



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISC. CIVIL APPLICATION NO. 279 OF 2017

BETWEEN

MUMIAS SUGAR COMPANY LIMITED.....APPLICANT/CLIENT

AND

PROFESSOR TOM OJIENDA & ASSOCIATES.....RESPONDENT/ADVOCATE

RULING

1. The application before me is a Chamber Summons dated 7th December 2017. It is made under **section 44** of the *Advocates Act (Chapter 16 of the Laws of Kenya)*, **Paragraph 11** of the *Advocates Remuneration Order 2009*, **section 3A** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* and all other enabling provisions of the law. The applicant challenges the taxation by the Taxing Officer of the respondent's Advocate-Client Bill of Costs issued on the 11th October 2017.

2. The applicant seeks, in the main, an order that, *"That the Honourable Court do issue an order granting leave to the Applicant to file Reference out of time objecting to the taxed advocate client bill of costs out of time in High Court Miscellaneous No. 31 of 2017 as consolidated with Misc. No. 29 of 2017."* The other orders sought are that the reference be deemed as duly filed and the court be pleased to review the taxation decision. Since leave must be sought and obtained before the reference is filed, I will limit this decision to whether I should grant leave to file the reference out of time.

3. The essential facts are set out in the depositions sworn on 7th December 2017 by Rachel Auta, the applicant's legal officer, and Edmond Kadima Wesonga, the advocate acting for the applicant in the matter. The applicant's case is that two bills, ***Kisumu HC Misc. 31 and 32 of 2017*** were consolidated and the ruling on the taxation, which is the subject of the proposed reference, was delivered in the absence of its advocates. Ms Auta deposed that the applicant only got to learn about the ruling when it received a notice of demand from the respondent directly and not through its advocates on record. She avers that by the time the notice was received the time for filing the reference had lapsed.

4. Mr Wekesa, counsel for the applicant, submitted that the delay in filing the Reference was due to inadvertence of the applicant's counsel and that the court ought to excuse and exercise discretion in the applicant's favour. He relied on the case ***Njagi Wanjeru & Company Advocates v Ben Momanyi t/a Momanyi & Associates NRB Misc. Civil Application No. 448 of 2010[2014]eKLR*** where the court considered the provisions of **Paragraph 11** of the *Advocates Remuneration Order* and stated that it had unfettered discretion to extend time. Counsel also cited the case of ***Philip Keiptoo Chemwolo & Another v Augustine Kubende NRB CA Civil Appeal No. 103 of 1984 [1986]eKLR*** to support the submission that where mistakes are made by the advocate, a party should not suffer the penalty of not having the case heard on merits and that the court should take an equitable approach to do justice.

5. The respondent opposed the application through the replying affidavit of Prof. Tom Ojienda SC, the managing partner, sworn on 22nd January 2018. The thrust of the objection is that the applicant has not demonstrated an excusable delay to warrant granting of leave to file the reference out of time. Prof. Ojienda was of the view that the court should not allow the application as the applicant did not comply with **Paragraph 11** of the *Advocates Remuneration Order* as it did not give notice in writing to the taxing officer on the items it was objecting to in order for the Taxing Officer to give reasons for the ruling and since no reasons for the ruling have been given, the application is incompetent. Counsel referred to the case of ***Gacau Kariuki & Company Advocates v Allan Mbugua Ng'ang'a Advocates HC Misc. No. 678 of 2011[2012]eKLR***.

6. **Paragraph 11** of the *Advocates' Remuneration Order 2009* provides the procedure for filing a reference to this court as follows;

Objection to decision on taxation and appeal to Court of Appeal

(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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(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.

