



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC (REF) APPLICATION NO. 71 OF 2017

HALIMA KASI TONUI

SUSAN OCHOLA

MARY ADHIAMBO MARCUS

ELIZABETH MGHOI MKOBA AND 30 OTHERS.....PLAINTIFFS/APPLICANTS

VERSUS

THE BOARD OF TRUSTEES TELEPOSTA PENSION SCHEME

LLYOD MASIKA LIMITED.....DEFENDANTS/RESPONDENTS

RULING

1. Through a Chamber Summons dated 17th March, 2017 premised on the provisions of Article 159(2)(d) and (e) of the Constitution of Kenya, 2010, Sections 1A, 1B, 3, 3A, 27 and 80 of the Civil Procedure Act, Cap 21 Laws of Kenya; Orders 45 and 50 of the Civil Procedure Rules, 2010, Section 51(2) of the Advocate's Act, Cap 16 Laws of Kenya, Rules 11 and 62 of the Advocates Remuneration Order and all other enabling provisions of the law, the applicants seek the following orders:-

i. Spent;

ii. Spent;

iii. That the Honourable Court be pleased to grant the applicants leave to file this taxation reference out of time;

iv. That the Honourable court be pleased to allow the Taxation Reference and to set aside, review and or vary the certificate of taxation dated 25th January, 2017 and the Honourable Deputy Registrar's ruling dated 19th of March, 2016;

v. The Honourable court be pleased to tax items 1 and 2 of the Bill of costs dated 13th October, 2015 and or in the alternative order it to be re-taxed by a different Deputy Registrar with appropriate directions; and

vi. That costs of this application be provided for.

2. The application is anchored on the grounds in support of it and the affidavit of Halima Kasi Tonui sworn on 17th March, 2017. The 1st respondent's Administrator and Trust Secretary, Peter K. Rotich filed a replying affidavit sworn on 31st March, 2017 on behalf of the 1st and 2nd respondents. The applicant's Counsel on 9th May, 2017 filed their written submissions. Counsel for the 1st respondent filed one set of submissions on 2nd May, 2017 and further submissions on 30th June, 2017.

3. In highlighting the said submissions, Mr. Manguro, Learned Counsel for the applicant stated that they were seeking orders for review of a ruling dated 19th March, 2016 on a bill of costs. He sought orders for stay of execution and for the setting aside of the certificate of taxation dated 25th January, 2017 as there is an error on the amount taxed. It was submitted that the Deputy Registrar taxed two items at Kshs. 88,177.50 and the total taxation came to Kshs. 279,008.00/=. It was the Counsel's view that the court should have awarded the respondents Kshs.163,555.00 as costs. It was submitted that when calculating instruction fees, the Deputy Registrar miscalculated the issue of the value of the premises which was Kshs.1,385,500/=. as pleaded in the plaint yet the dispute was not on the ownership of the property but on the

issue of rent.

4. He cited the provisions of Rule 62 of the Advocates Remuneration Order which states that where an instructing client is instructing one Advocate where there are two defendants, the bill should be taxed as one. He relied on the authorities cited in their written submissions of **Shah vs Mbogo & Another [1974] EA 116**, that addresses the issue a court's discretion. He also cited the case of **Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board**, Civil Appeal No. 220 of 2004 that states that a Judge will not normally interfere with the discretion of a Taxing Officer unless he erred in principle in assessing the costs. The authorities of **Governors Balloon Safaris Limited vs Skyship Company Limited & Another [2015] eKLR** and **Ahemdnasir Abdikadir & Co Advocates vs National Bank of Kenya Limited (2)[2006] 1 EA 5** were cited, where Courts held that in instances where reasons for the disputed items on bills of costs are contained in considered rulings, there is no need to seek further reasons from the Taxing Officer. He further stated that the applicants have suffered substantial loss due to the erroneous taxing of the bill of costs.

5. Mrs Kwaya, Learned Counsel for the respondents opposed the application. She stated that the application seeks an extension of time to file a reference, but the applicants have failed to show good cause as to why a reference should be filed out of time. She relied on the provisions of the Advocates Remuneration Order that state that a reference must be filed within 14 days.

