



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 317 OF 2014

AL YUSRA RESTAURANT LIMITED.....PETITIONER

VERSUS

KENYA CONFERENCE OF CATHOLIC BISHOPS.....1ST RESPONDENT

KNIGHT FRANK KENYA LIMITED.....2ND RESPONDENT

RULING

1. Kenya Conference of Catholic Bishops, the 1st Respondent in the petition is through the Chamber Summons dated 15th April, 2019 seeking orders against the Petitioner, Al Yusra Restaurant Limited, as follows:-

“a. THAT this Honourable Court be pleased to set aside the Deputy Registrar’s Ruling dated 29th March, 2019 taxing Petitioner’s Party to Party bill of cost dated 4th September 2018 at Kshs.1,822, 425.00.

b. THAT this Honourable Court be pleased to refer back the Bill of Costs to the Deputy Registrar for taxation in accordance with the law.

c. THAT the costs of the Reference be awarded to the Applicant.”

2. The application is supported by the grounds on its face and the supporting affidavit sworn on the date of the application by the Applicant’s Finance Administrator, Rev. Fr. Daniel Kimutai Rono.

3. On 1st October, 2019, Mr Musili who was holding brief for Mr Manda for Knight Frank Kenya Limited, the 2nd Respondent in the petition indicated to the court that the 2nd Respondent was not opposed to the 1st Respondent’s application.

4. Through the application, the 1st Respondent faults the taxing master for misapprehending and misapplying the law and principles of taxation in the nature of the suit giving rise to taxation; failing to exercise the powers and discretion given to her under the Advocates (Remuneration) Order; failing to consider the 1st Respondent’s written submissions on the taxation; arriving at an improper determination of the subject matter of the suit; failing to giving due consideration to the relevant factors of the case including interests of the parties, value of the subject matter, the public interest, and the importance and complexity of the matter; and awarding costs that in all circumstances of the suit were manifestly disproportionate to the suit, unreasonable and inordinately high as to amount to substantial oppression and injustice to the Applicant.

5. Rev. Fr. Rono at paragraph 15 specifically avers to the time taken to file the application as follows:-

“THAT further I am informed by my advocates on record which information I verily believe that we have filed the Reference Application within the stipulated time of fourteen days provided by Rule 11(2) of the Advocates Remuneration Order since the date of delivery of the Ruling by the Deputy Registrar on 29th March, 2019.”

6. The Petitioner opposed the application through grounds of opposition dated 18th June, 2019 as follows:-

“ a. THAT the application as laid is incompetent, misconceived and incurably defective as the same was filed out of time contrary to the provision of paragraph 11(1) and (2) of the Advocates Remuneration Order.

b. THAT pursuant to Paragraph 11(4) of the Advocates Remuneration Order, [2009], the instant application is an abuse of the court process as same is/was filed without leave of court.

c. THAT the application is vexatious and craves to be dismissed ex-debito justitiae”

7. The Petitioner’s grounds of opposition raises a question of jurisdiction and that issue must be determined before the court can proceed further. The Petitioner’s case is premised on Paragraph 11(1) and (2) of the Advocates (Remuneration) Order which 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 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.”

8. The Petitioner submits that the reference was filed on 16th April, 2019 which was outside the time limit prescribed by Paragraph 11(1) since the taxing officer delivered her ruling on 29th March, 2019. The Petitioner points out that there was no application made for enlargement of time as allowed by Paragraph 11(4).

9. It is the Petitioner’s case that the 1st Respondent did not seek reasons from the taxing officer and even assuming that the reasons are contained in the ruling delivered on 29th March, 2019, the 1st Respondent ought to have filed the reference within the time frame stipulated in Paragraph 11(1). The court is referred to the decision in the case of **Vishisht Tawar v Anthony Thuo Kanai t/a Thuo Kanai Advocates [2014] eKLR** as underscoring the importance of following the procedure of Paragraph 11 of the Advocates (Remuneration) Order.

10. Counsel for the 1st Respondent on the other hand takes the view that the application was filed within the statutory time limit. It is submitted that after the taxation ruling was delivered on 29th March, 2019, an application was made through a letter dated 1st April, 2019 requesting for a typed copy of the ruling with reasons for the taxation. According to the 1st Respondent a typed copy of the taxation ruling was availed on 3rd April, 2019.

