



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 88 OF 2006

CHARLES MURUINGI (Trading as C.M. Steel Erectors

and General Building Contractors..... **PLAINTIFF**

VERSUS

MERCY WANJIRU GACHONGO1ST DEFENDANT

PISGAH LIMITED2ND DEFENDANT

ENGINEER EZIO DUBBINI3RD DEFENDANT

RULING

1. This is an application by the 1st Respondent/defendant under **Rule 11(2)** of the Advocates Remuneration order for extension of time to file and serve the reference and the record of the reference out of time. It is supported by an affidavit in support and annexures made thereto on the subject matter of the reference. The background of this Chamber Summons arises out of a judgment of this Court dated 23rd June 2017 awarding quantum of Kshs. 2,170,000 with costs in favor of the plaintiff as against the 1st defendant and 2 others in the initial suit.

2. Taxation proceedings before the Deputy Registrar was instituted vide the plaintiff's party and party bill of costs filed in court on 15th March, 2018. In the Learned Deputy Registrar's ruling dated 24th August, 2018 the bill of costs was taxed at Kshs.679,155 payable by the 1st defendant/applicant. The 1st defendant in his affidavit in support of the chamber summons state that none of them or their counsel attended the delivery of the ruling session.

3. Regarding the taxation of the bill of costs there is a dispute as to the amount taxed and the failure by the taxing master to give reasons for the decision. On the filing of the reference itself the plaintiff/defendant contends that the delay was not caused by their faults but due to the fact of the court not notifying them of the date. Secondly, they had no way of knowing of the taxing master ruling without adequate notice to participate in the proceedings. If granted extension of time the applicant's state that he intends to file the reference timeously. The applicant has also applied for stay of execution of the certificate of taxation pending the hearing and determination of the reference.

4. The respondent/plaintiff though, duly served with the chamber summons but as at the time of preparing this ruling no rejoinder or replying affidavit had been filed.

5. The chamber summons proceeded as an undefended claim. looking at the question raised by the applicant in light of the circumstances of this motion the substantial part of it appears to be within the ambit of the principles. In the case of **Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission and 7 others 2014 eKLR** where the court underpinned the following principles to guide courts in exercising discretion in forecasting the result of the application on extension of time to be.

(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.”*

6. In persuasive authority from the neighboring Jurisdiction decided by the Superior court of **Tanzania in Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women’s Christian Association of Tanzania CA No. 2 of 2010**. The Court observed as follows on grant of extension of time;-

“(a) The applicant must account for all the period of delay.

(b) The delay should not be inordinate.

(c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.

(d) If the court feels that there other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.”

7. In this particular case the aggrieved party in terms of **Rule 11(1)** of the Advocates remuneration order had 14 days in which to file a reference to the High Court. The application has set out briefly the facts and grounds which made it impossible to file a notice of appeal and the reference within the stipulated time. After considering the chamber summons before me and the supporting affidavit, the learned Deputy Registrar Ruling I take the following review. I note at his point the impugned ruling was delivered on 24th August, 2018 at Malindi in the absence of the 1st defendant/applicant. The pronouncement was never served upon the applicant/defendant to validly consider its implication in order to decide whether to comply or prefer an appeal.

8. So far no replying affidavit or grounds of opposition have been filed by the plaintiff/respondent. It is the applicants contention that the reference will involve many triable issues which ought to be ventilated in the event leave is granted to file the same out of time. The guidance to be discerned from principles in the **Nicholas Salat and Lyamuya cases** (*supra*) is that the law permits the exercise of discretion where sufficient reasons exist to explain the delay to meet the statutory timelines.

9. The applicant contends that there is an arguable case for the intended reference on one key main ground that the taxed bill of costs is inordinately high and there were no reasons or proper basis laid out by the taxing master. In the affidavit the applicant also sets out the facts that the delay was caused by the taxing master failure to bound reasons for the taxation. Since the respondent was appraised of this application but chose not to file any opposition I take it that no prejudice would be suffered in the event this court grants extension of time to file the reference out of time.

10. I am therefore satisfied that the applicants blunder not to file the reference within time in terms of **Rule 11(1)** of the Advocates Remuneration order has been explained and should be excused in this case. The respective application dated 5th October, 2018 is allowed under the following orders;

(1) The applicant will serve a copy of the notice of appeal and the memorandum of the reference upon the respondent within 7 days of today’s date.

(2) That there be a stay of execution of the certificate of taxation pending the hearing and determination of the reference.

(3) That the earlier order issued of payment of 200,000 still stands as a condition precedent for this Court to entertain the reference.

(4) That failure to comply with condition No.(3) within 7 days from today’s date. The applicant right to file a reference remain extinguished.

(5) That in the evidence of compliance with prayer No. (3) both parties do file submissions on the issues raised in the reference within 14 days from the date of filing and service of the reference which takes effect from the payment of the amount Kshs.200,000.

(6) Costs of this application to abide the outcome of the reference.

(7) Compliance on 26th June 2019.

Dated, signed and delivered at Malindi this 18th day of June, 2019.

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REUBEN NYAKUNDI

JUDGE

Representation:

Mr. Kibunja for the plaintiff-present

Mr. Gicharu for the Appellant absent