



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

**MISCELLANEOUS CIVIL APPLICATION NUMBER 145 OF 2011**

**KWENGU & COMPANY ADVOCATES ..... RESPONDENT/PLAINTIFF**

**VERSUS**

**INVESCO ASSURANCE COMPANY LTD. .... APPLICANT/DEFENDANT**

**R U L I N G**

The application before the court is the Chamber Summons dated the 21<sup>st</sup> August, 2013. The application which was filed by the Defendant herein seeks the following reliefs: -

- i. **That the court do enlarge the time for giving notice in writing to the Taxing Officer on the items to which the Defendants objects and, filing a reference against the decision of the Taxing officer made on 28<sup>th</sup> September, 2012 on such terms as may be just and reasonable.**
- ii. **That in the alternative to (i) above the court do direct the Taxing Officer to furnish the ruling which contains the reasons to the Applicant/Defendant within 7 days and time be enlarged for the Defendant to file a reference against the decision of the Taxing Officer of 28<sup>th</sup> September, 2012.**

The many grounds upon which the application is based are shown on the face of the application but those which appear relevant to this court include the following: -

- a. **That the delay in requesting for the Taxing Officers ruling containing reasons for the taxation complained against, was not intentional and was beyond the Applicants control.**
- b. **That the applicant did not at any relevant time abandon its intention to challenge the taxation ruling.**
- c. **That the process of taxation was flawed, irregular and unlawful.**
- d. **That the Defendant/Applicant has sufficient and meritorious reasons for intending to institute the objection or reference to the Judge in Chambers.**

In its supporting affidavit, sworn by one Leonard Muraya Njenga, Advocate, the Applicant/Defendant concedes that it has never served any notice upon the Taxing Officer to supply or furnish his/her reasons

for the taxation either generally or by respective items in the Bill of Costs taxed by the Taxing Officer. The Applicant also depones in the said affidavit that it earlier filed an application dated 12<sup>th</sup> February, 2013 in which it sought a stay of execution of the orders and ruling of the Taxing Officer, as well as setting aside of the orders of the Taxing Officer granting a certificate of taxation but that the application was dismissed under a preliminary point of objection.

The Applicant brings this application under Rule 11(4) of the Advocates Remuneration Order.

The Respondent/Plaintiff opposed this application. In their replying affidavit sworn by one Apell Kwengu, they deponed that the application is defective, bad in law, an abuse of the court process, misconceived and brought in bad faith. The main ground underlying all the above allegations as this court understands it, is that this application has been brought out of time and when it is inordinately delayed and the Applicant seeks an enlargement of the time.

I have carefully perused the material before me as submitted by both sides. I have also perused the whole file record.

It is not in dispute that the Taxing Officers taxation ruling was delivered on 28<sup>th</sup> September, 2012 and taxed the Plaintiff's Bill of Costs at Ksh.1,324,291/40. Neither the Applicant/Defendants nor its counsel, had attended court to oppose the taxation application. A certificate of taxation was accordingly granted and issued by the Taxing Officer on the 2<sup>nd</sup> October, 2012. The certificate was adopted as a decree under an application dated 9<sup>th</sup> October, 2012. It is further not in dispute that the Applicant/Defendant's earlier application dated 12<sup>th</sup> February, 2013 seeking a stay of execution of the decree stated immediately above, and also seeking to set aside the taxation approvals stated, was dismissed by the court under a Preliminary Objection by the Respondent/Plaintiff dated 12<sup>th</sup> March, 2013.

The applicant did not formally object to the Taxing Officer's ruling on taxation delivered on 28<sup>th</sup> September, 2012. The Applicant was supposed to give the Notice required to be given to the Taxing Officer under Rule 11(i) of the Advocates Remuneration Order within 14 days of the taxation ruling. The Applicant could, on the other hand, make a reference to the Judge in Chambers, of its objection to the taxation ruling without serving the above notice to the Taxing Officer, if it was satisfied that the taxation ruling of 28<sup>th</sup> September, 2012 was based on sufficient reasons contained in the ruling itself. In that case, the Applicant could have filed such reference within 14 days of receipt of the ruling. The Applicant exercised neither of the two options stated above and admits that much.

Rule 11 of the Advocates Remuneration Order provides as follows: -

**“(i) 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.**

**(ii) 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 parties' concerned setting out the grounds of his objection.**

**(iii) ...**

**(iv) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (i) 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 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 be already expired.”**

With the admissions made by the Applicant as stated above, all it can expect is the favourable discretion of the court under the sub paragraph (4) above. This brings us to the question as to whether, taking into account the facts stated above, the court should or should not enlarge the time to give notice under sub-paragraph (i) of the Rule 11 of the Advocates Remuneration Order.

The Applicant having admitted failure to give the notice under the above rule, clearly stated that the delay in filing this application, was unintentional and arose out of confusion. No explanation of the “**confusion**” has been given. No actual reason for the delay of eleven months before filing this application, has been given. The court can only assume therefore, that the application was filed as a second thought after all other attempts to disrupt the Plaintiff’s processes to recover the taxed costs had failed.

As I understand it, this court had wide discretion to enlarge time under Rule 11(4) aforesaid, but such discretion cannot be exercised whimsically. The discretion, especially favourable discretion has to be based on reasonable grounds. In this case the applicant was under obligation to reasonably explain away the inordinate delay of eleven months before filing this application to seek the enlargement of time.

As I have stated already, no good or reasonable explanation for delay has been given. Unexplained “**confusion**” on the part of the Applicant for reasons not given is not good or reasonable explanation. Nor is the fact that the applicant’s failure to act timeously was not intentional or beyond control, both of which have not been explained.

Before making final orders the applicant also sought that the court do direct the Taxing Officer to furnish to the Applicant the ruling containing the reasons for taxation. It is however clear from the record and the applicant concedes that much, that it has never given the notice required to be given to the Taxing Officer, requiring him to furnish the ruling as provided under the Rule II(i) aforesaid. Why then should he expect the court to order or force the Taxing Officer to do so when it is clear the Taxing Officer has never refused to do so? The duty to give the notice lay squarely on the Applicant who clearly failed to carry it out. It cannot now shift the duty to other parties who are not interested or are under no legal obligation to do so. Otherwise the alternative prayer to enlarge time is already discussed herein above.

The Applicant also tended to delve into the merits of the Taxing officers taxation process. In the view of the court, the merits or demerits of the taxation process are not before this court under this application which only seeks for enlargement of time and stay of execution.

As to the issue of stay, the court observes that it was effectively canvassed under the application dated 12<sup>th</sup> February, 2012, which was refused and dismissed on a Preliminary Point of Objection. To seek a similar stay which was dismissed on same grounds is to ignore the Res Judicata principle a position which this court will not support.

The result is that the delay in filing this application is very inordinate and has not been sufficiently or reasonably explained to persuade the court to favourably exercise its discretion to enlarge time. The application as a whole is accordingly dismissed with costs. Orders accordingly.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of April, 2014.**

.....

**D A ONYANCHA**

**JUDGE**