



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. APPLICATION NO.79 OF 2020**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....APPLICANT**

**-VERSUS-**

**JOHN OMOLLO NYAKONGO T/A H.R GANIJEE & SONS.....RESPONDENT**

**RULING**

1. The application herein is by way of **Notice of Motion** dated **19<sup>th</sup> March, 2020** brought under **Section 44** of the **Advocates Act, Rule 11(4)** of the **Advocates Remuneration Order, Section 3A** of the **Civil Procedure Act, Order 51** of the **Civil Procedure Rules, 2010** and all other enabling provisions of law seeking for the following orders:-

a. That there be a **Stay of the Ruling** delivered by Hon. Deputy Registrar J.M.”) on the **6<sup>th</sup> day of February, 2020** pending hearing and determination of the Reference.

b. 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 the Taxing Master on the **6<sup>th</sup> February, 2020** on the taxation of the Respondent’s Party and Party **Bill of Costs** dated the **30<sup>th</sup> day of August, 2019**.

c. That consequently, the said reference be deemed to have been properly filed within time upon payment of the requisite court fees.

d. That the costs of this application be provided for.

2. The application is based on the grounds set out on its face and

**Supporting Affidavit** dated the **19<sup>th</sup> March, 2020** and a **Further Affidavit** dated **19<sup>th</sup> August, 2020** both sworn by the Applicant’s Advocate on record, **Mr. Edwin M. Mukele**.

3. The Applicant’s case is fairly straight forward. It is averred that the Hon. Taxing Master delivered a **Ruling** on the **6<sup>th</sup> February, 2020** awarding the Respondents **Kshs.5,782,746.39** as costs on the Respondent’s party and party **Bill of Costs** dated the **30<sup>th</sup> August, 2019**.

4. That the Applicant was dissatisfied by the said **Ruling** and vide a **letter** dated **10<sup>th</sup> February, 2020** addressed to the Deputy Registrar requested for the reasons for the said Ruling for purposes of filing a reference. That letter was never responded to and this necessitated the Applicant to follow up with yet other **letters** dated **27<sup>th</sup> February, 2020** and **12<sup>th</sup> March, 2020** respectively reminding the Taxing Master to supply it with reasons for his **Ruling**. Despite the numerous attempts, the Applicant averred that the Taxing Master has neither responded to any of the requests nor has he furnished the Applicant with reasons for the impugned **Ruling**.

3. It is Applicant’s further case that there has been no inordinate delay on its part since it has been diligent enough to pursue the reasons for the entire **Ruling** and it will be in the interest of justice that the court allows the application as prayed.

4. The Respondent on his part opposed the application vide the **Replying Affidavit** he swore on **29<sup>th</sup> July, 2020**. In his view, the instant application ought to have been filed in **High Court Miscellaneous File No. 332 of 2019** where taxation was conducted and not in a separate file for the sake of tidiness of procedure as anticipated under **Rule 11(1) & (2)** of the **Advocates Remuneration Order**. He further avers that the application is wholly incompetent for the reasons that the Applicant did not lodge a **Notice of Objection** of the decision of the Taxing Master indicating the items of taxation which it intended to object with **14 days** of the **Ruling** as required under **Rule 11(1)** of the **Advocates**

## **Remuneration Order.**

5. It is the Respondent's averments that it is the **Notice of Objection** which initiates the reference just as the **Notice of Appeal** initiates an Appeal and without the **Notice of Objection** being filed first, then the prayers sought by the Applicant in the instant application are misconceived and untenable in law.

9. Be that as it may, the Respondent adds that the reasons for the taxation are clearly set out in the **Ruling** delivered on **6<sup>th</sup> February, 2020** and the Applicant should not have gone ahead to file the instant application rather than purporting that it was awaiting the reasons by the Taxing Master. As such there is no plausible and satisfactory explanation that has been rendered by the Applicant for the delay in filing the instant application.

