



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. NO. 500 OF 2017

KENYA BUREAU OF STANDARDS.....APPLICANT

VERSUS

WILLIS O. NYENDE P/A

NYENDE & COMPANY ADVOCATES.....RESPONDENT

RULING

1. The application before the court is the Chamber Summons dated 20th April 2018 filed by the applicant, the *Kenya Bureau of Standards* following the taxation of an Advocate-client bill of costs filed by the respondent.

Prayers 1, 2 and 3 of the application are already spent and what is pending this courts determination is prayers 4 and 5 in which the applicant seeks extension of time under *paragraph 11* of the *Advocates Remuneration Order of 2009* to enable it file a reference against the decision of the taxing master delivered on 7th May 2018. The applicant also seeks for provision of costs of the application.

2. The application is premised on the grounds stated on its face and the depositions made in the supporting affidavit sworn by the applicant's counsel *Ms Goretti Nyariki* on 20th April 2019. The main grounds advanced in support of the summons are that though the applicant was served with the bill of costs and notice of taxation on 10th October 2017, it was not represented during taxation of the bill of costs as the notice of taxation got misplaced in its legal department; that failure to attend the deputy registrar on the date scheduled for taxation was not intentional; that the applicant intended to contest the entire bill of costs and it has sufficient cause to contest the taxation as the bill was taxed under the wrong provisions of the law; that the respondent will not suffer any prejudice if the application was allowed.

3. The application is opposed through a replying affidavit dated 18th May 2018 sworn by the advocate practicing in the respondent's firm *Mr. Willis O. Nyende*.

The gravamen of the respondents' opposition to the summons is that the application lacks merit as the applicant has failed to provide sufficient explanation on the basis of which the court can exercise its discretion to enlarge time as sought; that the applicant has been indolent and its conduct disentitles it from the exercise of the courts discretion in its favour; that the application is an afterthought and ought to be dismissed with costs.

4. By consent of the parties, the application was canvassed through written submissions: those of the applicant were filed on 25th May 2018 while those of the respondent were filed on 14th June 2018.

5. I have carefully considered the application, the written submissions by both parties and the authorities cited. It is not disputed that this court has discretion to enlarge or extend time for lodging of a reference notwithstanding the expiry of the time limited by *paragraph 11* of the *Advocates Remuneration Order*.

6. *Paragraph 11* of the *Advocates Remuneration Order* provides that a party who is dissatisfied with the decision of the taxing officer may within 14 days after the decision give notice in writing to the taxing master specifying the items of taxation which he disputed. The taxing officer on receipt of the notice is required to furnish the objector with his or her reasons for the decision on the objected items and on being served with the reasons, the objector is supposed to file a reference to the High Court within 14 days. These are the timelines which this court is empowered to extend under *paragraph 11 rule 4* of the aforesaid remuneration order.

7. I wish to state at the outset that the remedy of extension of time is not granted to an applicant as a matter of right. It is a discretionary remedy which is sought by a party who has failed to take the steps a party aggrieved by the decision of a taxing officer is required to take within the time prescribed by the law. For this reason, for an applicant to succeed in an application such as the present one, he or she must lay before the court sufficient relevant material explaining the failure to comply with the prescribed timelines to the satisfaction of the court.

8. In this case, it is my finding that the explanation offered by the applicant speaks more to the reasons why it was not represented before the deputy registrar on the date scheduled for taxation of the bill of costs than to the reason for failure to file a reference to the High Court within the prescribed time.

9. I say so because the primary explanation given by the applicant in support of the application is that the notice of taxation was misplaced at its legal department and that therefore, it was not aware of the date fixed for taxation; that for this reason its non-attendance on the date of taxation was not deliberate. This explanation in my view did not go to the issue before the court in this application. The issue arising for determination is not whether the applicant's non-attendance during taxation was deliberate or was occasioned by reasons beyond its control but whether the applicant had a plausible explanation for its failure to file a reference within the time limited by *paragraph 11* of the *Advocates Remuneration Order*. The explanation given by the applicant is therefore largely irrelevant to the instant application.

10. But even if the court were to accept the applicant's explanation that it had misplaced its notice of taxation, no explanation has been given why the applicant did not take any step to find out from the court registry when the bill of costs was fixed for taxation or the outcome of the said taxation.

11. The applicant's counsel has deposed that the applicant was surprised when they were served with the Notice of Motion dated 14th March 2018 seeking to have judgment entered against it in favour of the respondent for the taxed costs in the sum of KShs.1,983,700. The applicant did not however disclose the date on which it was served with the said application.

12. Learned counsel Mr. Nyende has stated in his replying affidavit that he served the applicant with the aforesaid application on 20th March 2018. This averment has not been disputed by the applicant. Since what is not disputed is deemed to be admitted, it is safe to conclude that the applicant became aware of the decision on taxation on 20th March 2018.

13. The taxing master's decision was rendered on 1st March 2018 meaning that by the time the applicant became aware of the decision on 20th March 2018, the 14 days within which it should have given notice of its objection to the taxing master had already expired. This may explain why the applicant did not issue the notice contemplated under *paragraph 11 (1)* of the *Advocates Remuneration Order*. It is however not disputed that there was a delay of one month between the date the applicant says it became aware of the taxing masters decision and the date of filing the instant application. If indeed the applicant was aggrieved by the decision of the taxing master, one would have expected it to move with speed to initiate the process of filing a reference immediately it became aware of the decision. Any delay in taking appropriate steps in that direction ought to have been sufficiently explained. Unfortunately, no explanation has been offered by the applicant for the delay in filing the instant application.

14. Having taken all the relevant factors into consideration, I have come to the inevitable conclusion that the applicant has totally failed to demonstrate sufficient cause to warrant the exercise of this court's discretion in its favour by granting the orders sought.

15. In the circumstances, I do not find merit in the application dated 20th April 2018 and it is hereby dismissed with no orders as to costs.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 27th day of September, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Ms Muthui holding brief for Ms Nyariki for the applicant

N/A for the respondent

Mr. Kibet: Court Assistant