11. It is the 1st Respondent’s case that Paragraph 11(1) provides for raising objection to the decision of the taxing officer by notice in writing within fourteen days after the decision. It is urged that Paragraph 11(2) then gives fourteen days for filing an objection from the date the taxing master gives reasons for his decision on the queried items. It is therefore the 1st Respondent’s case that the reasons for the taxation were given on 3rd April, 2019 and the application before this court having been filed on 16th April, 2019 was therefore filed within time.

12. A reading of Paragraph 11(1) and (2) will show that they are premised on the occurrence of two events at two different times. The first event is the issuance of a decision by the taxing officer. It is presumed that the decision is not accompanied by reasons. Paragraph 11(1) gives an objector fourteen days after the decision to write to the taxing officer seeking reasons for the decision on the particular items to which he objects to. It is noted that the provision does not give the taxing officer the time frame within which to give reasons but this should of course be done without unreasonable delay.

13. Once the taxing officer gives reasons, the second event is triggered. The objector is given fourteen days to apply to a judge by chamber summons setting out the grounds of his objection to the taxation.

14. The question to be asked is: when were the reasons given to the 1st Respondent? The Petitioner takes the view that the reasons were given on 29th March, 2019. In an affidavit sworn on 18th June, 2019 by the Petitioner’s Director, Bakeri Maalim Kulmia in opposition to the reference, it is averred that the 1st Respondent did not seek reasons for taxation from the taxing officer and failure to seek reasons cannot be blamed on the taxing officer. Further, that the taxing officer, in any event, delivered a reasoned ruling on 29th March, 2019 in the presence of counsel for the 1st Respondent.

15. It is noted that although counsel for the 1st Respondent submits that the reasons for the decision of the taxing officer were provided on 3rd April, 2019, Rev. Fr. Rono in his supporting affidavit clearly avers that the Deputy Registrar delivered the ruling on 29th March, 2019 and even attaches a copy of the ruling to his affidavit which confirms that it was indeed delivered on 29th March, 2019 in the presence of all advocates for the parties. Counsel for the 1st Respondent may have indeed been supplied with the ruling on 3rd April, 2019 as stated in the submissions but that cannot be said to be the date of the decision. The date of the decision is the date to ruling was delivered and that is 29th March, 2019.

16. A reading of the decision delivered by the Deputy Registrar on 29th March, 2019 clearly shows that she provided reasons for her taxation. The 1st Respondent has not availed evidence to show that an application was made to the Deputy Registrar for further reasons. Paragraph 11(1) of the Advocates (Remuneration) Order is meant to take care of situations where a bill of costs has been taxed by the taxing officer without reasons being given. However, it is very common nowadays for the taxing officers to give reasons for the taxation within the taxed bill. Indeed, in the case at hand the Deputy Registrar clearly titled her decision of 29th March, 2019 “*Ruling and Reasons for Taxation*”. There was therefore no cause for asking her to give reasons because the reasons were already given.

17. By her action, the Deputy Registrar rendered Paragraph 11(1) irrelevant and the next step that the 1st Respondent was to take is that found in Paragraph 11(2). The 1st Respondent was to apply to a judge by chamber summons within fourteen days from the date the reasons were given, being 29th March, 2019. The 1st Respondent did not do so thereby failing to comply with Paragraph 11(2).

18. The application was filed on the nineteenth day from the date the reasons for the decision were given. Even if the date of delivery of the decision and the date of the filing of the application are excluded from the tally, it is clear that the application was filed after seventeen days. The application therefore violates the clear provisions of Paragraph 11(2).

19. As pointed out by counsel for the Petitioner, paragraph 11(4) provides an opening for enlargement of time by stating that:-

“The High Court shall have power in its discretion by an 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.”

20. The 1st Respondent did not take advantage of that provision before filing the current chamber summons.

21. In view of what I have stated above, it becomes clear that the application before me was filed outside the fourteen days stipulated by Paragraph 11(2) of the Advocates (Remuneration) Order. There is therefore no proper application before me and I have no jurisdiction to consider the merits of the issues raised by the 1st Respondent in the application. In my view, a court is deprived of jurisdiction to delve into the substance of a pleading that has been filed out of time. The court has no power to consider the merits of a case that is not properly before it.

22. I therefore find merit in the grounds of opposition raised by the Petitioner to the 1st Respondent’s chamber summons application dated 15th April, 2019 and filed on 16th April, 2019. The 1st Respondent’s chamber summons application is therefore struck out with costs to the Petitioner.

Dated, signed and delivered through email at Nairobi this 30th day of April, 2020

W. Korir,

Judge of the High Court