



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL APPL. NO. 156 OF 2014**

**OLANDO UDOTO & OKELLO ADVOCATES.....APPLICANT**

**VERSUS**

**JOHN CHOMBA T/A RANGE MERCHANTS.....RESPONDENT**

**RULING**

1. By an application dated 2nd February 2016 and filed in court on the same day, the respondent/applicant John Chomba T/A Range Merchants seeks from this court orders:

a. Spent

b. Spent

c. That the court be pleased to enlarge time within which the respondent/applicant may lodge an objection to the decision of 12<sup>th</sup> December 2015 by the learned taxing officer.

d. That the decision of the learned taxing officer of 12<sup>th</sup> November 2015 be set aside and the bill of costs dated 29<sup>th</sup> January 2014 be taxed afresh and

e. Costs

2. The application is brought under the provisions of Rule 11(1) of the Advocates (Remuneration Order) and all other enabling powers and provisions of the law.

3. The application is predicated on the grounds that:

a. The ruling on taxation was delivered on 12<sup>th</sup> November 2015.

b. Despite having instructions to do (sic) so, the respondent/applicant's former advocates did not file an objection in time.

c. The learned taxing officer erred in law and principle in determining the costs payable.

d. The client has already paid the fees agreed.

4. The application is further supported by an affidavit sworn by John Wanjohi Chomba sworn on 2<sup>nd</sup>

February 2016, who deposes that he appointed the firm of M.K. Chebii & Company advocates to act for him in the matter but that the said advocates failed to appear in court for hearing of the bill of costs on 29<sup>th</sup> October 2015. The said advocates thereafter failed to appear in court for the delivery of the ruling on 12<sup>th</sup> November 2015. That thereafter, the said advocates informed the respondent/applicant that the ruling had been delivered and advised him that he could challenge the decision. That the applicant was aware and the applicant herein executed a supporting affidavit for the same but that his former advocate did not file it in court as shown by annexure JWC 1 draft application and draft supporting affidavit; that it was not the applicant's fault that the reference/objection was not filed challenging the decisions of the taxing officer; that he has an arguable reference for reasons that:

- a. The taxing officer relied on a 2009 Advocate Remuneration Order for a matter filed in 2001;
- b. The taxing officer ignored the issue that retainer for the instructions claimed was not given.
- c. The taxing officer made a determination on the value of the subject matter without any supporting documents being placed before him.
- d. The taxing officer made determinations on items which had not been particularized.

5. The Chamber Summons is opposed by the applicant/respondent/advocate who swore a replying affidavit on 5<sup>th</sup> February 2016 by Hector Odallo Okello advocate who deposes that the application is bad in law, lacks merit, frivolous, vexatious and brought in bad faith and to deny his firm the requisite legal fees; that no justifiable reasons had been advanced for the granting of the orders sought, that the applicant seems not to understand what he is seeking from this court; that the reasons for the delay are not sufficiently stated; the decision sought to be challenged is not annexed; the application should have merit or probability of success; that the application should be for review to a judge for consideration and attention and not an objection.

6. The parties' advocates agreed and filed written submissions to dispose of the chamber summons. In his written submissions dated 15<sup>th</sup> February 2016 and filed in court on 16<sup>th</sup> February 2016, the applicant who is the respondent in the main cause submitted, reiterating the grounds on the face of the application dated 2<sup>nd</sup> February 2016 and the supporting affidavit thereof; while maintaining that it was his advocate who failed to file the objection as intended, against the taxation by the taxing officer.

7. The applicant also set out the grounds upon which he intends to object to the taxation which are, principally, that the taxing officer erred in law in applying Schedule V1 of the Advocates Remuneration Amendment Order, 2009 instead of applying the 1997 Order since the bill as taxed related to a suit filed in 2001. The applicant also denied in toto each of the items of the bill challenging the same.

8. The applicant submits that having been called upon by his former advocates to swear an affidavit in support of an application to challenge the taxed bill of costs, it was the failure of his said former advocates to file the application in time and that the delay is not inordinate hence the court should not allow the respondent to unfairly enrich himself in view of the meritorious intended challenge to the amount taxed.

