



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 271 OF 2012

TILLY KITUKUAPPLICANT

VERSUS

HELLEN MUENI MULEI RESPONDENT

RULING

The Application

This ruling is on an application by way of a Chamber Summons dated 25th October 2012 brought by the Applicant herein, pursuant to the provisions of Rules 11 (1) & (4) and 56 of the Advocates Remuneration Order and section 3A of the Civil Procedure Act, The Applicant is seeking the following orders:

1. That this Court be pleased to order that this suit being Mutomo RMCC No. 2 of 2011 be consolidated with Mutomo RMCC No. 10 of 2011, Mutomo RMCC No. 5 of 2011, Mutomo RMCC No. 19 of 2011, Mutomo RMCC No. 11 of 2011, Mutomo RMCC No. 22 of 2011, Mutomo RMCC No. 20 of 2011, Mutomo RMCC No. 12 of 2011, Mutomo RMCC No. 7 of 2011, Mutomo RMCC No. 13 of 2011, and Mutomo RMCC No. 3 of 2011 for purposes of this application only.
2. That this Honourable Court be pleased to order an interim stay of execution of the Order/Decree issue on 1st October, 2012 emanating from the judgment of this Court delivered on 15th June 2012 in the aforementioned matters pending the *inter partes* and final determination of this application.
3. That this Court be pleased to enlarge time to enable the applicants herein to object to the decision of the taxing officer on 13th August 2012 out of time.

The main grounds for the application as set out in the Chamber Summons and in a supporting affidavit sworn on 25th October 2012 by Lillian Waweru, a Legal Manager at Directline Assurance Company Limited who are the insurers of motor vehicle registration KBH 157. In summary the grounds are that the aforementioned suits arose from the same cause of action being a road traffic accident alleged to have occurred along the Kitui – Mutomo at Kyatune area on 27th November 2010, involving motor vehicle registration number KBH 157C. The Respondents in the aforementioned suits allege to have been passengers in the said motor vehicle at the time of the said accident, and the Applicant(s) are the alleged legal and or beneficial and/or insured owners and/or agents /employees of the alleged owners of the Motor Vehicle Registration Number KBH 157C.

It is alleged that the advocate for the Respondents caused the Court to assess costs in the absence of the Applicants, and that no notice of the same was given despite the Applicant(s) having taken steps to have the costs assessed on agreement by the parties. The Applicant contends that there was a test suit in the matters in SRMCC No. 15 of 2011 in which judgment was on liability was delivered by the Court on

23rd May 2011. Further, that judgment was subsequently entered on aforementioned matters 15th June 2012 wherein the Applicants were found 100% liable and the Respondents were awarded general and special damages together with costs of the suit and interest.

The Applicants are aggrieved by the decision of the Taxing Officer delivered on 18th August, 2012 in the aforementioned suits, and wish to seek reasons for the decision. It is alleged that the Respondents in the aforementioned suits did not invite the Applicants to participate in assessment / taxation of the costs as required under paragraph 72 of the Advocates (Remuneration) Order, 2009.

Further, that the said Respondents were awarded attendance and witness costs in all the aforementioned suits whereas there were no attendances and/or witness expenses incurred, save for the test suit in SRMCC 15 of 2011 in which the Applicants have already settled the said costs. This was for the reason that the other suits were stayed pending the hearing of the “test suit” pursuant to a consent between the Respondents’ advocates and the Applicant’s advocates which was adopted as an order of the Court on 22nd November 2011.

The Applicants averred that they took steps to be involved in the assessment process but only learnt that the costs had already been assessed when the time within which to seek reasons had already lapsed. The Applicants are also apprehensive that the Respondents may threaten to levy execution against them as the certificates of costs have already been issued. Further, that the costs that were assessed/taxed on 13th August, 2012 are for a substantial sum and the Applicants stand to suffer collective injustice and irreparable damage and loss if they are paid to the Respondents, as they are contested.

The Applicant did not file written submissions despite being given several opportunities and timelines within which to do so.

The Response

The Respondent filed a replying affidavit sworn on 10th April 2013 in reply to the Applicant’s application. The Respondent’s Advocates, Mulu & Company Advocates, in addition filed written submissions dated 15th July 2015. The said application is opposed by the Respondents who state that the judgment delivered by the lower court at Mutomo on 15/6/2012 awarded the Respondents damages together with costs and interest. Further, that the Respondents proceeded to have their costs assessed and a decree to that effect issued.

