



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 203 OF 2012

RANDOLPH M. TINDIKA t/a

TINDIKA & COMPANY, ADVOCATES.....APPLICANT

VERSUS

LUKA MWAMBAGA MSAGHA.....RESPONDENT

RULING

1. The applicant through a Notice of Motion dated 22nd February, 2017 brought under the provisions of Paragraph 11(3) and (4) of the Advocates Remuneration Order, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 50 rule 6 of the Civil Procedure Rules, 2010 and Article 159 of the Constitution of Kenya, 2010 and all other enabling provisions of the law seeks the following orders:-

- (i) That this Honourable court be pleased to extend the time within which the applicant ought to have filed a reference objecting to the decision of the Taxing Officer in taxing the Advocate/Client bill of costs dated 18th June, 2012 in this matter;
- (ii) That the applicant be allowed to file a fresh reference in these proceedings within seven (7) days from the date of grant of the said leave; and
- (iii) The costs of this application be in the cause.

2. The application is premised on the grounds in support of it and the affidavit of Randolph M. Tindika sworn on 22nd February, 2017. He also filed a supplementary affidavit on 4th April, 2017. The respondent filed a notice of preliminary objection on 10th March, 2017 to the effect that this court is *functus officio*, that the application herein is *res judicata* and that the application is time barred. The respondent also filed a replying affidavit on 10th March, 2017 to oppose the application.

3. The applicant filed his written submissions on 26th April, 2017. Counsel for the respondent filed a list of authorities on 10th March, 2017 but filed no written submissions.

4. In highlighting his submissions, Mr. Tindika Advocate made reference to paragraph 11(4) of the Advocates Remuneration Order and invited this court to exercise its unfettered discretion to enlarge time within which to file a reference. He indicated that the delay occasioned was for a period of 8 days, which he submitted was not inordinate. He submitted that it is a cardinal tenet of law that parties to a dispute need to be heard. He prayed to be given the said opportunity. He invited the court to peruse the authorities in support of his application.

5. Mr. Mwaniki, Learned Counsel for the respondent opposed the application and stated that the last day for the applicant to file a reference was on 29th January, 2016. He argued that 2 years have elapsed since the said date. Counsel cited the Court of Appeal decision of **Mohamed Shally Sese (Shah Sese) vs Fulson Co. Ltd and Another** [2006] eKLR where the court said that extension of time is an equitable remedy that is availed to a deserving party. It is not a right.

6. He further submitted that the court has to consider if the delay of 2 years had been explained to enable the court to exercise its discretion in favour of the applicant. He urged the court to consider the prejudice to be suffered by the respondent if the application is allowed. Mr. Mwaniki stated that the applicant is an Advocate who should know the rules. He prayed for the application to be dismissed.

7. In response to the submissions by the respondent's Counsel, Mr. Tindika stated that the court struck out the reference that had been filed earlier, for being filed late, thus it cannot be argued that there has been delay in filing the present application.

8. In distinguishing the Court of Appeal decision in **Mohamed Shally Sese (Shah Sese) vs Fulson and Co. Ltd** (supra) from the application herein, the applicant stated that the delay therein was 1 year as compared to the delay herein which was 8 days at the time he filed the reference that was struck out. He urged the court to extend the time for filing a reference.

ANALYSIS AND DETERMINATION

9. The issues for determination are:-

- (i) If this court is *functus officio*;
- (ii) If the application dated 22nd February, 2017 is *res judicata*; and
- (iii) If this court should extend time for filing a reference.

10. The Black's Law Dictionary 10th Edition defines the word *functus officio* as:-

“having performed his or her office” (of an officer or official body) without further authority or legal competence because the duties and function of the original commission have been fully accomplished.” (emphasis added).

11. In **Raila Odinga and 2 Others vs IEBC & 3 others** [2013] eKLR, the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The origins of the *functus officio* doctrine, with special reference to its application in administrative law” [2005] 1222 SALJ 832 which reads as follows:-

“..... the functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the said matter the (principle) is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.” (emphasis added).

12. Bearing the contents of the above excerpt in mind, the reference dated 18th February, 2016 was struck out for being filed out of time. The substance of the application was not heard and determined with finality. This court can therefore not be *functus officio*.

13. The court has considered the contents of the application dated 18th February, 2016 *vis a vis* the application dated 22nd February, 2017. The order sought in the former application was for the setting aside of the decision of the Taxing Officer in respect to a bill of costs dated 18th June, 2012. It also sought the assessment of the fees payable on contentious items that had been taxed. The latter application seeks an order for extension of time for the applicant to file a fresh reference.

14. The doctrine of *res judicata* is provided for, under the provisions of Section 7 of the Civil Procedure Act. It states as follows:-

“No court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.” (emphasis added).

15. Explanations as to the doctrine of *res judicata* are given in the Civil Procedure Act as follows:-

“Explanation (1) – The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it. (emphasis added).

Explanation (2) – For the purpose of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly by the other.

Explanation (4) – any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

16. In **Bernard Mugo Ndegwa vs James Githae and 2 Others** [2010] eKLR, it was held that the applicant who raises the issue of *res judicata* must show that:-

- (i) The matter in issue is identical in both suits;
- (ii) The parties in the suit are substantially the same;
- (iii) There is concurrence of jurisdiction of the court;

(iv) **The subject matter is the same; and**

(v) **There is a final determination as far as the previous decision is concerned.** (emphasis added).

17. This court did consider the reference dated 18th February, 2016 but found that it was filed out of the timelines allowed by Paragraph 11(2) of the Advocates (Remuneration) Order, 2009. This court did not go into the merits of the reference but struck it out. The argument therefore that the present application is *res judicata* is erroneous as the application of 18th February, 2016 was not determined with finality. It is my finding that the application dated 22nd February, 2017 is not *res judicata*.

18. On the issue of leave to file a reference out of time, the applicant in paragraph 10 of his affidavit deposes that failure to file the reference in time was not deliberate but a mistake and/or inadvertence on his part in reckoning the time it should have been filed. The respondent's Counsel argued that the above explanation was not satisfactory as a delay of 2 years before the filing of the present application has not been explained to enable this court to exercise its discretion in favour of the applicant.

19. The Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 Others** [2013] eKLR 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.”

20. The applicant herein filed a reference on 18th February, 2016. It however turned out that he filed it 8 days late and for the said reason it was struck out. The applicant has owned up to his mistake and has filed the present application. After considering the submissions made and authorities relied upon, if this court fails to grant the orders sought, it may end up conferring a financial benefit to the respondent which he may not be entitled to. The issue of the amount of legal fees payable to the applicant can only be determined through a full hearing of a reference. The applicant has prayed for leave to file the same out of time. Bearing in mind the decision in the **Nicholas Kiptoo Arap Korir Salat** case (supra), this court will exercise its discretion in favour of the applicant herein due to the explanation he has given for failure to file a reference in time.

21. In order to give parties a level playing field, I make the following orders:-

(i) The applicant is granted leave to file a reference within 14 days from the date of this ruling; and

(ii) The costs of this application shall be borne by the applicant for his failure to file a reference within time thus necessitating the filing of this application.

It is so ordered.

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

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Sitati holding brief for Mr. Tindika for the applicant

Mr. Manguro holding brief for Mr. Mwaniki for the respondent

Mr. Oliver Musundi - Court Assistant