



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 101 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT (CAP 26) OF THE LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF THE UNIVERSITIES ACT

AND

IN THE MATTER OF THE SUSPENSION OF WELLINGTON KIHATOWAMBURU ON EXAMINATION IRREGULARITIES

AND

IN THE MATTER OF ARTICLES 22(1), 2(a)(b)(c), 23(1), 27(1)(2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF KENYATTA UNIVERSITY AND THE VICE CHANCELLOR, KENYATTA UNIVERSITY

REPUBLIC.....APPLICANT

VERSUS

KENYATTA UNIVERSITY.....1ST RESPONDENT

THE VICE-CHANCELLOR,

RULING

Applicant/Respondent's Case

1. By a Chamber Summons dated 14th December, 2017, the Applicants in the instant application, who are the Respondents in the main application, **Kenyatta University** and **The Vice-Chancellor, Kenyatta University** (hereinafter referred to as “the Respondents”), seek the following orders:

- 1. This application be certified urgent and heard on priority basis *ex parte* at first instance.**
- 2. Pending the hearing and determination of this Application, the Honourable Court be pleased to stay the taxing decision made by Hon. S. Mwayuli on 9th October, 2017 on the *ex parte* Applicant's Bill of Costs dated 24th February, 2017.**
- 3. The Honourable Court be pleased to extend the time for filing the instant application and that it be deemed to have been properly filed.**
- 4. The decision of 9th October, 2017 by the Learned Deputy Registrar on the *ex parte* Applicant's Bill of Costs dated 24th February, 2017 be set aside and the matter be remitted to a different Deputy Registrar for taxation.**
- 5. In the alternative to (4) above, the Honourable Court be pleased to set aside the decision of 9th October, 2017 by the Learned Deputy Registrar on the *ex parte* Applicant's Bill of Costs dated 24th February, 2017 and tax the said Bill of Costs.**
- 6. The costs of this application be provided for.**

2. However since the other substantive prayers may well depend on the Court's decision whether or not to extend time, it was decided that that limb of the application be dealt with first.

3. According to the Respondents, vide a Bill of Costs dated 24th February 2017 (hereinafter ‘*the Bill of Costs*’), the *ex parte* Applicant herein sought his costs in the matter to be assessed at Kshs. 22,610,425/-. By written submissions dated 8th June, 2017, the Respondents objected to various items in the Bill of Costs on the ground that the amounts contained in the Bill of Costs which were identified in the submissions, as drawn, were manifestly excessive, lacking in basis or unsupported.

4. It was averred that by a decision delivered on 9th October, 2017, the Learned Deputy Registrar, **Hon. S. Mwayuli**, taxed the Plaintiff's (sic) Bill of Costs at Kshs. 1,377,384/-. Subsequently, the *ex parte* Applicant's forwarded the Certificate of Taxation and a fourteen (14) day demand to settle the same.

5. According to the Respondents, having held that the matter was neither complex nor time-consuming, the Learned Deputy Registrar erred when she increased the instruction fee payable from the scale fee of Kshs. 100,000/- to the sum of Kshs. 1,000,000/- without justifying the basis for that increase, despite having correctly set out the basis instruction fees. It was therefore the Respondents' case that the Learned Deputy Registrar also erred in taxing the getting up fees at the amount of Kshs. 333,334/- on the basis of the said instruction fees.

6. The Respondents averred that although they requested for the ruling and reasons for taxation at the time of their delivery by the Learned Deputy Registrar on 9th October 2017, the same were not forthcoming until the *ex parte* Applicant's advocates shared them with the Respondents' advocates since

the Respondents' advocates' attempts to locate the file were futile.

7. The Respondents therefore averred that it is in the interest of justice that the Learned Deputy Registrar's decision of 9th October, 2017 be set aside and the Bill of Costs dated 24th February, 2017 be taxed before another Deputy Registrar or by this Honourable Court.

8. The application was however opposed by the *ex parte* applicant based on the following grounds of opposition:

1. That the application is fatally defective for having been filed out of time and without the requisite leave from this honourable court.

2. That the application discloses no triable issues for determination by this honourable court

3. That the application is an afterthought meant to prevent the *ex parte* applicant from receiving his costs as it was only filed after the same were demanded.

4. That the application alleges that no reasons were given for the taxation herein, while as the respondents have attached the ruling and reasons for taxation as part of their evidence.

5. That the application is vexatious and frivolous.

6. That the application has been made in bad faith to frustrate the *ex parte* applicant/respondent

7. That the notice of motion dated 14th December 2017 is fatally defective for having been filed out of time without leave, it is misconceived, incompetent and should be dismissed with cost to the *ex parte* applicant/respondent

9. Apart from the said grounds the *ex parte* applicant deposed that as the said Application has been filed way out of the statutory allowed time, this Court should not grant prayer 3 of the said Application, and the same should be struck out.

