



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 208 OF 2014

A.M. KIMANI & CO. ADVOCATES ADVOCATES/RESPONDENT

VERSUS

TRIDENT INSURANCE CO. LIMITED CLIENT/APPLICANT

RULING

The Application

This ruling is on an application by way of a Chamber Summons dated 20th March 2014 brought by the Respondent herein, pursuant to the provisions of Rule 11 of the Advocates Remuneration Order. The Respondent is seeking orders that this Court do stay further action on the certificate of taxation dated 20th April 2015 pending the hearing and determination of this application, and do extend time within which the Respondent can object to the Taxing Officer's decision of 14th April 2015. Lastly, that the costs of this application be in cause.

The main grounds for the application are that the Respondent was not heard during the taxation of the Bill and will be prejudiced if not granted the opportunity to be heard, the amount taxed was manifestly excessive and the retainer is disputed. The Respondent's Legal Officer, Martin Bett, deponed in a supporting affidavit he swore on 15th June 2015 that the Applicant acted in bad faith to tax the bill when there were out of Court negotiations ongoing, and that they only came to know of the taxation through the Applicant's letter dated 23rd April 2015. Further, that the Respondent can only be able to deal with the issue of the disputed retainer and the manifestly excessive taxed sum of Kenya shillings Two Hundred and Nine Thousand Eight Hundred Twenty Three (Kshs.209,823.00) if the orders herein are granted.

A further supporting affidavit was sworn on 15th June 2015 by Amos Ogotu Wandago, the Respondent's Advocate, who stated that they were instructed to defend the Bill of Costs dated 18th December 2014 which was slated for hearing on 14th April 2015, but which date was erroneously diarized as 18th February 2015, and that the failure to attend the taxation was inadvertent and not intentional. Further, that he attempted out of court settlement with the Applicant in a meeting held on 4th March 2015 but no agreement was reached.

The Response

The Applicant herein filed Grounds of Objection dated 24th June 2015 and a Replying Affidavit she swore on 4th September 2015. The Applicant stated that the issue of the Respondent having retained her firm to render legal services has never been an issue as the said Respondent did by their letter dated 1/2/2010 instructed her to file a memo of appearance and defence on their insured's behalf in HCC No.

327 of 2009. The Applicant annexed a copy of the letter. Further, that the only issue for determination in the bill filed herein was how much fees was payable for the legal services rendered, and that this has been determined by the Taxing officer when she taxed her bill of costs as mandated by the Advocates Remuneration Order.

The Applicant denied that any meeting and agreement was reached between her and Mr. Amos Wandago Advocate, and stated that the Respondent has admitted that it became aware of the taxed costs on 23/4/2015 and yet they filed this application on 17/6/2015. Further, that the Respondent has failed to disclose that the Applicant filed a recovery suit for costs and summons in the said suit were served on it on 3/6/2015. The Applicant averred that the Respondent had also since filed a defence in the said suit, and that she had filed a response thereto. The pleadings in the said suit were annexed by the Applicant.

The Applicant further averred the filing of this application is a calculated move to frustrate her recovery suit and enforcement of the certificate of costs. It was also contended that the Respondent will not suffer any prejudice if the application is declined as it has recourse to professional negligence against the firm of Okongo Wandago & Company advocates for failure to act. However, that if the orders sought are granted, the Applicant will suffer great prejudice as she will be denied the chance to enforce her taxed costs and fees despite her firm having rendered legal services since 2010 without any payment.

The Submissions

The Respondent's application was canvassed by way of written submissions. The Respondent's Advocates, Morara, Apiemi & Nyangito Advocates filed submissions dated 27th October 2015 wherein they argued that the right to be heard is one of the tenets of natural justice and cited the decisions in **James Mwangi Gachungu vs The AG, Embu Misc. Application No. 36 of 2011** and **C. W. Wanjihia & Co. Advocates Vs A. P. A. Insurance Co. Ltd, High Court Misc Application No. 571, 524 & 525 of 2004** in this regard in relation to applications for taxation of bill of costs.

Further, that the Respondent's former advocate had explained that he had mistakenly believed that the bill of costs had been slated for taxation on the 18th February, 2015 alongside other bills of costs, that is in HCC Milimani Misc. No. 7/15, 8/15, 23/15, 24, 15, 857/14 and 856/15 involving the parties herein. The existence of the said bills of costs has not been disputed, and that the Respondent should not be condemned due to an honest mistake of counsel. It was also submitted that the Respondent is willing to abide by any such terms and conditions as this Court may deem necessary and just to grant the orders herein sought.

