs of this application be provided for.

6. The facts upon which the application is founded are set out on the face of the application and the supporting affidavit of Francis Muhoro Gachanja, a director of the applicant, sworn on 30th January 2020. The application was urged by the Client's advocate, Mr Mungai, who urged the court to allow the application on the ground that the respondent would not suffer any prejudice and that the client should be given an opportunity to canvass the reference which raised serious issues.

7. The application was opposed through the affidavit of John N. Mugambi, the respondent, sworn on 12th February 2020. A large party of the affidavit contains arguments and submissions which were reiterated by his counsel, Mr Otenyo. He has opposed the application on the basis that it has been brought in bad faith and is an abuse of the court process. Counsel submitted that applicant failed to comply with the court's direction on 15th January 2020 by failing to file reference as directed but instead applied for reasons in the letter to the Deputy Registrar. Further that the applicant now seeks enlargement of time yet it has not advanced any reason why it failed to file the reference as directed. The respondent submitted the court has already exercised its discretion to grant leave and in the circumstances, the court ought not to grant leave once again as the applicant is to blame for failing to comply with the court's direction and has brought the application after undue delay. It contends that respondent continues to suffer prejudice as it continues to be kept out of its money.

8. The matter for consideration in this matter is whether I should exercise discretion to extend time for filing the reference in favour of the Client. The respondent cited the Supreme Court decision in ***Nicholas Kiptoo arap Salat v Independent Electoral and Boundaries Commission and 7 Others SCK Application No. 16 of 2014 [2014] eKLR*** where the court set out the factors for consideration when determining an application for extension of time as follows:

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive 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.

8. I would also add what the Court of Appeal stated in ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi CA Civil Application No. NAI 25 of 1997 (UR)*** that:

It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether or not to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chance of the appeal succeeding if the application is not granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.

9. At the end of the day, the duty of the court is to do justice in light of the circumstances of each case. In this case, the initial application for extension of time was allowed on two conditions; filing the reference within 7 days and payment of costs. Although the Client paid costs, it failed to file the reference. It is only on 28th January when I drew the applicants' attention to the fact that it did not need reasons, that it filed the reference on, the next day, 29th January 2020 and followed it up with the application to validate the reference.

10. As I understand, counsel for the applicant believed that it was necessary to apply for reasons hence he wrote to the Deputy Registrar on 17th January 2020, two days after the order extending time to file the reference. That is why I drew counsel's attention to the decisions of the court that the reasons for the taxation decision are contained in the ruling hence there was no need to seek reasons for the decision (see ***Mumias Sugar Company Limited v Professor Tom Ojienda and Associates KSM HC Misc. No. 279 of 2017 [2018] eKLR***).

11. Although there was a delay of 7 days from the last day from which the reference was to be filed, I do not consider this delay inordinate. I also do not think that the failure to file the reference was deliberate or intended to delay or defeat justice. The Client has been eager to

prosecute its reference. It paid the costs ordered by the court and once the court drew counsel's attention to his misstep, he took steps to rectify it by filing the reference on the date after attending court. I also find that there was any mistake or misapprehension of the law, it was one by the advocates and the Client should not be penalized for it by preventing it from pursuing its reference. I am therefore prepared to condone the failure by the applicant to comply with the orders of 15th January 2020.

12. The court should always lean towards hearing the merits of a case and I do not think the respondent will be prejudiced if the reference, which has now been filed, is heard on merits. Any prejudice to the respondent can be compensated by an award of costs.

13. I allow the Chamber Summons dated 30th January 2020 on terms that I order that the Chamber Summons dated 29th January 2020 be deemed as duly filed. The applicant shall pay the respondent costs of Kshs. 30,000.00 within 14 days from the date hereof.

DATED and DELIVERED at NAIROBI this 13th day of MARCH 2020.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Client/Applicant.

Mr Otenyo with him Mr Mugambi instructed by Mugambi and Company Advocates.