



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 19 OF 2015**

**CENTRAL BANK OF KENYA..... APPLICANT**

**VERSUS**

- 1. MUSLIM FOR HUMANRIGHTS (MUHURI)**
- 2. HAKI AFRICA**
- 3. THE INSPECTOR-GENERAL OF POLICE**
- 4. THE CABINET SECRETARY MINISTRY OF INTERIOR  
AND COORDINATION OF NATIONAL GOVERNMENT**
- 5. THE HON. ATTORNEY-GENERAL**
- 6. THE DIRECTOR OF PUBLIC PROSECUTION**
- 7. FINANCIAL REPORTING CENTRE.....RESPONDENTS**

**RULING**

**The Application**

1. By Chamber Summons application dated 17<sup>th</sup> February, 2017 the Applicant prays for the following orders:

1. That the Honourable court be and is hereby pleased to certify the application herewith as urgent and hear on a priority basis ex parte at first instance;
2. That the Honourable Court be and is hereby pleased to issue an order of interim injunction pending the hearing and determination of the application herewith, restraining any proceedings towards enforcement and/or execution howsoever of the certificate of costs issued and delivered on the 30<sup>th</sup> of June, 2016 in respect of High Court (Msa) Petition 19 of 2015;
3. That the Honourable Court be and is hereby pleased to grant an order enlarging time within which the Applicant herein may prosecute its objection to the taxation of the Bill of Costs lodged in High Court (Msa) Petition 19 of 2015;

4. That the Honourable Court be and is hereby pleased to issue an order setting aside the decision of the taxation master as set out in the Ruling issued and delivered on the 30<sup>th</sup> June, 2016 and the Certificate of Costs of similar date viz High Court (Msa) Petition 19 of 2015;

5. That the Honourable Court be and is hereby pleased to issue an order of re-taxation of the Bill of Costs lodged in High Court (Msa) Petition 19 of 2015 and direct the taxing master accordingly; and,

6. That the costs do issue.

2. The application is premised on grounds stated thereon and is supported by affidavit of **Kennedy Kaunda Abuga** sworn on 17<sup>th</sup> February, 2017.

3. The Applicant's case is that it was sued and named as the 6<sup>th</sup> Respondent in a High Court (Msa) Petition No. 19 of 2015 which Petition was allowed by the Hon Justice Anyara Emukule, vide a Judgment dated 12<sup>th</sup> November, 2015. In the said Judgment dated 12<sup>th</sup> November, 2015, the Hon. Judge awarded costs to the Petitioners, as against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents to be borne through the office of the 3<sup>rd</sup> Respondent. The Applicant's case is that the Taxing Master proceeded to tax the Bill before her and awarded the 1<sup>st</sup> and 2<sup>nd</sup> Respondent the sum of Kshs. 9,621,022.60 upon consideration of the Bill. The applicant objects to the said taxation on the ground inter-alia that the Taxing master did not consider its submissions on taxation. The Certificate of Costs have since issued on the 30<sup>th</sup> June, 2016 and the Applicant Bank is exposed to enforcement action and/or compulsion to settle the Bill whereas it was never heard on the matter. Further the Applicant states that it was not notified of the delivery of the Ruling to allow it a timeous opportunity to lodge a reference if warranted. The Applicant is apprehensive that pending the determination of the meritorious Reference, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents may prejudice and expose the bank to financial embarrassment and ridicule by enforcing the impugned Ruling and Certificate of Costs and that the bank's means are well known and its ability to settle the taxed sum in accordance with the Hon. Judge's direction through the Hon. AG's Office is incontestable and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are not exposed to prejudice.

### **The Response**

4. The application is opposed by the Petitioner/Respondents vide grounds of opposition dated 6<sup>th</sup> March, 2017 and a replying affidavit sworn by Yusuf M. Aboubakar sworn on 6<sup>th</sup> March, 2017.

