



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. NO. 154 OF 2016

ATAKA, KIMORI & OKOTH ADVOCATES.....APPLICANT

VERSUS

JOSELINE MWANGO JOHN.....RESPONDENT

RULING

1. The application dated 6th September, 2017 and the application dated 29th January, 2018 were heard contemporaneously. This ruling is therefore in respect of both applications.

2. The application dated 6th September, 2017 seeks orders that:

“(1) This Honourable Court be pleased to enter judgment in favour of the Applicant herein for the sum of Ksh.1,056,249/= being the sum of costs taxed by the taxing officer and contained in the certificate of Taxation herein dated 22nd August, 2017.

(2) This Honourable Court be pleased to order that the taxed sum do attract interest at court rate from the date of taxation until payment in full.

(3) That the costs of this application be awarded to the Applicant.”

3. It is stated in the grounds and the affidavit in support of the application that the Advocate/Client Bill of Costs was taxed at Ksh.1,056,249/= and a Certificate of Taxation issued on 22nd August, 2017. That the Certificate of Taxation has not been set aside or varied through an order of the court and the Applicant wishes to realize the said costs.

4. The application is opposed as per the grounds of opposition dated 10th August, 2018. The grounds are as follows:

“1. The Respondent herein has filed an application for leave to file a Reference out of time dated 29th January, 2018 for reasons that:

(a) The learned Taxing Master erred in Taxing the Bill of costs without taking into account the Deposit on legal fees paid by the Respondent/Client of Ksh.150,000/= and without ascribing to it any justifiable and reasonable grounds.

(b) That in taxing the Bill of Costs at Ksh.1,506,249/= the Taxing Master exercised his discretion wrongly.

(c) The Taxing Master failed to consider the notion of “reasonableness” in the taxation of costs factoring in the deposit paid by the Respondent/Client.

(d) The failure to file a reference out of time was not occasioned by the Applicant.

2. It is in the interest of justice that the Respondent’s application be heard first as the orders sought herein if allowed will render it nugatory.”

5. The application dated 29th January, 2018 seeks orders that:

“1. Spent

2. This Honourable Court enlarges the time within which to file a reference against the decision of the taxing officer delivered at Nairobi on 17th August, 2017.

3. That there be stay of execution of the Certificate of Taxation pending the hearing and determination of the reference.

4. The reference filed hereafter be deemed as properly filed though out of time.

5. The costs of the application be in the cause.”

6. The delay in filing the reference is blamed on misdiarization of the matter by the Applicant’s advocate and the consequent failure to attend court on the ruling date. It is averred that the Bill of Costs was taxed at a colossal sum of money without taking into account the deposit paid.

7. The application is opposed. It is stated in the replying affidavit that the Certificate of Taxation was served on 20th September, 2017 and therefore the Respondent’s Advocate was aware of the taxation. It is further averred that this case is a delaying tactic. That the delay of six months is inordinate and unexplained and that application should be dismissed. It is further stated that the Respondent lives in Germany and may be unreachable for purposes of enforcement.

8. The applications were argued by way of written submissions which I have considered.

9. There is no dispute that the certification of taxation has been issued and still stands. There is no dispute over the retainer. Section 51(2) Advocates Act provides that:

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

10. An Advocate who has fulfilled the said requirement is entitled to judgment. However, in the case at hand, there is an application for, *inter alia*, the stay of the Certificate of Taxation and enlargement of time within which to file a Reference.

11. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in the **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**

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 consideration for extending time.”

12. Rule 11 (4) of the Advocates (Remuneration) Order provides as follows:

(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.”

13. The explanation given is that there was misdiarization of the matter by the advocate. This averment is by the Respondent/ Client and not by the advocates or any other person with personal knowledge of the issue. There are no documents exhibited e.g. the entry in the diary in question. There is also no denial that the Certificate of Taxation was served on 20th September, 2017. This therefore brought the Certificate of Taxation to the attention of the Respondent advocate within one month of the taxation. There is therefore no satisfactory explanation why the application for enlargement of time was not filed earlier.

14. The application dated 29th January, 2018 in prayer No. 4 seeks orders that **“the reference filed hereafter be deemed as properly filed though out of time.”** If this prayer is allowed, it would be in contravention of Rule 11(1) 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.”

15. I am persuaded by the following authorities :

(a) **Tom Ojienda v Nairobi city County Assembly [2017] eKLR** where it was held:

“In the application dated 3rd August, 2017, what is sought is enlargement of time within which to file a reference against the Taxing Officer’s order. I do not construe that to be the same as enlargement of time within which to give a notice in terms of rule 11(1) of the Advocate Remuneration Order.”

(b) **Karume investments Limited v Kenya shell Limited & another [2015] eKLR:**

“...Rule 11(1) is a statutory provision which cannot be ignored or wished away”

16. Although it has been submitted that this court has the discretion to grant stay of execution of the Certificate of Taxation pending the filing and determination of the intended Reference/Notice of objection to Taxation, the issue of filing of the Notice of Objection to Taxation has only cropped up in the submissions and was not pleaded. Parties are bound by their pleadings.

17. With the foregoing, I allow the application dated 6th September, 2017 as prayed with costs. The application dated 29th January, 2018 is hereby dismissed with costs.

Date, signed and delivered at Nairobi this 19th day of June, 2019

B. THURANIRAJADEN

JUDGE