6. According to the Respondent, the order for Stay of Execution that has been sought for by the Applicant cannot issue for the reasons that that the Applicant has neither stated any substantial loss it would suffer nor has it offered to deposit any security as required by law. And unlike the Applicant, the Respondent will be prejudiced if Stay is granted since it will delay the Respondent's right of enjoyment of its fruit of a successful litigation.

7. The Applicant filed a **Further Affidavit** in response to the facts deponed to by the Respondent in the **Replying affidavit**. It is deponed that the Applicant had no legal obligation to file the instant application under **H.C.C.C MISC. 332 of 2019** because the instant application carries a unique subject matter and is distinct from the proceedings conducted in **H.C.C.C MISC. 332 of 2019**. That the letters addressed to the Deputy Registrar constitute to sufficient notice in law as envisaged under **Rule 11(1)** of the **Advocates Remuneration Order**.

8. The Applicant further averred that there were no reasons provided by the Taxing Master in the **Ruling** that would have enabled the Applicant to exercise the right to lodge the reference. It is argued that the Applicant has an arguable reference with high chances of success owing to the fact that the Taxing Master manifestly allowed excessive expenses which would prejudice that Applicant if compelled to settle such sums.

9. In conclusion, the Applicant submits that the instant application was triggered by the Taxing Master's failure to furnish it with reasons for the **Ruling** and as such there is no delay attributable to the Applicant.

10. The application proceeded by way of written submissions vide directions issued by this court on **30<sup>th</sup> July, 2020**. The submissions were then set to be highlighted on **28<sup>th</sup> August, 2020**. When the court reconvened on **28<sup>th</sup> August, 2020**, **Mr. Mukele** Counsel for the Applicant sought and was allowed to drop prayer No.1 of the application and further file supplementary submissions in response to the Respondent's submissions. **M/s Murage**, Counsel for the Respondent was not opposed to having prayer No.1 of the application dropped and in the same vein urged the court to disregard the submission by the Respondent with regard to the said prayer.

### **The Applicant's submissions**

11. In the submissions filed on **19<sup>th</sup> August, 2020**, the Applicant identified three issues for determination, that is:-

a. **Whether the Applicant lodged a Notice of Objection for purposes of Rule 11(1) of the Advocates Remuneration Order.**

b. **Whether this court should enlarge time within which the Applicant is to file its reference challenging the Ruling delivered by the Taxing Master on the 6<sup>th</sup> day of February, 2020 on the taxation of the Respondent's party and party Bill of Costs dated 30<sup>th</sup> August, 2019.**

c. **Whether this Honourable Court should issue a Stay of Execution of the Ruling delivered by the Taxing Master on the 6<sup>th</sup> February, 2020 pending hearing and determination of the reference.**

12. With regard to the first issue, the Applicant reiterated that it wrote several letters addressed to the Deputy Registrar seeking reason for the **Ruling** delivered on **6<sup>TH</sup> February, 2020** and such letters as amounting to a **Notice of Objection** as envisaged under **Rule 11(1)** of the **Advocates Remuneration Order**. To buttress this argument, further reliance is placed on the cases of **Lubullelah & Associates Advocates...Vs...Kenyatta National Hospital [2010]eKLR** and **Hamilton Harrison & Mathews...Vs...Mumbi Ngengi [2020]eKLR**, where in both cases the court held that a letter addressed to the Taxing Master seeking for reason of the Ruling would suffice as a Notice as required by **Rule 11(1)** of the **Advocates Remuneration Order**.

13. As for whether this court should extend the time in which the reference can be filed, it is submitted that the fault was on part of the Deputy Registrar in failing to respond to the letters by the Applicant or giving reasons of the **Ruling** delivered on **6<sup>th</sup> February, 2020** for purposes of filing the reference. In any event, it is argued that failure by the Deputy Registrar to supply the Objector with reasons does not mean that the Objector (the Applicant herein) cannot file a competent reference hence the need to extend the time for filing the reference.

