



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 377 OF 2014**

**(FORMERLY CONSTITUTIONAL PETITION NO. 530 OF 2014)**

**INTERCOUNTRIES IMPORTES AND EXPORTES.....PETITIONER**

**VERSUS**

- 1. THE NATIONAL LAND COMMISSION**
- 2. CHIEF LAND REGISTRAR**
- 3. THE ATTORNEY GENERAL**
- 4. THE TELPOSTA PENSION SCHEME.....RESPONDENTS**

**AND**

- 1. PARK AVENUE INVESTMENTS LIMITED**
- 2. JUBILEE INSURANCE COMPANY LIMITED**
- 3. TRUST BANK LIMITED ( IN LIQUIDATION)**
- 4. COMMISSIONER OF LANDS.....INTERESTED PARTIES**

**RULING**

1. Before this court is the notice of motion dated 3<sup>rd</sup> August, 2016 seeking to set aside the notice to show cause dated 19<sup>th</sup> July, 2016 and that this court be pleased to grant leave to the 4<sup>th</sup> respondent to file requisite notice of objection in writing to the taxing officer and subsequent reference to the High Court out of time with respect to the ruling of the taxing master delivered on 4<sup>th</sup> February, 2016.

2. The grounds upon which the Motion is premised are that a ruling was delivered on 4<sup>th</sup> February, 2016 by the Deputy Registrar taxing the 3<sup>rd</sup> interested parties bill of costs dated 24<sup>th</sup> June, 2015 at KShs. 2,689,667. and the petitioner's bill of costs dated 4<sup>th</sup> June, 2014 at KShs. 2,741,947 respectively. That the last time the parties were in court, directions were given that the taxation would be done on 7<sup>th</sup> December, 2015. That on the said date the same was not cause listed and as such it was upon the court to issue notice of the ruling date. That the 4<sup>th</sup> respondent's advocates were never issued with ruling notice and they only came to learn of the ruling after it had been delivered, through an email from Echessa & Bwire Advocates on 16<sup>th</sup> June, 2016 a day after obtaining a certificate of taxation. That the notice of ruling in the court file

dated 28<sup>th</sup> January, 2016 indicated service upon Kale Maina & Bundotich advocates situated at Teleposta Towers, 13<sup>th</sup> Floor Kenyatta Avenue yet the firm shifted its offices in April, 2015 to Upperhill Fortis Suites, 6<sup>th</sup> Floor, Hospital Road. That the time the 4<sup>th</sup> respondent's advocates came to learn about the notice of the ruling, the requisite period within which to file a notice of objection against the taxing master's decision had long lapsed. It was contended that there is a real and imminent danger of execution of the Certificate of Taxation dated 15<sup>th</sup> June, 2016 as the 3<sup>rd</sup> interested party's advocates have already commenced execution process by taking out Notice to show cause why execution should not issue against the 4<sup>th</sup> respondent.

3. The petitioner vide the replying affidavit of Arief Madhani filed on 24<sup>th</sup> August, 2016 contended that service of notice of the ruling was issued by court on 28<sup>th</sup> January, 2016 on all parties and the court so confirmed before delivery of the ruling on 4<sup>th</sup> February, 2016. That the 4<sup>th</sup> respondent filed a notice of appointment of advocates on 6<sup>th</sup> December, 2014. That no notice of change of address was filed by the 4<sup>th</sup> respondent's advocates contrary to the standard procedure. That the address on the ruling notice and the notice of appointment are similar. That the applicant have been indolent in applying for leave to file notice of objection out of time. That the explanation for the 6 months delay is not satisfactory.

4. Fidelis Marabu Limo, advocate in conduct of this matter on behalf of the 3<sup>rd</sup> interested party swore a replying affidavit on 24<sup>th</sup> October, 2016. He contended that the allegation by the 4<sup>th</sup> respondent is dishonest since they continue to receive service through the same address even after moving to the alleged new office/address as is evidenced by the 3<sup>rd</sup> interested party's bill of costs dated 24<sup>th</sup> June, 2015. It was further contended that the matter was listed on the daily cause list on 4<sup>th</sup> February, 2016 for purposes of the ruling and if the 4<sup>th</sup> respondent's advocates were diligent, they would have known that the ruling was delivered on that date.

5. It was the 4<sup>th</sup> respondent's submissions that rule 11 of the Advocates' Remuneration (Amendment) Order gives court the discretion to extend time for lodging a reference out of time notwithstanding the expiry of the stipulated 14 days. That section 3A of the Civil Procedure Act gives inherent jurisdiction to the court to make any such orders so that the ends of justice can be met. The 4<sup>th</sup> respondent also cited Article 159 (2) (d) of the Constitution that justice should be administered without undue regard to technicalities. It was submitted that once the 4<sup>th</sup> respondent learnt of the ruling it moved fast to file this application. It relied on **Labh Singh Harman Singh v. Attorney General & 2 others [2016] e KLR**.

