



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC. MISC. CASE NO. 30 OF 2019**

**MAURICE CARLOS OUMA T/A ODHIAMBO OUMA & COMPANY ADVOCATES.....APPLICANT/RESPONDENT**

**VERSUS**

**PAULINE AKWANCHA.....RESPONDENT/APPLICANT**

**RULING**

Pauline Akwacha (hereinafter referred to as the Respondent) has come to this court seeking orders that there be a stay of execution and all consequential proceedings in Kisumu ELC Miscellaneous Application nos. 30, 31 and 33 all of 2019 pending the hearing and determination of this application inter partes and that the court does extend the time for challenge of the decision of the taxing master. That the taxation of the bill of costs dated 17<sup>th</sup> October, 2019 and the resultant Certificate of taxation and Decree be set aside and the Bill of costs be remitted back for taxation by another Deputy Registrar for hearing on merits. That the orders issued herein to apply to in Kisumu ELC Miscellaneous Application nos. 30, 31 and 33 all of 2019 since they were already consolidated. Costs of this application be provided for.

The application is based on the facts that **the Respondent's previous advocates is unresponsive to the Respondent's request on the matter necessitating the change of advocates and that the failure to file the reference/revision within the requisite period was occasioned by the Respondent's previous advocate who failed to notify the Respondent about the taxation of the Court in time until when the statutory tie to file a reference had already lapsed.**

**The respondent contends that the failure to file a request in time was a mistake of an advocate which should not be visited on the Respondent/Judgment Debtor and that the intended reference has good chances of success.**

**If a stay of execution of the Judgment/decree pending the hearing and determination of the Intended Reference is not granted, the Respondent's application herein and the eventual intended reference will be rendered nugatory.**

**That the Respondents instructed the Applicant as a group in a representative capacity and hence the instruction fees, attendances and disbursements should not have been charged on each one of them. Instead the costs should have been taxed and the same divided among the Respondents. That the applicant served the Respondent with a proclamation and auctioneers bill of costs. That the Respondent is aggrieved by the decision of the taxing master and intends to file a reference. That the resultant mother suit KISUMU ELC CASE NO. 136 of 2016 was a suit that sought declaration and it was not a money claim. That the taxed costs are exaggerated and unfair.**

**That the bill of costs pegged the subject matter of the suit at Kshs. 100,000,000/= ostensibly being the value of the suit property while the Respondent was just a tenant paying monthly rent of Kshs. 10,000/- which should inform the subject matter. That the Applicant did not disclose to the Honorable Court that a part payment of Kshs. 403,000/= had been made to him during the taxation and when the Judgment was being adopted. That the Respondents were not given an opportunity to be heard and the taxation and all consequential orders ought to be set aside ex debito justice.**

The supporting affidavit reiterates the grounds of the application.

Maurice Carlos Ouma trading as Odhaimbo Ouma & Co. Advocates filed grounds of opposition stating that:

- 1. The application is misconceived and bad in law.**
- 2. The application lacks merit and does not lay.**
- 3. The application is fatally and incurably defective.**
- 4. The application is an abuse of the court process.**

**5. That the affidavit in support of the application is defective.**

**6. The application has not met the threshold required in law to merit the orders sought.**

**7. The application is simply res-judicata, the very issues raised in application, are the very issues that the application has variously raised in all the previous application that have been heard and determined on merits.**

**8. The application has not demonstrated proper reasons for the delay in undertaking the desired action and has simply appeared before this Honorable Court with unclean hands.**

I have considered the application, grounds of opposition and rival submissions. It is trite law that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party. When extending time for taking any action, the court is exercising a discretion that has to be applied Judiciously and not whimsically. The applicant has to give a basis for the extension of time. The applicant has to give reasons for the delay to the satisfaction of the court. Moreover, the respondent to the application ought to demonstrate prejudice if the extension is granted and whether the application has been brought without delay.

The salient facts of this case are that the Advocate –Client Bills of costs were filed on 17<sup>th</sup> October 2019 and taxation of the said bills was done on 3<sup>rd</sup> of September 2020 and the respondent was ordered to pay Kshs. 372,435 in each cause. The certificate of costs dated 7/7/2020 in the sum of Kshs. 372,435 made on 03/09/2020 was adopted as Judgment of the court on 11/6/2021.

Order 11 of the advocates remuneration order provides that an objection to the taxation has to be made within 14 days of the taxation. Order 11 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 subsection (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.**

In this case the respondent took approximately 9 months to come to this court to challenge the bill of costs. The delay is inordinate. Moreover, the respondent has come to court during execution and more than 20 days after time certificate of costs has been adopted as the Judgment of the court. The application appears to be an afterthought.

The respondent appears to blame his previous lawyer who failed to notify her of the taxation of the court. This court observes that it was also a duty of the respondent to find out from her lawyer the outcome of the taxation. Moreover, there is no letter addressed to the advocate requesting for the outcome of taxation and therefore I do not believe that the respondent was not aware of the outcome of the taxation.

The upshot of the above is that the respondent is guilty of inordinate delay in applying for extension of time and that mistake of counsel can't be an excuse in this case as the respondent has not demonstrated that she tried to find out the outcome of taxation. Ultimately the application is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 21<sup>st</sup> DAY OF JANUARY, 2022**

**ANTONY OMBWAYO**

**JUDGE**

**THIS RULING HAS BEEN DELIVERED TO THE PARTIES BY ELECTRONIC MAIL DUE TO MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN THE LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON 15TH MARCH 2020.**

**ANTONY OMBWAYO**

**JUDGE**