9. In the opposing submissions dated 9<sup>th</sup> February 2016 and filed on the same day, the respondent contends that the application is bad in law, lacks merit, is frivolous, vexatious and brought in bad faith since there was no decision made on 12<sup>th</sup> December 2015 by the taxing officer but that there was one of 12<sup>th</sup> November 2015. That there is no sufficient time given for failure to file objections to the taxation within 14 days from 12<sup>th</sup> November 2015; that the draft objection should have been attached to this application hence there are no triable issues upon which this court can base the exercise of its discretion to grant the prayers sought in the application; and thirdly, that the delay in concluding this matter prejudices the respondent as the applicant intends to drag this suit by filing numerous

applications. Finally, that in view of the above, should the court find it fit to grant the application, then the same should be with conditions the major one being that he deposits the said amount of kshs 254,143 in court within seven(7) days of the order, failure of which the same to lapse. He prayed for dismissal of the application with costs.

10. I have carefully considered the application dated 2<sup>nd</sup> February 2016, the supporting affidavit, replying affidavit and the parties written submissions and authorities relied on by the applicant's counsel.

11. The law applicable and providing for enlargement of time within which to file an objection out of time is Rule 11(4) of the Advocates Remuneration Order which provides that:

***“ The High Court shall have power in its discretion by order to enlarge 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 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. The above provision clearly provides that this court has unfettered discretion to enlarge time for any party to do what is required under the provisions of Paragraph 11 of the Advocates (Remuneration) Order. That discretion, nonetheless, must be exercised judiciously.

13. In this case, it is not in dispute that taxation of advocate/client bill of costs was done on 12<sup>th</sup> November 2015 and a Certificate of Taxation issued by the Taxing Officer/Deputy Registrar on 17<sup>th</sup> December 2015 for kshs 254,143. On 7<sup>th</sup> January 2016, the advocate filed Notice of Motion dated 5<sup>th</sup> January 2016 seeking for entry of judgment on the taxed costs.

14. As at the time the above application came up for hearing interpartes on 21<sup>st</sup> January 2016, no objection to the taxation had been filed. The application was then argued interpartes before me and a ruling date reserved for 24<sup>th</sup> February 2016 when the respondent filed this application seeking for stay of the ruling on judgment for taxed costs as espoused. In Section 51 Rule (2) of the Advocates Act, and seeking leave to file objection to taxation out of time.

15. No doubt, there was delay in filing this application which was only lodged after the application for judgment for taxed costs had been canvassed and reserved for ruling, following the serious opposition to the entry of judgment and giving reasons that the respondent/applicant had instructed his former advocates to file objection to the taxed bill of costs and even signed an affidavit for purposes of filing such objection but that the same had not been filed.

16. There being inordinate delay in filing the objection as stipulated under paragraph 11 of the Advocates Remuneration Order, the only issue is whether the delay has been explained to the satisfaction of the court and that notwithstanding the delay, justice can still be served to the parties without occasioning them irreparable prejudice.

17. In **Leo Sila Mutiso V Rose Hellen Wangari Mwangi CA Nairobi 255 of 1997** (unreported), the Court of Appeal stated that:

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which the court takes into account in deciding whether to grant an extension of time are:***

***First, the length of the delay’ secondly, the reason for the delay, thirdly (possibly), the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”***

18. I have already found that the delay is from 12<sup>th</sup> November 2015 upto 2<sup>nd</sup> February 2016, about three months from the date of taxation. On the reasons for delay, the applicant/respondent contends that he had instructed his former advocates on record to file objection to the Certificate of Taxation quite in time and even executed a supporting affidavit to the contemplated application which was also drafted as annexed to his affidavit hereto, but only learnt that the same had not been filed on time. In other words, The applicant was disappointed by his then advocates on record who delayed filing an already drafted application following his express instructions to them to file it in time. This court has not been given any reasons why the applicant's former advocate's feet grew cold after the taxation. That matter is left to speculation since they have not sworn any affidavit explaining the reasons for their failure to file the objection in time as instructed by the applicant.

19. Albeit not every mistake made by an advocate that would lead to a client suffering would be excused, the Court of Appeal has set standards that this court has also adopted in several of its decisions in such instances. For example, in **Wanendeya V Gaboi & Another [2002] 2 EA 662 cited with approval in CA 70/2004** ( Warsame, M' Inoti and Murgor JJA) where the Court of Appeal in reinstating an application that had earlier been dismissed for non attendance by an advocate for a party, the court stated that disputes ought to be determined on merits and that lapses ought not to necessarily debar a litigant from pursuing his rights.