7. The respondent pointed to the fact that the applicant did not seek reasons for the decision under **Paragraph 11(1)** aforesaid hence the application was incompetent. I do not think that failure to seek reasons is necessarily fatal to this application. A plethora of decisions suggest that the reasons for the decision are contained in the ruling and that the provisions does not in the words of Ringera J., impose on the court ritualistic observance thereof even when reasons for the disputed taxation are already contained in the formal and considered ruling by the Deputy Registrar (see *Ahmednasir Abdullahi and Company Advocates v National Bank of Kenya Ltd* [2006]1 EA 5, *Postal Corporation of Kenya v Donald Kipkorir and 3 Others* HCCC No. 658 of 2004(UR) and *Kipkorir Titoo and Kiara Advocates v Deposit Protection Fund Board* [2005]2 KLR 258).

8. What is clear from the provisions I have set out above is that the court has unfettered discretion to enlarge the time to lodge the objection and the reference under **Paragraph 11(1)** and **11(2)** respectively of the *Advocates Remuneration Order*. In exercising such discretion, the court acts judiciously bearing mind the facts placed before it and to meet the ends of justice. In *Njagi Wanjeru & Company Advocates v Ben Momanyi t/a Momanyi & Associates (Supra)*, Ougo J., adopted what the Court of Appeal stated in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* CA Civil Application No. NAI 25 of 1997 (UR) that:

It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether or not to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chance of the appeal succeeding if the application is not granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.

9. Mr Wesonga deponed that the parties highlighted their submissions on the bills of costs before the Deputy Registrar on 11th July 2017. On that day, the ruling was fixed for delivery on 21st September 2017. He did not attend the court for ruling but requested a colleague, Mr Wafula, to attend the ruling on his behalf. Mr Wafula duly attended court and informed him by text message that the ruling would be delivered on 11th October 2017. He deposed that he inadvertently failed to record the date in his diary and therefore failed to attend court. Mr Wafula exhibited pages of his diary to show that he had failed to diarise the date of the ruling. That it is only after the client was directly informed of the ruling by the respondent by the letter dated 7th November 2017 they knew about the decision. Mr Wafula sent the clerk to Kisumu to obtain a copy of the ruling on 29th November 2017 following which this application was filed on 8th December 2017.

10. In response that to the grounds set out by the applicants, the respondent stated that the reasons advanced by applicant and in particular that the advocate forgot to diarise the date for the ruling was insufficient and in particular the applicant did not prove that the copy of the diary attached belonged to the applicant's advocates.

11. I have considered the facts leading to the delay in filing the reference and I am of the view the reasons given by the applicant's advocate are reasonable and plausible. I also find that the failure to attend court was not deliberate. I do not think the client should suffer from the mistakes of its advocates particularly where the advocate has made disclosure of the fact of inadvertence. I have also taken into account the period of delay from 29th November 2017 to 8th December 2017 and I cannot say that it is inordinate.

12. The subject matter is a reference from assessment of costs by the Deputy Registrar. The issue only relates to quantum of costs and the result of the reference may lead to affirmation of the decision or reduction of costs. I have also considered that the issues raised in substance of the taxation are not frivolous and given the amount in issue, I think it is in the interests of justice that the applicant be allowed to exercise its statutory right to seek review of the decision of the Deputy Registrar. In my view, the costs of the application are sufficient to salve the respondent's wounds caused by this application and the resultant delay.

13. I therefore allow the Chamber Summons dated 7th December 2017 on the following terms;

(a) The applicant shall lodge and serve its reference within **fourteen (14) days** from the date hereof.

(b) The applicant shall pay the respondent costs of this application assessed at **Kshs. 15,000/-** only to be paid within 14 days.

14. This above orders shall apply in **KISUMU HIGH COURT Misc. Applications Nos. 280, 281, 282 and 283 of 2017.**

DATED and DELIVERED at KISUMU this 20th day of March 2018.

D.S. MAJANJA

JUDGE

Mr Wekesa instructed by Wekesa & Simiyu Advocates for the applicant/client.

Prof. Ojienda, S.C., instructed by Prof. Tom Ojienda and Associates Advocates for the respondent/advocates.