

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC PETITION 5 OF 2019

GEORGE OWINO ODHIAMBO & 13 OTHERS.....PETITIONERS

VERSUS

KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

R U L I N G

1. The petition by the petitioners was on 30th July 2020 dismissed with costs to the 1st Respondent. The party and party costs were on 8th December 2020 taxed at Kshs.326,367/= as per the ruling delivered by the Taxing Master on the said date.

2. That by a chamber summons application dated 24th February 2021 brought under Order 11 (2) of the Advocates Remuneration Order, the petitioners inter alia sought leave to lodge a reference against the ruling of the Taxing Master out of time; stay of execution of the certificate of costs, and, setting aside and/or variation of the certificate of costs; as the court deemed appropriate. The application was supported on the grounds set out on the body of the application and the supporting affidavit sworn and supplementary affidavit sworn by Steve Gichaba Birundi, the 13th petitioner/applicant. The applicant averred that the taxation of the instructions and fees getting up fees was manifestly irregular and excessive and thus, faulted the Deputy Registrar's exercise of discretion in taxing the items at the amounts that she did. The applicants contended the Deputy Registrar failed and/or neglected to take into account that the petition was a public interest matter, and to apply the generally accepted principles of taxation in public interest matters. The applicant further contended execution in regard to the costs was carried out in a discriminatory manner as against the 13th petitioner alone when the costs were against all the 14 petitioners.

3. Joseph Nyoike Mutonyi advocate for the 1st Respondent filed replying affidavit in opposition to the applicants application. He averred that the taxing master gave reasons in her ruling and there was no legal requirement to prepare another ruling. He stated the applicants ought to have filed the reference within 14 days of the delivery of the ruling on the taxation. He averred that the applicants had not given any reason for the failure to file a reference within the period provided for under law. He stated the applicant's advocates were served with a Notice of Taxation of the 1st respondent's party and party costs scheduled on 4th November 2020 on 19th October 2020 which Notice was duly received and acknowledged. The petitioners advocates did not attend the hearing on 4th November 2020 and the taxation proceeded exparte. The petitioners advocates were served with a ruling notice scheduled for 8th December 2020 via email on 11th November 2020. On 16th December 2020 the 1st Respondent's advocates notified the petitioners advocates that the party and party bill of costs had been taxed at Kshs.326,367/= and on 15th January 2021 forwarded via email the certificate of costs issued by the Deputy Registrar on 23rd December 2020 to the petitioners advocates. The 1st respondent's advocates thus contended the applicants had all along been aware of the taxed costs and did not take any action to challenge the same until the execution for the recovery of the costs was initiated. There was no explanation offered for the delay in filing the Reference and the 1st respondent prayed for the dismissal of the application.

4. Although the court directed the parties to canvass the application by way of written submissions, the applicants did not file any submission. The applicants counsel on 21st October 2021 informed the court the petitioners had opted not to file any submissions and indicated that they would entirely rely on the affidavits sworn in support of the application.

5. I have reviewed and considered the application and the affidavits in support and in opposition to the application and the written submissions filed on behalf of the 1st respondent. The singular issue for determination is whether the applicants have made out a case to warrant the court to exercise its discretion to allow extension of time for filing a reference out of time and/or to interfere with the taxing master's exercise of discretion.

6. The applicant filed Notice of Objection to the taxation of the party and party costs on 2nd March 2021 vide the Notice of objection dated 24th February 2021. The ruling rendered by the Deputy Registrar on 9th December 2020 contained the reasons respecting the taxation of the party and party costs at Kshs326,367/=. The applicants had notice of the date of the ruling but failed to attend the court to take the ruling. The applicants were duly notified about the outcome of the taxation by the 1st Respondent's advocates on 16th December 2020 via email. The applicants, if they had any objection to the taxation, had 14 days from the date of the ruling to file a reference. In the cases of **Ahmed Nasir Abdikadir & Co. Advocates -vs- National Bank of Kenya Ltd (2006) IEA5** and **Evans Thiga Gaturu, Advocates -vs- Kenya Commercial Bank Ltd (2012) eKLR** courts held that where a ruling on taxation was comprehensive and contained reasons, it was unnecessary for the taxing officer in the event of an objection to the taxation, to redraft another ruling containing the reasons.

7. In the **Ahmed Nasir Abdikadir & Co Advocates -vs- National Bank of Kenya Ltd** case (supra) the court stated thus :-

“ Although rule 11(1) of the advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not indeed to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling --- Therefore the reference having been filed way out of the period prescribed should have been dismissed but having been given due consideration in substance the same is dismissed.

8. In the present matter the ruling given by the taxing officer contained the reasons and it was superfluous for the applicant to seek reasons on the taxation when the same had been provided. The notice of objection to the taxation was filed well over two months from the date the ruling was delivered. No reasons whatsoever have been proffered for the delay. It was incumbent on the applicants to explain the delay in giving notice of objection and in filing the reference against the taxation. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. See the case of *Nicholas Kiptoo Arap Korir Salat –vs- IEBC & 7 others (2014) eKLR* where the supreme court laid the principles that should guide a court in exercising its discretion to extend time.

9. In the instant matter the court is satisfied the applicants have not provided any basis upon which the court can exercise the discretion to extend time in their favor. The chamber summons application dated 24th February 2021 and Notice of Objection of even date are accordingly dismissed with costs to the 1st Respondent.

10. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 20TH DAY OF JANUARY 2022.

J M MUTUNGI

JUDGE