10. According to the applicant, the Respondents correctly stated that the ruling and reasons for taxation challenged herein was delivered on the 9th October 2017, before counsel for the parties herein and that at the time of the delivery thereof the deputy registrar read her full ruling and reasons for taxation before both counsels for the parties herein hence the Respondents were aware of the ruling and reasons for taxation since the 9th October 2017 and should have filed this Application within 14 days after the said date.

11. In the applicant's view the fact that the Respondents' Counsel did not get a copy of the ruling and reasons for taxation until the same was provided by my counsel on record clearly exhibits indolence on the Respondents' part and this Court should not assist and/or excuse the same.

12. Based on legal advice, the *ex parte* applicant averred that on the 9th October 2017 the deputy registrar informed the counsel on record that a copy of the ruling and reasons for taxation would be available by the 11th October 2017 at the registry. However on the said date, a copy of the ruling and reasons for taxation was not available, and it was also not available on subsequent days. This therefore prompted the applicant's counsel on record to write a letter to the deputy registrar on the 23rd October 2017 requesting for the said ruling and reasons for taxation and a copy of the ruling and reasons for taxation was immediately provided.

13. It was disclosed that subsequently the applicant's counsels on record extracted a Certificate of Taxation and on the 27th November 2017 served the same upon the Respondents' counsel together with a copy of the ruling and reasons for taxation. It was the applicant's position that though the Respondents

have allegedly stated that they could not get a copy of the ruling and reasons for taxation until the same was provided by my counsel on record, they have not shown this Court what steps or efforts, if any they made to get the said ruling and reasons for taxation. To the applicant, the Respondents well knowing that they intended to challenge the taxation of the bill of costs dated 24th February 2017 waited until they were served with a Certificate of Taxation and a demand letter to file the current Application in an effort to frustrate the applicant's efforts to recover costs rightfully awarded by this Court.

14. It was the applicant's case that the Respondents did not provide any genuine and/or reasonable reasons for the inordinate delay of over two months they took to file this Application and for that and the reasons provided herein above this Court should not exercise its discretion in their favour and extend the time for filing the Application.

Determinations

15. I have considered the matters canvassed in the application herein which are relevant to the present ruling.

16. That this Court has the jurisdiction to extend time for filing a reference is not in doubt. This position was reaffirmed in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65** where it was held the court has unfettered discretion under sub paragraph (4) of rule 11 of the ***Advocates Remuneration Order*** to extend time prescribed by sub paragraph (1) and (2) of the same rule within which to give notice of objection to the decision on taxation and to file a reference to a Judge in respect of such taxation. In fact that Court appreciated that the law is not that the High Court is only vested with inherent power and jurisdiction to prevent abuse of the Court process or to further the ends of justice only in matters falling within the ***Civil Procedure Act*** and ***Rules*** but that the Court is clothed with inherent powers and jurisdiction all the time in all causes irrespective of legislative or other juridical foundations of any such cause or matter before it as the juridical root of the Court's inherent power does not lie in section 3A of the ***Civil Procedure Act*** but in the nature of the High Court as a Superior Court of judicature.

17. In the said case the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in Court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

18. In this case the Respondents have contended that although they requested for the ruling and reasons for taxation at the time of the delivery by the Learned Deputy Registrar on 9th October 2017, the same were not forthcoming until the ex parte Applicant's advocates shared them with the Respondents' advocates since the Respondents' advocates' attempts to locate the file were futile. The applicant has however admitted that though the Deputy Registrar informed the counsel on record that a copy of the ruling and reasons for taxation would be available by the 11th October 2017 at the registry, no such copy was available and was in fact not available on subsequent days, prompting the applicant's counsel on record to write a letter to the deputy registrar on the 23rd October 2017 requesting for the same. It was only then that a copy thereof was immediately provided. By this time, 14 days within which the reference was to be filed had already lapsed.

19. It is therefore clear from the applicant's own narration that even if the Respondents had exercised due diligence, there is no guarantee that they would have gotten a copy of the ruling and reasons therefor before the expiry of the said 14 days period. It is therefore clear that the blame must substantially lie on the Court for failure to avail the ruling and reasons within the time necessary to lodge a reference.

20. Since no issue turns on the other conditions it is my view that the prayer for enlargement of time is merited. Accordingly time is hereby extended to the Respondent within which to file reference with such period as would validate the already filed application.

21. The costs of this application will be in the cause.

Dated at Nairobi this 27th February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ruiru for the ex parte Applicant/Respondent

Mr Gitau for Mr Mwangi for the Respondent/Applicant

CA Ooko