



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPL. CASE NO. 530 OF 2013

MWANGI KENG'ARA & CO. ADVOCATESADVOCATE/RESPONDENT

VERSUS

UPWARD SCALE INVESTMENTS CO. LTD. 1ST CLIENT/APPLICANT

LINMERX HOLDINGS LIMITED2ND CLIENT/APPLICANT

GEOMAX CONSULTING ENGINEERS LTD.....3RD CLIENT/APPLICANT

GATH CONSULTING ENGINEERS LTD.4TH CLIENT/APPLICANT

JAMES RIRIGI NJUGUNA.....5TH CLIENT/APPLICANT

TRIAD ARCHITECTS 6TH CLIENT/APPLICANT

MASTERBILL INTEGRATED PROJECTS.....7TH CLIENT/APPLICANT

RULING

INTRODUCTION

1. The **Notice of Motion** application before the court is dated **2nd February 2015**. It is filed by the Client/Applicant under Section 1A, 1B and 3A of the Civil Procedure Act, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and any other enabling provisions of law. The application seeks the following orders:-

- 1. That this application be certified urgent and heard ex-parte in the first instance.**
- 2. That this Honourable court be pleased to stay taxation of the Advocate/Client bills of costs filed in Nairobi High Court Miscellaneous Application numbers 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529 and 530 of 2013 and Nairobi High Court Miscellaneous Application Number 26 of 2014 between the parties herein pending inter-partes hearing and determination of this application.**
- 3. That this Honourable court be pleased to enlarge time for giving notice to appeal and grant the Applicants herein leave to file an appeal out of time against the decision of the Honourable court vide its Ruling dated and delivered on 18th November 2014.**

4. That this Honourable court be pleased to stay taxation of the Advocate/Client bills of costs filed in Nairobi High Court Miscellaneous Application numbers 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529 and 530 of 2013 and Nairobi High Court Miscellaneous Application Number 26 of 2014 between the parties herein pending inter-partes hearing and determination of the intended appeal.

5. That costs of the this application be borne by the Advocate.

2. The application is premised on the grounds set out therein and is supported by affidavit of **Joseph Gitau Mburu** dated 26th February 2015 with annexures thereto, and a further affidavit of **Leonard Njega** dated and filed in court on **10th February 2015**.

3. The background to the application, according to the Applicant, is that that the Applicants herein filed an application to strike out and/or dismiss the bills of costs field in the matter herein together with sixteen (16) other matters namely Nairobi High Court Miscellaneous Application numbers 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529 and 530 of 2013 and Nairobi High Court Miscellaneous Application Number 26 of 2014 vide an application dated 19th August 2014. The Respondent did reply to the said application and also filed a preliminary objection in relation thereof. The court proceeded to hear and rely on the preliminary objection thereby upholding the same, allegedly without giving due attention to the application. The Applicant states that the said preliminary objection ought to have been canvassed together in the application given the fact that to determine the preliminary objection, reference had to be made to the application and as such legal issues and factual issues both fell for consideration. The Applicant states that the said application raised serious issues as it referred to directions that had been given by the court in relation to bills of costs to be placed before the court for determination. The said order, and/or court directions were not followed and the Applicants herein being aggrieved sought protection of the court. The Applicants are aggrieved by the said ruling and have preferred an appeal against the same. The outcome of the appeal shall have a direct effect on whether or not the taxations should proceed with the bills as presented or not. It is submitted that it would be counter-productive to have two processes running concurrently within the courts and it would be prudent for the court to determine and/or give directions on the validity of the bills of costs filed before any other steps are taken.

4. The Advocate/Respondent opposed the application vide a Notice of Preliminary Objection dated and filed in court on 5th February 2015. The Advocate/Respondent raised two issues in the Notice of Objection that is,

i. That the Notice of Motion is bad in law and is an abuse of the process of this court

ii. That the Notice of Motion be dismissed with costs to the Advocate/Respondent.

EVIDENCE AND SUBMISSIONS OF PARTIES

5. Mr. King'ara for the Client/Applicant relied on the supporting affidavit in the application, and further submitted that the court gave a Ruling herein on 18th November 2014, which was against the Client/Applicant. However, Mr. King'ara did not attend the court for the Ruling and so they were not able to file their Notice of Appeal within time, but did that three days out of time, and for that reason, the Client/Applicant prays for extension of time. On the issue of stay, the counsel submitted that the Advocate/Respondent has already been paid a sum of Kshs.24 million, and they are still taxing a sum of Kshs.156,000,000/=. The counsel submitted that the Advocate/Respondent has become greedy and vexatious and should be stopped by this court. Since this court did not by its Ruling of 18th November 2014 stop the said taxation, it is the Applicant's prayer that at least a stay of those taxations should be allowed to enable the Client/Applicant appeal that Ruling.

