



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 31 OF 2016

IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16,

LAWS OF KENYA

AND

IN THE MATTER OF THE TAXATION OF COSTS

BETWEEN ADVOCATES AND CLIENT

BETWEEN

A. H. MALIK & COMPANY.....APPLICANT/ADVOCATES

-V E R S U S-

SHEHLA GHAFORRESPONDENT/CLIENT

IN THE HIGH COURT OF KENYA PETITION NUMBER 218 OF 2015

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONTRAVENTION OF THE PROVISIONS OF THE BILL OF RIGHTS AND FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 22, 29, 45, 47, 71 AND 75 AND CHAPTER FOUR OF THE CONSTITUTION OF KENYA 2010

AND

PENAL CODE, CHAPTER 63 LAWS OF KENYA CRIMINAL PROCEDURE CODE CHAPTER 75 LAWS OF KENYA

SHEHLA GHAFORPETITIONER

-VERSUS-

THE HONOURABLE

THE ATTORNEY GENERAL1ST RESPONDENT

INSPECTOR GENERAL OF POLICE2ND RESPONDENT

JAMAL GHAFORINTERESTED PARTY

RULING

1. By a Chamber Summons dated 24th March, 2017, **A. H Malik & Co. Advocates**, the applicants in this ruling (hereinafter referred to as “the Advocates”) seek the following orders:

1 That this Honourable Court do enlarge the time for the giving of the Notice of Objection to the Taxing Officer of this Honourable Court as required by Rule 11(1) of the Advocates (Remuneration) Order for a further fourteen (14) days from the date of this Order.

2 That this Honourable Court do enlarge the time within which to apply to a Judge in Chambers for the review and setting aside of The Taxing Officer’s decision.

3 That The Honourable Taxing Officer of this Honourable Court do provide the Applicant with the reasons for her decision forthwith.

4 That the costs of this Application be provided for.

2. According to the applicants, the ruling the subject of the instant application was delivered on 20th February, 2017 wherein the Taxing Officer wholly struck out the Applicant’s entire Bill of Costs lodged on 7th April, 2016 on the ground that the Applicants/Advocate had not attached documents to the Bill of Costs to prove that the Applicants had been instructed to act and yet the Respondent had not disputed the same. To the contrary, the Respondent had not only admitted having instructed the Applicant she had also generally admitted that the services alleged to have been offered to her were offered as alleged.

3. According to the applicants the delay in taking immediate instructions was occasioned by the illness of **Mohamed Zahir Ahmed Malik** hence no action was taken till 17th March, 2017 when the said **Mohamed Zahir Ahmed Malik** returned to work after substantial recovery.

4. It was averred that by the time instructions to file the Notice of Objection to the Taxation, the fourteen (14) days stipulated under Rule 11(1) of the **Advocates (Remuneration) Order** for doing so had lapsed.

5. To the applicant, the delay of about fourteen (14) days to bring this Application is not inordinate and should be excused as the same was caused by factors that were beyond the Applicants’ control.

6. It as the applicants’ case that they stand to suffer a grave injustice unless the time herein is enlarged as the Taxing Officer struck out the Applicant’s entire Bill of Costs despite the fact that it is an undisputed fact that the Applicant had rendered extensive legal services to the Respondent.

Respondent’s Case

7. The application was opposed by the Respondent.

8. According to the Respondent/Client, the Applicants undertook and committed to act on her behalf in NRB HCCC NO. 227 OF 2015 and NRB HC Petition No. 218 of 2015 on a *pro bono* basis.

9. It was therefore her case that the application is unmerited and an abuse of court process as she is not indebted to the Applicants for any taxed amounts. In addition, she contended that the Applicants have failed to demonstrate any sufficient and/or justifiable cause to warrant the grant of orders sought for the enlargement of time to file a notice of objection and reference and is therefore guilty of an inordinate and

inexcusable delay in lodging this application.

10. It was the Client's case that an Advocate does not need a client's instructions to file a protective appeal on a court's decision. As such even if the Applicant's advocate had no instructions to do so, he should have lodged the notice of objection on time to protect the interests of the Applicants in the case. The Respondent therefore maintained that the Applicants' lethargic conduct is inexcusable as he is not a layman but an experienced advocate who is fully aware of the effect that such an indefensible delay would have on his case and thus should have made proper arrangements towards ensuring that the notice of objection is filed in time.

11. The Respondent asserted that the applicant is off-beam and there was in fact a gap of thirty seven (37) days from the date the ruling was delivered and the date this application was lodged which is inordinate and unexplainable.

12. The Respondent averred that she would be prejudiced if the conclusion of this matter is delayed as the Applicant intends to drag this suit by filing numerous applications.

Determinations

13. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions and authorities cited.

14. That this Court has the jurisdiction to extend time for filing a reference is not in doubt. This position was reaffirmed in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** where it was held the court has unfettered discretion under sub paragraph (4) of rule 11 of the Advocates Remuneration Order to extend time prescribed by sub paragraph (1) and (2) of the same rule within which to give notice of objection to the decision on taxation and to file a reference to a Judge in respect of such taxation. In fact that Court appreciated that the law is not that the High Court is only vested with inherent power and jurisdiction to prevent abuse of the Court process or to further the ends of justice only in matters falling within the ***Civil Procedure Act*** and ***Rules*** but that the Court is clothed with inherent powers and jurisdiction all the time in all causes irrespective of legislative or other juridical foundations of any such cause or matter before it as the juridical root of the Court's inherent power does not lie in section 3A of the ***Civil Procedure Act*** but in the nature of the High Court as a Superior Court of judicature.

15. In the said case the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

16. In this case the reason advanced by the applicants for not taking steps in the matter within the prescribed time is that the instructing client was unwell and was unable to give the instructions. However no evidence has been adduced to support the fact that the nature of the illness was such that instructions could not be given.

17. It is noteworthy that under the Advocates Remuneration Order what is required as a first step in the objection is the request for the reasons for the decision. Surely one does not require instructions to request for the reasons and in any case it has not been shown that the instructing client was not in a position to give such simple instructions as the request for reasons for the decision.

18. In my view the reasons advanced for not taking a necessary step in the proceedings are simply unsatisfactory.

19. In the premises no sufficient material has been placed before me to enable me exercise my discretion

in favour of the applicants and extend the time for commencing the process of objection to the taxation.

20. Accordingly, this Motion fails and is dismissed with costs.

Dated at Nairobi this 31st day of July, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Otieno for Mr Orina for the applicant

CA Mwangi