



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 69 OF 2012

IN THE MATTER OF AN APPLICATION BY INDERPAL SINGH, FRANCIS NNEBE AND JAMES KISA ON BEHALF OF CONVENT DRIVE SOUTH RESIDENTS ASSOCIATION FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF THE PHYSICAL PLANNING ACT CHAPTER 286 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CITY COUNCIL OF NAIROBI AND THE APPROVAL OF BUILDING PLANS REGISTRATION NUMBER FC 410 TO BE ERECTED ON LR NO. 3734/229

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

AND

IVYLAND PARK LTDINTERESTED PARTY

RULING

1. By a chamber summons dated 10th October 2016 the applicant seeks from this court orders:

i. Spent;

ii. That there be stay of certificate of taxation with respect to the 1st and 2nd respondent's bills of costs in this matter pending hearing and determination of the Reference on taxation;

iii. That the court be pleased to enlarge the time within which the applicant should file the reference;

iv. That the reference filed herewith be deemed to be duly filed;

v. That costs of the application be in the cause.

2. The application which is brought under the provisions of Rule 11(4) and 11(5) of the Advocates Remuneration Order, 2009, Sections 63(c) Sections 89 and 95 of the Civil Procedure Act, Order 22 Rule 22 of the Civil Procedure Rules, 2010 is supported by the affidavit of Kevin Kangethe advocate sworn on 10th October 2016 and grounds on the face of the application.

3. According to counsel's depositions in support of the grounds, which also formed the basis of his oral submissions in court, the 1st and 2nd respondent's Bill of costs were on 1st September 2016 taxed at 727,718 and shs 733,444 respectively, making a total of shs 1461162; That the applicants were aggrieved by the ruling and seek to challenge it on items (1), 64 and (1),(84) of the 1st and 2nd respondents bills of costs respectively on the grounds, among others, that the items as awarded were excessive and inordinately high for an environmental public law matter that sought prerogative orders to ensure observance of the zoning policy; That such high costs would have the net effect of preventing ordinary citizens from accessing the courts seeking public law remedies; That the taxing officer erroneously granted getting up fees whereas the same does not arise in Judicial Review matters; That there is imminent risk of execution which would render the intended reference nugatory and would cause chaos as this is a representative suit; That delay in filing the Reference was occasioned by the fact that this is a representative suit and it took time for deliberations to be made by members; That the applicants are willing to offer reasonable security in terms directed by the court.

4. The chamber summons was opposed by the interested party **Ivyland Park Ltd** through a replying affidavit sworn by **Dr Zhang Yu Ling** the Managing Director of the company sworn on 23rd November 2016 and contending that the application is a non starter as it raised no arguable issue; That there is no error in principle in regard to the quantum of taxed costs and that no exceptional issue had been shown to warrant intervention of the Superior Court; That no adequate reasons have been demonstrated as the reasons were already contained in the ruling hence, a Reference should have been filed and client's instructions sought later; That the taxing officer properly exercised her discretion; That the applicant had been granted stay of execution for 30 days earlier and did nothing on the ruling date hence it should not be given a second chance; That stay and extension of time will delay realization of the fruits of the interested party's judgment; That as the grounds proposed in the Reference are hopeless, it would be in vain to extend time for filing of the Reference; That litigation must come to an end; That the application is a blatant abuse of the court process and that there is no special circumstances to warrant the orders sought.

5. Parties argued the application orally before me on 13th February 2017 with Mr Karanja counsel for the applicant reiterating the contents of the application, grounds, depositions in the supporting affidavit and maintaining that his clients are entitled to the orders sought because the delay in filing the Reference is only 10 days in that taxation was done on 1st September 2016 and the Reference filed on 11th October 2016. That the matter was of public interest hence costs were excessively awarded against the applicants who are ordinary citizen.

6. In opposition to the chamber summons, Mr Ochieng Odhiambo counsel for the 2nd respondent/interested party submitted that the principles for stay had not been met and that the applicant herein had been given 30 days stay within which they should have filed a reference which time they squandered; That the Taxing Master's ruling had reasons for taxation hence it was easy for the applicants to file a reference within the shortest time but waited until the 40th day to file one and seek extension of time; That one official of the Association (applicants) should have sworn an affidavit to indicate what difficulties they had and in the absence of that affidavit, there is no evidence that consultations were going on; That no security costs are offered.

7. It was contended that there is no good reason for stay and or enlargement of time; that the courts should not deny advocates remuneration for the work done hence the application should be dismissed.