20. In **Katsuri Ltd V Nyeri Wholesalers, CA (APP) No. 248 of 2012 at Nyeri**, a dismissed appeal was restored by the Court of Appeal where the mistake involved having been the omission of counsel to enter the date of the hearing in his diary.

21. In **Phillip Chemwolo & Another V Augustine Kubende [1982-88] KAR 103 page 1040**, the Court of Appeal- Apaloo JA stated as follows regarding blunders and mistakes of advocates such as those involved in this case:

***“ Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.***

***I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purposes of imposing discipline.”***

22. In yet another Court of Appeal decision of **Belinda Murai & 9 Others V Amos Wainaina CA Nairobi 9/1978** regarding mistake by counsel , the Court of Appeal pronounced itself thus:

***“A mistake is a mistake, it is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of junior Counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which Courts of Appeal sometimes overrule.”***

23. The above decisions, though pronounced long before the effective date of the new constitutional dispensation in 2010, the principles established do resonate very well with the letter and spirit of the Constitution of Kenya 2010 which commands us to administer justice without undue regard to procedural technicalities, whereas Statutory provisions of section 1A and 1B of the Civil Procedure Act obliges the courts to exercise their authority in the application of the Rules and law in a just, expeditious, proportionate and affordable manner of resolving disputes.

24. In the instant case, there is no indication that the applicant herein is trying or has tried to undermine or delay the just and expeditious determination of this matter. This is so because his new advocates even went ahead and filed replying affidavit to oppose the application for judgment on taxed costs and argued the application in court on the first appearance in court. I do not therefore find any evidence of the applicant being guilty of overreaching or dilatory conduct in this matter. It is not unusual that indeed delay in litigation is more often than not caused by the procedural requirements under the same law that commands courts and the parties to disputes to administer justice and or to prosecute cases without undue delay. However, in this case, apart from the recalled ruling in respect of the application for judgment on taxed costs, there has been no other thing on record to suggest that the applicant has procrastinated the expeditious and just determination of this advocate/client costs matter.

25. I therefore on the above reasons find that despite the delay which has been satisfactorily explained, justice can still be served by enlarging time for the applicant to challenge the already taxed costs. I am equally satisfied that the failure to file objection to taxation in time is excusable and an order of enlargement will accord both parties an equal opportunity to properly have their day in court, for a court of law strives to do justice and denying a party a chance to be heard on merit to ventilate his grievances fully is a last resort measure. Though the allowing of this application will no doubt inconvenience the advocate/respondent, the inconvenience is capable of being adequately compensated by an award of costs since he takes no blame for the delay.

26. On the chances of the application for objection succeeding, the applicant has gone to great detail to give the grounds why he believes his intended objection has merits. However, at this stage, this court shall not delve into the merits of the intended objections save to state that in the face thereof as stated in the grounds and submissions, the intended objection is arguable and not frivolous. This is not to say that it must succeed. To delve into the details will no doubt prejudice the outcome thereof.

27. As earlier stated, this court does not see any serious prejudice that might be occasioned to the advocate/ respondent if the application is granted. No such prejudice has been demonstrated by the advocate and the delay which has no doubt inconvenienced him in that his judgment has been recalled, can be adequately compensated by an award of thrown away costs.

28. Accordingly, I allow the Chamber Summons application dated 2nd February 2016 and order that:

1. The proceedings in respect of the Notice of Motion dated 5<sup>th</sup> January 2016 be and are hereby stayed

2. The period within which objection to the decision of the Taxing Officer made on 12<sup>th</sup> November 2015 ought to have been filed be and is hereby enlarged. The applicant to file and serve such objection within 14 days from the date hereof.

3. The applicant/client to pay to the respondent/advocate thrown away costs of kshs 20,000/- within the next 14 days from the date hereof and in default summary execution for their recovery to issue.

4. Prayer No. 4 of the application is declined and deferred as it forms the substratum of the intended actual objection proceedings.

Orders accordingly.

Dated, signed and delivered in open court this 20th day of April 2016.

**R.E. ABURILI**

**JUDGE**

**In the presence of**

Mr Okello Advocate for the Respondent

Carolyn Ndegwa (pupil) from Andabwa &co Advocates in court on behalf of the Applicant

Henry: Court Assistant