6. It was submitted that on the issue of stay of execution, the applicants have not complied with Order 42 rule 6 of the Civil Procedure Rules by showing that they will suffer substantial loss. She relied on the case of **James Wangalwa vs Agnes Naliaka Cheseto [2012] eKLR** where the court held that just because execution is imminent does not mean that the applicant will suffer substantial loss. Counsel also relied on the case of **Francis Kuta vs Nancy Wambui and Another**, Civil Appeal No. 298 of 1996, where the court found that if a party succeeds on appeal, costs that have been paid will be refunded.

7. Counsel further submitted that the applicants have failed to offer security, thus in the absence of compliance with Order 42 rule 6 of the Civil Procedure Rules, the application must fail.

8. On the issue of separate instruction fees, it was submitted that the respondents' Counsel got instructions separately from the two respondents and that receipt of instructions is a different task from drawing of pleadings. Mrs Kwaya further submitted that Rule 62 of the Advocates Remuneration Order disallows separate fees where instructions are given jointly. She relied on the case of **Mayers and Another vs Hamilton and Others [1975] EA** to support the said argument.

9. She further stated that the Deputy Registrar followed the rules to the letter and the fees awarded is not excessive. She concluded by stating that the Deputy Registrar exercised her discretion properly and the application should not be allowed.

10. The issues for determination are:-

- i. If the applicants should be granted leave to file a reference out of time;
- ii. Whether orders for stay of execution should be granted; and
- iii. If the taxation reference should be allowed as prayed.

11. In **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 Others [2013] eKLR**, the Supreme Court set out the following principles that should be considered in exercise of a court's discretion in extension of time:-

“(i) 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;

(ii) A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;

(iii) Whether the court should exercise discretion to extend time is a consideration to be made on a case to case basis;

(iv) Where there is a reasonable cause for the delay. The delay should be expressed to the satisfaction of the court;

(v) Whether there will be any prejudice suffered by the respondents, if extension is granted;

(vi) Whether the application has been brought without undue delay and;

(vii) Whether in certain cases, like Election Petitions, public interest should be a consideration for extending time.”

12. The ruling the subject of the present application was delivered on 19th March, 2016. The present application was filed on 20th March, 2017. Paragraph 11 of the Advocates Remuneration Order provides as follows with regard to the timelines within which a reference should be filed:-

“1. Should any party object to the decision of the taxing officer, he may within 14 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 leave of the Judge but not otherwise, appeal to the Court of Appeal.

4. The High court shall have power and discretion by order to enlarge the time fixed by subparagraph (2) for the taking any step; application for such an order may be 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. Under paragraph 11(4) of the Advocates (Remuneration) Order, 2009, the High Court is conferred with the power and discretion to enlarge the time fixed for filing of a reference. The application herein was filed a year after the delivery of the ruling by the Deputy Registrar on 19th of March, 2016. Instead of giving reasons as to why the reference was filed so late after delivery of the contested ruling, the applicant's deponent is dead silent about it.

14. It is a contradiction in terms for the applicants to seek leave to file a reference a year after the Deputy Registrar's ruling and in the same breath state that the said application has been filed without unreasonable delay as captured in paragraph 13 of the supporting affidavit. That is far from the truth.

15. Due to the fact that the applicants in the maze of the several prayers sought forgot to give an explanation for delay in the filing of the application seeking leave to file a reference out of time, I find that no reasonable cause has been shown in line with the holding in the case of **Nicholas Kiptoo Arap Korir Salat** (supra), as to why I should exercise my discretion in favour of the applicants. The foregoing means that all the prayers sought herein cannot stand in the face of a denial of the order for the filing of a reference out of time.

16. The application dated 17th March, 2017 is dismissed in its entirety. Costs of the application are awarded to the defendants/respondents.

DELIVERED, DATED and SIGNED at MOMBASA on this 10th day of August, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Manguro holding brief for Mrs. Kipsang for the plaintiffs/applicants

Ms Sitati holding brief for Mr. Bundotich for the defendants/respondents

Mr. Oliver Musundi - Court Assistant