



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NUMBER 21 OF 2013**

**SOUND D ENTERTAINMENT LIMITED. .... APPLICANT**

**VERSUS**

**ANTHONY BURUNGU & CO. ADVOCATES. .... RESPONDENT**

**RULING**

The application before the court is the Chamber Summons by the Applicant dated the 21<sup>st</sup> January, 2013. It mainly seeks: -

- a. Leave to appeal out of time against the Ruling delivered by Deputy Registrar on 25<sup>th</sup> October, 2012 in Misc. application Number 284 of 2012 in his capacity as a Taxing Master.
- b. Stay of Execution of the said ruling pending the final determination of the intended appeal.

The grounds upon which the application is based are that

- i. The Applicant was unaware of the date of the Ruling delivered by the Taxing Master.
- ii. That the cause of delay and failure in filing the intended appeal was caused by Applicant's former advocate who failed to inform the applicant of the Date and nature of the ruling delivered by the Taxing Master.
- iii. That further delay to file the appeal by the Applicant was caused by the effort to obtain a new advocate.
- iv. The intended appeal has arguable issues.
- v. That unless the application is granted the applicant will suffer damage and prejudice.

The application is strongly opposed. The Respondent averred that: -

- a. The application is fatally defective, an abuse of court process and is intended to subvert the course of justice.
- b. That the applicant's hands are dirty and he has failed to give the court true and proper facts and accordingly deserves no favourable exercise of discretion.

The facts of this case from the file record appear to be that on the 25<sup>th</sup> October, 2012 the court Deputy Registrar sitting as the Taxing Master in an Advocate-Client Bill of costs in Misc. Application No. 284 of 2012, allowed in his Ruling certain items of fees which aggrieved the Applicant. His deponements in support of this application are that they would have appealed in relation to those items since he does not appear to attach the whole Bill of Costs.

The Applicant herein, Sound Entertainment Ltd was all along represented by Kasamani & Company Advocates while the Respondent was represented by Anthony Burugu & Co. Advocates. It is not clear why and Applicant does not explain why Burugu & Co. Were not in court to take their ruling. However by a letter dated 1<sup>st</sup> November, 2012 sent through internet, the Applicants Advocates M/s Kasamani demanded from Anthony Burugu & Co. Advocates a refund of Ksh.36,622/- which appear overpaid if the fees deposit received by Anthony Burugu & Co. at the outset of the case would, be taken into account. Kasamani & Co. indeed threatened to appeal to the Taxing Master over the item of Ksh.150,000/- received by Burugu & Co. at the outset. This in the courts view clearly indicates that the Applicant's Advocates even without receiving instructions, were aggrieved of some taxation items allowed or otherwise.

The record shows that a month later on 1<sup>st</sup> December, 2012, Kasamani & Company Advocates, informed their client of how the bill of fees was taxed and whether an appeal should be preferred. There is no evidence if its client, the applicant herein, replied. The next the court is informed is that the Applicant, on 22<sup>nd</sup> January, 2013 filed this application seeking leave to appeal out of time.

It is trite law that this court has jurisdiction and power to grant leave to appeal out of time on good and reasonable cause for delay to file appeal in time being shown. It is a discretion which is wide but which like any other discretion of court, must be exercised reasonably and not whimsically. It is, therefore a burden of the applicant to show or demonstrate those good grounds to persuade the court to exercise the discretion in applicant's favour. The court will take into account are the length of delay, the reason for delay and the chances of success of the intended appeal.

In this case, the application is brought under Sections 79(a), 95, 1A and 3A of the Civil Procedure Act and Order 51 of the Advocates Remuneration Order. Clearly, the applicant approached the court through inapplicable provisions of the law. The correct provision is Order 11 of the Advocates (Remuneration) Order which provides thus: -

- “1. Should any party object to the decision of the taxing officer, he may within 14 days after the decision, give notice in writing to the taxing officer of the items of taxation to which the objects.**
- 2. The taxing officer shall forthwith record and forward to the objector may within 14 days from the receipt of the reasons apply to the 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 leave of the judge but not otherwise, appeal to the Court of Appeal.**
- 4. The High Court shall have power and discretion by order to enlarge the time fixed by subparagraph (2) for the taking of any step; application for such an order may be by Chamber Summons upon giving to every other interested party not less than three clear day's 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 Applicant did not file an objection within 14 days to the taxing officer. The Taxing officer has not given or written any reasons for his original ruling on any items. Indeed, no items objected to by the applicant as an objector have been identified. As a result, there is no decision which the Applicant can challenge before the Judge by a Chamber Summons.

The relevant question then is which decision is the Applicant intending to appeal against especially where the Applicant has not identified the particular items which he wants to object to the Taxing Officer. It is clear to the court, therefore, that not only in the application brought under totally inapplicable provisions but the substance of the application is so vague to appoint it makes little sense. For that reason alone this court would strike the application out as misconceived and incompetent.

On the other hand the Applicant's cause of delay from October, 25<sup>th</sup> 2012 to 31<sup>st</sup> January, 2013 is not reasonable. His advocate was in court and wrote to the applicant on 1<sup>st</sup> December, 2012. The explanation that he was engaging a new advocate between then and 31<sup>st</sup> January, 2013 is not reasonable. It needs only a few days to engage an advocate and 60 days is inordinate delay. The delay of 60 days was the Applicant's, not his counsel's. The Applicant cannot therefore, lay blame upon his counsel for the 60 days.

For the above various reasons this court is not persuaded that its discretion to enlarge time should be exercised in favour of the applicant. The application is dismissed with costs. Order accordingly.

Dated and delivered at Nairobi this 24<sup>th</sup> day February, 2014.

.....

**D A ONYANCHA**

**JUDGE**