5. The Respondents' case is that the Ruling of the Taxing Officer having been delivered on 30<sup>th</sup> June, 2016 and the 6<sup>th</sup> Respondent/Applicant objecting to the same, the 6<sup>th</sup> Respondent/Applicant ought to have given notice of the items of taxation to which it objects to the Taxing Officer in writing within fourteen (14) days after the said Ruling, which notice was not given. Upon receipt of the said notice the Taxing Officer should have recorded and forwarded to the 6<sup>th</sup> Respondent/Applicant the reasons for her decision on those items objected to. However, this could not happen as no notice was issued. On receipt of the Taxing Officer's reasons the 6<sup>th</sup> Respondent/Applicant ought to have applied to a Judge setting out the grounds of its objection. The Taxing Officer gave notice dated 27<sup>th</sup> June, 2016 for the Ruling on the basis of which the Petitioners/Respondents' advocates sent an advocate to hold his brief for the delivery of the said Ruling and therefore there is no justifiable basis for the said application. The Respondent's case is that the Honourable Taxing Officer indeed considered all the submissions filed and the highlighting of the same made by the parties including the 6<sup>th</sup> Respondent/Applicant whose brief was held by Mr. Ngari and that the 6<sup>th</sup> Respondent/Applicant has not shown that the Taxing Officer misapplied the law or wrongly exercised her jurisdiction to warrant this Court to enlarge time for them to object to the taxation.

### **Submissions**

6. Parties made oral submissions to the application. **Mr. Adala** for the Applicant submitted that the surviving prayers are 2, 3, 4, 5 and 6. The main prayers they are seeking is prayer no. 3 for enlargement of time within which the Applicant herein may execute its objection to the taxation of Bill of Costs lodged in the High Court Mombasa Petition No. 19 of 2015. Counsel submitted that no notice of Ruling of Taxing Master was given to the Applicant. When the Bill of Costs was argued before the Taxing Master a date for Ruling was issued for 14<sup>th</sup> June, 2016. On that date no Ruling was given. No further date was issued for purpose of giving that Ruling. The record shows that the said Ruling was read on 30<sup>th</sup> June, 2016. The Applicant's advocates are in Nairobi. However, in the Respondent's affidavit there is a notice addressed to all advocates and litigants. Counsel submitted that the said notice does not indicate whether or not it was served upon the Respondents; and in fact the notice was not served. So the Applicant was not aware of when the Ruling was delivered. Counsel submitted that in fact on 25<sup>th</sup> January, 2017 the Applicant wrote a letter to the court enquiring when the Ruling would be delivered. The effect was that the Applicant was not able to comply with the time limitation required to challenge the decision of the Tax Master. The Applicant's case is that mistake cannot be attributed to the Applicant herein and they are praying for natural justice and fair hearing. That includes the right to appeal the Ruling of the Taxing Master. Counsel urged the court to enlarge time for filing a reference out of time, noting that the reference is meritorious and has high chances of success. The certificate of costs had already been issued, and the Respondent herein can at any time execute the same without the Applicant having a chance to be heard.

7. **Mr. Aboubakar** for the Respondents opposed the application vide a replying affidavit filed on 7<sup>th</sup> March, 2017 and grounds of opposition filed on the same date on two main grounds. Counsel submitted that prayer No. 2 which is for injunction to stop execution cannot issue at this stage and prayers No. 4 and 5 are premature. They cannot be granted before the leave. The only available prayer is no. 3. Even then Counsel submitted that the Applicant has to prove lack of notice of Ruling.

8. Mr. Aboubakar noted that record shows that on 30<sup>th</sup> March, 2016 the matter was mentioned to confirm filing of submissions. The 6<sup>th</sup> Respondent/Applicant was represented by a Mr. Tarus. The matter was to be mentioned again on 11<sup>th</sup> May, 2016 and Mr. Lusi for 6<sup>th</sup> Respondent did not attend the court. Counsel submitted that there is a clear precedent of Mr. Lusi not attending court. That notwithstanding a notice was posted in the Judiciary and Law Society Websites. Counsel submitted that he got his notice from those websites. In addition the notice was pinned at the Judiciary Notice Board. So it is wrong to state that notice was not given. Mr. Aboubakar submitted that the Applicant had no reason not to write to seek reasons from the Taxing Master within 14 days. In other words due diligence was not taken by the Applicant. Mr. Aboubakar submitted there are no reasons given for the apparent negligence and lack of due diligence by Mr. Lusi. Counsel submitted that the Ruling was given on 30<sup>th</sup> June, 2016. He immediately served a notice of certificate of costs by 7<sup>th</sup> July, 2016. The Applicant was aware of this. They did nothing until February, 2017 when this application was filed. This again shows lack of seriousness. Counsel submitted that the Applicants are not deserving of the orders they seek, and that in any event the application has no merit. It does not show a point of law to be argued. It is made in bad faith and it is meant to delay this matter.