It is the Respondent’s contention that annexures ‘LW-2’ and ‘LW-3’ of the Applicant’s application is evidence that the Applicants were aware of the assessment of costs by the taxing officer at the lower court as way back as 12/7/2012. However, that they sat on their laurels and did not take any, if at all, step to object to the costs. Further, that while this application was filed on 29/10/2012, the applicant has not been keen to have it heard expeditiously and it is in fact the Respondents who have fixed this matter for hearing severally.

It was submitted by the Respondent that the applicable rule is Rule 11(1) of the Advocates Remuneration Order (2009) which provides as follows;-

“Should any party object to the decision 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.”

Further, that Rule 11(4) of the Advocates Remuneration Order (2009) grants discretionary power to this Court to enlarge the time within which an objection to taxation may be raised, however, the discretion should be exercised judiciously and reasonably to meet the ends of justice.

It was submitted in this regard that no reason has been advanced by the Applicant to explain the delay in filing the objection to taxation on time, and there is nothing for this court to consider in making a decision

on whether or not to enlarge time. It was the Respondent's contention that the Applicant is intent on delaying the Respondents from getting the fruits of the legally obtained judgment and costs.

The Issue and Determination

I have considered the arguments made by the parties, and find that the issue for determination is whether the court should exercise its discretion to enlarge time for the Applicants to object to the Taxing Officer's decision. The provisions as to the filing of references from decisions of taxing officers are found in rule 11 of the Advocates Remuneration Order, which provides as follows:

“ (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) 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.”

The material time for filing an application to this court as set out in rule 11(2) of the said Order is within 14 days of receipt from the taxing officer of the reasons for his or her decision. Under Rule 11(4) of the Advocates Remuneration Regulations, this Court has the discretion to extend the time for challenging the decision of the taxing master. However, the applicant has to justify the delay and the court must exercise its discretion judiciously so as not to prejudice any party as held in **Shah Parekh Advocates vs Appollo Insurance Co. Ltd, (2005) eKLR.**

The Applicants herein claim that they were condemned unheard during the hearing of the taxation, and explained that since they were not aware nor informed of the taxation date, they delayed in giving notice to the taxing officer within the required 14 days.

I have perused the annexures 'LW-2' and 'LW-3' to the Applicant's supporting affidavit which the Respondent claims is evidence that the Applicants were aware of the taxation. I note that the first bundle of letters marked "LW2" were letters dated 12th July 2012 by the Applicant's advocates to the Respondents' Advocates confirming payment of the decretal sum and costs, while the second bundle of documents marked "LW3" were notices dated 29th July 2012 by the Applicants' Advocates to the Respondents' Advocates to fix the matter for mention.

There also various letters dated 12th September 2012 which are annexed, which were written by the Applicants' Advocates to the lower Court seeking to peruse the court files and obtain certificates of costs. It is thus evident that the Applicants only became aware of the taxation on or about 12th September 2012, which was one month after the assessment of costs had taken place. In addition, no evidence was provided by the Respondents to show how the date of taxation of 13th August 2012 was taken, nor of any notice of the same given to the Applicants.

I am therefore satisfied that the explanation by the Applicants as to why they did not file their objection within time is legitimate, and I am inclined to exercise discretion in their favour. I am in this regard

guided by the decision in **Shah v Mbogo (1967) EA 116** as follows:

“... this discretion is intended so to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by way of evasion or otherwise to obstruct or delay the course of justice”.

I note that some of the prayers sought in the Applicants’ Chamber Summons dated 25th October 2012 are spent. The orders of this Court therefore is on the outstanding prayer, and it is hereby ordered as follows:

1. Time be and is hereby enlarged for the Applicants to object to the decision of the taxing officer on 13th August 2012 in Mutomo RMCC No. 2 of 2011, Mutomo RMCC No. 10 of 2011, Mutomo RMCC No. 5 of 2011, Mutomo RMCC No. 19 of 2011, Mutomo RMCC No. 11 of 2011, Mutomo RMCC No. 22 of 2011, Mutomo RMCC No. 20 of 2011, Mutomo RMCC No. 12 of 2011, Mutomo RMCC No. 7 of 2011, Mutomo RMCC No. 13 of 2011, and Mutomo RMCC No. 3 of 2011 out of time within 14 days of the date of this ruling.
2. Each party shall bear their costs of the said Notice of Motion.

Dated, signed and delivered in open Court at Machakos this 19th day of January 2016.

P. NYAMWEYA

JUDGE