6. The 3<sup>rd</sup> interested party on its part submitted that the 4<sup>th</sup> respondent must satisfy the four conditions for grant of stay of execution thus there must be sufficient cause, substantial loss would occur if the order is not granted, there should not be unreasonable delay and security for cost must be furnished. To support the said argument it cited **Stephen Wanjohi v. Central Glass Industries Limited Nairobi High Court Civil Case No. 6726 of 1991** and **Kenya Shell Limited v. Kibiru (1986) KLR** where the aforesaid conditions were said to be key in granting stay of execution. It was further submitted that the court's discretion is to be exercised where delay is genuine. On this issue, the 3<sup>rd</sup> respondent cited **Mbogo v. Shah [1967] EA 116**, **AG v. Theuri [1985] LLR 240** among others. It was submitted that the 4<sup>th</sup> respondent's delay was inexcusable since the delay is not explained.

7. The petitioner held a similar position to that held by the 3<sup>rd</sup> interested party that the 4<sup>th</sup> respondent must and has not satisfied the conditions for grant of stay of execution as provided for in Order 42 rule 6 of the Civil Procedure Rules. They cited numerous authorities which highlight the conditions therein among them, **Andrew Kuria Njuguna v. Rose Kuria Nairobi Civil Case 224 of 2001**. The court in that case was particular to define what substantial loss means thus; ***“coming to substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely, she stood a risk of suffering substantial loss moneywise or other, and therefore grant the stay.”***

8. It was further submitted that the 4<sup>th</sup> respondent ought to have been vigilant in bringing this application.

That the 4<sup>th</sup> respondent was under duty to bring the same within the prescribed time which it didn't. It cited **Antoine Ndiaye v. African Virtual University [2015] e KLR**. It was further submitted that the delay must be explained and should also not be inordinate.

9. Clause 11 of the Advocates' Remuneration Order 2009 is clear that the Court has discretion to extend time for lodging a reference notwithstanding the expiry of the 14 day period prescribed for the reference from the taxing master's decision on costs. Paragraph 11 of the Advocates' Remuneration Order provides as follows:

**"11. 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 subparagraph (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), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**

**(5) 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."**

10. The court has duly considered the application and the arguments advanced by the respective parties. The 4<sup>th</sup> respondent/applicant has sought leave to file a notice of objection to the Taxing Officer and subsequent reference to the High Court out of time against the ruling of the taxing officer delivered on 4<sup>th</sup> February, 2016. It's main ground is that it was not notified when the ruling was delivered on the 7<sup>th</sup> February, 2016 as the notice was served on its advocates at Telposta Towers yet the firm had shifted its offices in April, 2015 to upperhill fortis suites, 6<sup>th</sup> floor, Hospital Road.

11. I have perused the notice of ruling/judgment that was served by the registry upon the parties and the physical addresses indicated thereon. The address for Kale maina & Bundotich & Co. Advocates is indicated as Teleposta Towers 13<sup>th</sup> floor, Nairobi. An advocate from the said firm told the court that they had, by then, moved offices. No evidence has been offered to the contrary The court notes though the 4<sup>th</sup> defendant stated that it came to learn about the ruling on 8<sup>th</sup> June, 2016, the application herein was filed on the 3<sup>rd</sup> day of August, 2016 more than one and a half months later and no good reason has been given for that delay.

12. While this court is prepared to find that notice of ruling/judgment was not served upon the applicant, it has noted that no good reason has been given why the applicant did not file the present application on time upon learning of the delivery of the ruling. However, the court finds that despite the delay, justice can still be done to the applicant. See the case of Ivita Vs. Kyumba (1984) KLR 441.

13. On the other hand, the respondents have a decree in their favour and this court should not be obsessed

with the interest of the applicant at the expense of those of the respondent.

Having said that, and in balancing the interests of the parties herein, the application dated 3<sup>rd</sup> August, 2016 is hereby granted as prayed on condition that the taxed amount is deposited in court pending the hearing and determination of the reference. The amount to be deposited within 30 days from today.

Costs of the application shall abide the outcome of the reference.

**Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of March, 2017.**

.....

**L NJUGUNA**

**JUDGE**

*In the presence of*

.....*For the Petitioner*

.....*For the Respondent*

.....*For the Interested Parties*