### **The Determination**

8. I have carefully considered the submissions. In my view, since the only issue parties submitted upon was the issue of extension of time to file a reference, the only issue for determination is whether this court should in fact extend the time as prayed.

9. In order to address this issue, the court must first take judicial notice that it is a right of every litigant either to appeal a decision where such a right exists, or as in this particular matter, to file a reference after an unfavourable Ruling in taxation. It is also the right of any litigant to be given notice of a Ruling or a Judgment to be delivered. Therefore, when a court is satisfied that a notice of a Ruling or a Judgment was not given to a party, and where such failure caused the party not to comply with certain statutory time lines, the court must set the record straight and avail to a party a cause which would have been available had a notice been given. This position applies equally to a situation where it is in doubt as to whether or

not a notice was actually issued.

10. In this particular matter, it was submitted by Mr. Aboubakar for the Respondents that Mr. Lusi who was on record for the Applicants was negligent in failure to attend the court for the Ruling on 30<sup>th</sup> June, 2016. Mr. Aboubakar submitted that in any event a notice of the Ruling was posted in the Judiciary and the Law Society Websites, and that indeed, even him he was only able to get the notice through those websites. Mr. Aboubakar accused Mr. Lusi of negligence and failure to exercise the diligence for his client. Those submissions by Mr. Aboubakar could be correct. However, the correctness thereof is not something proved beyond reasonable doubt. There is always the possibility that Mr. Lusi did in fact not see the notice, or that in fact he had exercised due diligence on behalf of his client. Yet, the requirement for notice before a Ruling or Judgment could be delivered is paramount and cannot be subject of guesswork. It is the finding of this court that the posting of the notice aforesaid in the aforesaid websites was not a conclusive evidence of effective service. It is also the finding of this court that the alleged negligence and lack of exercise of due diligence by Mr. Lusi, advocate for the Applicant, did not compromise the right of the Applicant to receive a notice of the Ruling. This is a case where the mistake of counsel cannot be visited upon his client.

11. Lastly, extension of time is always in the discretion of the court to be exercised judiciously and in the interest of justice. It is the finding of this court that it is in the interest of justice to extend time required herein by the Applicant to file a reference.

12. Mention was made of the fact that the said Ruling was delivered on 30<sup>th</sup> June, 2016 yet the application herein was filed in February, 2017 and so there was an inordinate delay in filing the application. However, I have looked at the supporting affidavit of **Mr. Kennedy Kaunda Abuga** that when the bank found out about the Ruling which it did not like, it immediately wrote a letter dated 25<sup>th</sup> January, 2017 to the court seeking confirmation whether indeed a Ruling had been delivered. In other words the litigant in his own interest, by-passed his advocates to seek justice for itself. Such a litigant cannot be said to have slept on its rights.

13. The inescapable conclusion herein is that the application is allowed in terms of prayer No. 3 thereof extending or enlarging time within which the Applicant herein may prosecute its objection to the taxation of the Bill of costs lodged in High Court (Msa) Petition 19 of 2015. Costs shall be in the cause.

Orders accordingly.

**Dated, Signed and Delivered in Mombasa this 12th day of April, 2017.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Aboubakar for Respondents

Mr. Adala for Applicant

Mr. Ngari for 5<sup>th</sup> Respondent

Mr. Ngari holding brief Omatsa for 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Mr. Kaunda Court Clerk