18. It further argued that the reference is arguable and therefore the court should protect the Applicant's right under **Article 50** of the **Constitution**, which guarantees every person the right to have any dispute that can be resolved by the application to be decided in a fair and public hearing. In support of this line of argument, the Applicant relied on the cases of **Kipkorir Titoo & Kiara Advocate ...Vs...Deposit Protection Fund Board [2005] eKLR**, **Evans Thiga Gaturu Advocate...Vs...Kenya Commercial Bank Limited [2012] eKLR** and **Peter Julius Njoroge...Vs...Fidelity Commercial Bank Limited & Another [2018]eKLR**.

14. I will not consider the third issue for determination since Applicant dropped the prayer on whether or not this court should issue a Stay of the Execution of the **Ruling** delivered on **6<sup>th</sup> February, 2020**.

## **Respondent's Submission**

15. Firstly, the Respondent submitted that the Application herein should have been filed in the same file as where the request for reasons for the taxation was made and where taxation was conducted, which is **Mombasa H.C.C.C MISC. 332 of 2019** as opposed to being filed in a new and fresh file.

16. Secondly, the Respondent challenges the letters by the Applicant which it argues that they were only asking for the reasons of the **Ruling** for purposes of filing a reference and were not in conformity with **Rule 11(1)** of the **Advocates' Remuneration Order** to suffice as a **Notice of Objection**. It is argued that the letters are vague as to which items the Applicant objects to and therefore they cannot form the basis of initiating a competent reference. The Respondent in support of this line of argument relied on a number of cases. The first is the case of **Macharia & Co. Advocates...Vs...Arthur K. Magugu & Another [2012]eKLR**, where the Court of Appeal held as follows:-

**“... If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items the items objected to and sought reasons for their taxation, the respondents notice of 1<sup>st</sup> August, 2001 was fatally defective. It follows that the respondent's reference based on it was incompetent and we agree with the counsel for the Appellant that it should have been struck out.”**

17. The second case is the case of **Matiri Mburu & Chepkemboi Advocates...Vs...Occidental Insurance Company Limited [2017] eKLR**, the court expressed itself as follows:-

**“... the provisions of Paragraph 11 of the Remuneration Order serve several purposes. Firstly the requirement that a party seeking reasons gives a notice of items objected to, serves to narrow down the issues, and secondly, give notice to the adverse party and the taxing master of his objection. Thus the taxing master, adverse party and ultimately the reference court in their respective roles can focus on the specific matter objected to rather than entire bills of costs, which often run into several pages. .. The objective is obvious: the expeditious disposal of taxation disputes. Thus compliances with the requirements of paragraph 11 of the Remuneration Order is not a mere technicality that can be pushed aside peremptorily as the Applicant appears to suggest. The provisions of Article 159 (2) (d) of the Constitution were not intended to overthrow procedural or technical requirements, but to guard against “undue regard “ to procedural technicalities in the administration of justice.**

18. The third issue the Respondent submitted on is whether the Applicant has made out a case for grant of an order for extension of time to file a reference out of time. Here the Respondent relied on the case of **Nicholas Kiptoo Korir arap Salat...Vs...IEBC and 7 Others [2014]eKLR**, where the Supreme Court set out the underlying principles a court should consider in an application for Leave to Appeal out of time.

24. The Respondent was highly critical of the Applicant's assertions that it could not have filed the reference owing to failure of the Deputy Registrar in supplying the reasons for his **Ruling**. According to the Respondent, the reasons for the **Ruling** are clearly set out in the face of the **Ruling** and it would be against logic to ask the Taxing Master to supply further reasons. In the circumstances, the Applicant could have filed a reference within the prescribed timeliness without purporting to wait for reasons.