8. In a brief rejoinder, Mr Karanja submitted that they have given reasons for the delayed filing of the Reference as the Association is not a company and that 30 days elapsed before getting instructions. Further, that it is in the interest of justice that costs are awarded but to the bare minimum particularly in public interest litigation and that given 7 days, a reference would be filed. On security for costs it was submitted that this is not an appeal but nonetheless, the applicants would be willing to pay what the court will determine.

DETERMINATION

9. I have carefully considered the application by the applicant dated 10th October 2016, grounds and supporting affidavit and also the replying affidavit by the 2nd respondent/ interested party. I have also considered the parties' advocates' oral submissions and the relevant statutory provisions. No case law was relied on.

10. In my view, the main issue for determination is whether the applicant is entitled to the orders sought.

11. The procedure for challenging a taxing officer's ruling or decision on taxation is provided for in Paragraph 11 of the Advocates Remuneration Order which stipulates:

1) Should any party object to the decisions 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 14 days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all 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 for sub paragraph (1) or sub paragraph (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.

12. In the instant case, on 1st September 2016 the taxing officer Mrs E.W. Mburu Deputy Registrar delivered a ruling on taxation and reasons thereof. She also granted a stay of execution for 30 days upon a request by Mr Ngethe, for purposes of filing a Reference and Mr Ogola counsel for the respondent had no objection to that stay.

13. From 1st September 2016, nothing happened until 10th October 2016 when the application by way of chamber summons seeking to stay and for enlargement of time was filed. No certificate of taxation was issued or extracted pursuant to the ruling.

14. In the application, the prayer for enlargement of time to file the Reference out of time does not mention whether or not there was any objection filed as regards the specific items that the applicant wishes to challenge.

15. Under paragraph 11(1) of the Advocates Remuneration Order, a party objecting to the decision of the taxing officer ***may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.***

16. In the instant case, albeit the applicant's oral application for stay stated that the 30 days stay was for purposes of filing a Reference, no notice in writing objecting to the items of taxation was given to the taxing officer. Albeit the ruling contained all the reasons for taxation and therefore paragraph 11(2) would be superfluous in the circumstances as there would be no need for asking for reasons for taxation by the person objecting to the taxation, but paragraph 11(1) as read with (4) clearly shows that the High Court has power to enlarge time fixed for filing of objection to the specific items or (2) for filing of the reference itself.

17. In other words, before one can file a reference, they must have filed a notice objecting to specific items within 14 days of the date of the ruling on taxation. And where such time has lapsed, then an application for enlargement can be lodged to the High Court (judge).

18. In this case, it is clear that the time for filing notice of objection lapsed and therefore before considering whether or not to grant more time for filing a reference under sub paragraph 2, the court must be satisfied that notice of objection to taxation, specifying the items being objected to was filed with the Taxing Officer.

19. No leave to enlarge the time for filing notice of objection has been sought. It follows that even if the court was to enlarge time for filing a reference, that reference will be incompetent and amenable for striking out since no leave has been sought and or obtained to enlarge time under sub paragraph (1) of the Rule 11 of the Advocates Remuneration Order.

20. Therefore in the instant case, I find that the application for enlargement of time to file a reference is ill conceived as such enlargement, where there was no notice of objection to the particular taxed items or where there is no prayer for enlargement of time to file notice of objection to the specific items as taxed will be redundant.

21. It is for the above reasons that I find this application fatally incompetent and amenable for striking out.

22. Furthermore, albeit the taxing officer granted stay of execution for 30 days, that stay did not stay the processes for filing of the reference, as stipulated in paragraph 11 of the Advocates Remuneration Order. The stay would have enabled the applicant to file notice of objection to the taxation within 14 days of the date of ruling, as the reasons for the taxation were already in the ruling to file a Reference after such notice of objection.

23. The court notes that it is in this application for enlargement of time to file a reference that the applicant is specifying items 1 and 64 and 1 and 84 of the respective respondent's taxed bills of costs. Regrettably, it is not before the judge that the notice of objection is to be filed, but before the taxing officer who taxed the bills.

24. Accordingly, I find that it would be a waste of judicial time and resources to delve into the delay or reasons thereof in filing of the Reference as the application herein is incompetent and I must proceed to dismiss it but I order that each party shall bear their own costs of the application.

Dated, signed and delivered at Nairobi this 23rd day of March 2017.

R.E. ABURILI

JUDGE

N/A for the Applicant

N/A for the Respondent

CA: George