The Applicant filed submissions dated 2nd November 2015, and reiterated therein that the issue that the Respondent seeks to raise if allowed to object to taxation out of time is the issue of retainer and yet it has not challenged the letter authorizing the Applicant to act on behalf of their insured in Machakos HCCC NO. 327 of 2009 that is the subject of taxation. Further, that the Respondent has admitted being served with taxation notice and bill of costs and has stated that they became aware of the taxed costs on 23/4/2015 which is nine days after the costs were taxed.

It was submitted in this regard that paragraph 11 of the Advocates Remuneration Order clearly states that anybody who wishes to object to taxation must do so within 14 days from the date of taxation. Therefore that the Respondent at the time it became aware of the taxed costs had 5 days remaining within which they would have objected. However, that it chose not to act and no explanation has been given why. It was further submitted that it is trite law that in any application for extension of time the applicant must satisfy the court that the application has been filed without undue delay, if there is any delay it must be explained. Reliance was placed on the decisions in **Wambugu Motende & Co. Advocates vs Kajulu Holdings Limited & 3 Others, (2015) eKLR Civil application No. Nai 284 of 2014; Banking Insurance & finance Union vs Harambee Co-operative Saving & Credit Society, 2015 Eklr; A. K. Wahome vs Ali Hussein, (2013) eKLR Nairobi H.C Misc application No. 181 of 2012** and **Tana and Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others, (2015) eKLR** where the Courts refused to extend time in similar circumstances.

Lastly, the Applicant submitted that reliefs sought by the Respondent are discretionary, and the law as regard the exercise of the Courts' discretion is as set out in **Mbogo vs Shah, (1967) E.A. 116** and **Shah Parekh Advocates vs Appollo Insurance Co. Ltd, (2005) eKLR Misc 264 of 2003**, where it was held that that such discretion will be exercised when just cause is shown. It was urged in this regard that the Respondent has based its application solely on the basis that the taxation proceeded *ex parte*.

However, that paragraph 14 of the Advocates Remuneration Order allows the Taxing Officer to proceed *ex parte* with the Taxation, and paragraph 76 of the allows the taxing Officer to proceed with Taxation *ex parte* in default of appearance of either or both parties or their advocates. Therefore, that the fact that a matter proceeded *ex parte* is not a good ground upon which the applicant can seek for extension of time within which to object to the Taxing Officer. Further, that the applicant has not shown any error of principle to warrant reference against the decision and neither have they stated the items they need to object to.

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 Respondent 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 Respondent herein claims that it was condemned unheard during the hearing of the taxation and gave reasons why it did not attend the taxation. However, the material delay that ought to be explained is the delay in giving notice to the taxing officer within 14 days, as this is the time sought to be enlarged. The Respondent stated that it was aware of the taxed costs on 23rd April 2015, and this is shown by the stamp acknowledging receipt of the Applicant's letter dated 23rd April 2015 informing of the taxation. The stamped letter was annexed as Annexure “MB1” to the Respondent's supporting affidavit sworn by Martin Bett. The Certificate of Costs on the Court record dated 20th April 2015 certifies that the taxation was undertaken on 14th April 2015.

Therefore, not only was the Respondent within time to file the objection at the time of being notified of

the taxation on 23rd April 2015, but more importantly has offered no explanation why the said objection was not filed within time. It is also noteworthy that the Applicant filed a suit for recovery of her costs on 26th May 2015, and it is upon service of summons on the same on the Respondent on 10th June 2015 is when the present application was filed on 16th June 2015.

This Court also notes that the orders sought by the Respondent are based on alleged failure to attend Court by its previous Advocates. However, this is not a ground for a reference from a taxing officer's decision as contemplated by Rule 11 of the Advocates Remuneration Order, as taxation is guided by items that are clearly indicated in the various schedules of the order, and can only thus be set aside if such items are incorrectly or unreasonably applied. The items which the Respondent claims are manifestly excessive have also not been particularized to guide this Court as to whether valid ground exists for the exercise of its discretion.

Lastly, the Respondent claims that there were no instructions given to the Applicant, yet failed to respond to the letter dated 1st February 2010 that indicates that it gave instructions to the Applicant to enter appearance and file a defence in Machakos HCCC NO. 327/09. The said letter was attached to the Applicant's replying affidavit as Annexure "AMK1".

The sum total of the foregoing is that I am not inclined to exercise discretion in favour of the Respondent as no valid grounds have been shown. 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".

The prayers sought in the Respondent's Notice of Motion dated 20th March 2014 are accordingly denied, and the Respondent shall bear the costs of the said Notice of Motion.

Dated, signed and delivered in open court at Machakos this 27th day of November 2015.

P. NYAMWEYA

JUDGE