## **Analysis and Determination**

19. I have considered the Application and the submissions by the Counsel for the parties, and the issues that arise for determination:-

**a. Whether the instant application ought to have been made in Mombasa High Court Misc. File No. 332 of 2019;**

**b. Whether the Applicant complied with Paragraph 11 of the Advocates Remuneration Order with regard to Notice of Objection;**

**c. Whether the court may extend the time for filing of a reference under the Advocates' Remuneration Order in the circumstances of this case.**

20. On the first issue, it is submitted for the Respondents that the instant application is misconceived, incompetent and an abuse of court process in that it ought to have been made in **Mombasa High Court Misc. File No.332 of 2019** where taxation was done as opposed to filing a separate application. The Applicant on the other hand argues that no prejudice has been occasioned in filing the instant application separately and moreso it is distinct and separate from **File No.332 of 2019**.

21. In answering the ongoing question, I have considered that by this application the Applicant seeks a substantive prayer to enlarge time within which it can file a reference for a **Ruling** delivered on **6<sup>th</sup> February, 2020**. I also noted that the **Ruling** was made in **Mombasa H.C.C.C MISC. No.332 of 2019** with regard to the Respondent's **Bill of Costs** dated **30<sup>th</sup> August, 2019**.

28. Firstly, it is not in dispute that under **Rule 11(4)** of the **Advocates Remuneration Order**, this court has power to enlarge time within which an Applicant can file a reference to the High Court arising out of a taxation. A proper reading of the entire **Rule 11** reveals that such an application as envisaged under **sub-Rule (4)** ought to be filed in the same cause under which the taxation was done.

22. I say so because under **sub-Rule (1)**, the party who objects to the decision of the Taxing Officer is given **14 days** after the decision to give Notice in writing to the Taxing Officer of the items of taxation which he objects to. And then under **sub-Rule (2)**, the Taxing Officer records and forwards to the Objector the reasons for his decision and the Objector may, within **14 days** from the date of receipt of the reasons

apply to a Judge by Chamber Summons, setting out the Grounds of his Objection. Then we now come to **sub-Rule (4)** by which a party who has not been able to comply with the time limits as set out by **sub-Rules 1 or 2** can file an application for extension of time.

23. It does not require to be stated that the application under **sub-paragraph (4)** has to be made in the same file or cause under which the objection was made in the first place, it is logical. The application has to be made in the cause under which the taxation was done so that the Court, in exercising its discretion one way or the other can see when the objection as required under **Rule 11(1)** was made and the sequence of other events that followed thereafter in order to determine whether there are good grounds upon which an extension of time can be allowed under **Rule 11(4) of the Advocates Remuneration Order**.

24. My understanding of the jurisdiction of this court under **rule 11** of the **Advocates (Remuneration) Order** is that the court exercises its jurisdiction on the platform of the suit in which the impugned decision of the Taxing Officer was made. It is not exercised in a separate or fresh suit. Exercise of that jurisdiction is invoked through the filing and service of an objection under **rule 11 (1)**. The **Notice of Objection** sets out the contested items and findings, where necessary. Upon filing of the **Notice of Objection** within the suit, and upon service of the Notice, the Objector is required to file a reference to the Judge by way of Chamber Summons within the same suit. The Judge thereafter exercises jurisdiction under **rule 11** on the platform of the suit in which the impugned decision of the Taxing Officer was made.

25. The miscellaneous application before me is a fresh suit. An application under **rule 11(4)** ought to be brought in the suit in which the impugned decision was made. I do not think I would be properly directing my mind if I were to purport to exercise jurisdiction under **rule 11(4)** on the platform of this fresh suit yet the impugned decision of the Taxing Officer was made in a different suit, to wit, **Mombasa H.C.C.C Misc. Application No.332 of 2019**.

26. Consequently, the suit herein is struck out without venturing into its merits, on the ground that the court lacks jurisdiction to entertain the present application on the platform of a fresh suit such as the present suit. The Applicant shall bear costs of the application.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 28<sup>th</sup> day of October, 2020.**

**D. O. CHEPKWONY**

**JUDGE**

**28/10/2020**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

**D. O. CHEPKWONY**

**JUDGE**

**28/10/2020**