6. M/s Mwangi Keng'ara appeared for the Advocate/Respondent and submitted that this application is an abuse of the court process and should be dismissed with costs. She submitted that the said Notice of Appeal was filed in court on 4th December 2014, but was served upon her in court on 11th February 2015, and that by dint of Rule 77 (1) of Court of Appeal Rules the Notice should be struck out on that ground. On the merits of the application the counsel submitted that the issue before the court arises from the provisions of Rule 13 (1) of the Advocates Remuneration Order. Under Rule 2 thereof, the current Notice of Motion, being filed under the Civil Procedure Rules, is incompetent. Under the Advocates Remuneration Order there is no provision for filing a Notice of Appeal. That is provided for under Rule 11 (3) and its by way of a Chamber Summons before a Judge who rendered the decision. The counsel further submitted that before a stay of execution can be granted there must be an appeal that has been filed in court. Failure to annex a draft memorandum of appeal, to show whether there is an arguable appeal is fatal to the application. The said Notice of Appeal is to be filed under Appellate Jurisdiction Act Cap 9 Rules 4 and 74. The current Notice of Appeal is not filed under Cap 9 and 15 therefore incompetent. On the prayer to extend time counsel submitted that no reason have been advanced as to why there was delay. The notice of the Ruling of 18th November 2014, was given to all the parties in court and there was no reason why the Applicant did not attend the court. Counsel finally submitted that if the court were to exercise its discretion to allow the application, then the court should order security for the sums to be taxed at Kshs.134,041,994/80 to ensure that after the intended appeal is determined, the subject matter of taxations would still be intact.

7. I have considered the application and the submission of the parties. In my view, the following are the issues relevant to dispose of this matter:-

(a) Whether the application is properly before the court.

(b) Whether there being no draft memorandum of appeal the application should be dismissed.

(c) Whether this court can exercise its discretion to allow the application, and if so, how.

8. On the first issue, the Advocate/Respondent submitted that the Applicant ought to have come to court via the Advocates Remuneration Order, which is a complete code which does not provide for appeals from Taxing Master's decision. It was submitted that under Rule 11 of the Order grievances arising from the Taxing Masters decisions are ventilated through references to a judge in chambers. In my view, the matter before the court is not a reference before a judge in chambers. It is an independent process founded under the Civil Procedure Rules with intention to stop a process currently with the Taxing Master. The Taxing Master has not rendered a decision which can be the subject matter of a reference. Indeed, the Applicant has clearly stated the provisions of the law under which the Applicant is coming to court. I therefore find that the applicability of the Advocates Remuneration Order at this stage is premature, and that the application is properly before the court.

9. The second issue is whether the Notice of Appeal is properly filed and whether the lack of a draft memorandum of appeal makes it defective. A related issue to this is whether the court should extend the time to file the said appeal. On this matter M/s Mwangi Keng'ara availed many authorities. In the case of **Kenya Union of Domestic Hotels and Allied Workers – Vs – Nairobi Club**, the Court of Appeal stated that,

“It is now 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 this court takes into account in deciding whether to grant an extension of time are: first the length of the delay; secondly, the reason for 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.”

10. As evidenced by the above case law, it is clear to me that a decision to extend time to appeal is at the discretion of the court. That discretion is to be executed judiciously. In the matter at hand, the delay is only for 3 or 4 days. It is not inordinate. Further, the reason for delay is given. The counsel failed to attend the Ruling of the court on 18th November 2014, and therefore was not immediately aware of the content of the Ruling. I therefore find that the delay was excusable, and that in addition, there will be no prejudice to be suffered by the Respondent if the application were to be allowed. The other issues raised in relation to the said Notice is that the notice is not filed under Cap 9 of the Laws of Kenya, and that there is no draft memorandum of appeal to enable this court to determine whether there is an arguable appeal. Because of the very protected nature of this application and previous rulings of this court in the matter, and also because of the magnitude of the claim by the Advocate/Respondent which is over Kshs.156,000,000/= being alleged fees due to the Advocate/Respondent, this court would be reluctant to dismiss the application on technicalities of procedure. A party who wishes to test the integrity of the taxation process involving an amount of Kshs.156,000,000/= claimed in fees should not fail on technicalities. The justice system, now embodied in the Constitution through a process of fair hearing would be availed to such a litigant, and unless the failure is so material and going into the root of the matter, the court will allow every application to be heard and determined on their merits. I will therefore not pronounce myself on whether or not the said Notice of Appeal is proper or the effect of the fact that no draft memorandum of appeal has been annexed.

11. The court is also cognisant that the ongoing taxation process is lawful. This court has already dismissed an application to stop the same. It is now on record that the Taxing Master will render a Ruling on the said taxations on 26th March 2015. In other words, the process is already complete and the outstanding issue is only the decision. I will therefore not interfere with that process leading to the delivery of the Taxing Master's Ruling.

12. With the foregoing provisions of this Ruling in mind, I make the following orders:-

a. Time is hereby enlarged for the giving of Notice to Appeal, and the client, Applicant is hereby given the leave to file an appeal out of time against the decision of this court vide its Ruling delivered and dated on 18th November 2014. This order is CONDITIONAL on the Client/Applicant performing in the alternative either order (b) or (c) below.

b. The taxed fees found due by the Taxing Master pursuant to a Ruling to be delivered by the Taxing Master on 26th March 2015 on any subsequent date arising from Advocate/Client Bill of costs filed in High Court Miscellaneous Applications numbers 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529 and 530 of 2013 and 26 of 2014 between the parties herein shall be deposited in an interest earning account opened in the joint names of the parties advocates, and shall be the security for the Advocate/Respondent fees herein.

c. In the alternative to Order (b) above, the parties shall agree on any other available security or mode of security which may be appropriate under the circumstances provided that if the parties are unable to agree on such security within 7 days of the delivery of the Taxing Master's Ruling, Order (b) above will automatically apply.

d. Parties shall bear own costs of the application.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Njenga for the Advocate/Respondent

M/s Mwangi for the Client/Applicant

Teresia – Court Clerk