



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. APPLICATION NO. 629 OF 2012

CONSOLIDATED WITH 627, 628 AND 630 OF 2011

KAMAU KINYANJUI ADVOCATE.....APPLICANT

- VERSUS -

GEORGE GITAU MUNENE

(as an administrator of the estate of SAMUEL GITAU MUNENE).....1ST RESPONDENT

MUNENE ESTATES LIMITED.....2ND RESPONDENT

JANE GATHONI MUNENE

(as an administrator of the estate of SAMUEL GITAU MUNENE).....3RD RESPONDENT

JOAN MUGURE MUNENE

(as an co-administrator of the estate of SAMUEL GITAU MUNENE)...4TH RESPONDENT

R U L I N G

1. The application before the court is a Chamber Summons dated **8th October 2012**. It is filed under Section 1A, 1B and Section 3A of the Civil Procedure Act 2010 and Order 11 Rules 1, 2 and 4 of the Advocates (Remuneration) Order 2009 and Article 159 (2) (d) of the Constitution of Kenya 2010).

2. This is a consolidated Ruling also covering the following cases:--

1. Civil case miscellaneous application number 628 of 2011.

2. Civil case miscellaneous application number 629 of 2011.

3. Civil case miscellaneous application number 636 of 2011.

4. Civil case miscellaneous application number 628 of 2011. (the parent file)

3. The application seeks the following orders:-

a. That the Honourable Judge be pleased to grant the Applicant leave to give Notice to the Taxing Officer under Rule 11 (1) of the Advocates Remuneration Order, 2009, out of time in relation to the Ruling of the Taxation Officer dated the 22nd March 2012.

b. That the Honourable Judge be pleased to further grant the Applicant leave to file his objection(s) against the Ruling of the Taxation Officer dated 21st March 2012 out of time.

c. That the costs of this application be costs in the cause.

4. The application is premised on the grounds set out therein and is supported by affidavit of **WESLY J. KAMAU** dated **8th October 2012**.

5. The application is opposed by the Respondents. The 1st and 2nd Respondents filed grounds of opposition dated 29th October 2012 while the 3rd and 4th Respondents filed their grounds of opposition on 24th October 2012. Parties filed written submission which were highlighted on 13th May 2014

6. The brief history of the application is as follows. The Applicant filed his Bill of Costs against the Respondent herein on 6th July 2011. The advocates for the 3rd and 4th Respondents consequently filed a Preliminary Objection to the Bill of Costs. Upon the hearing of the Preliminary Objection, the same was upheld by the court and the Applicant's Bills of Costs was struck out with costs vide a Ruling delivered on the 2nd March 2012. On 22nd June 2012, the Applicant filed an application seeking *inter-a-alia* to have the Ruling upholding the Preliminary Objection set aside. The said application was scheduled for hearing on the 3rd day of October 2012 but the Applicant opted to withdraw the same on the said date. The Applicant thereafter filed this instant application seeking for leave to give the Taxing Officer notice under Rule 11 (1) of the Advocates Remuneration Order out of time and to also file his objections against the Ruling of the Taxing officer out of time. The advocates for the Respondents consequently filed grounds of opposition.

7. I have carefully considered the application and the opposition to it. The main issue here is whether this court can enlarge time to enable the Applicant file objections against the Ruling of the Taxation Officer dated 21st March 2012. It is not necessary for me to go into the details and the merits of whether or not there is a possibility that the Ruling on Preliminary Objection upheld by the Taxing Officer may be set aside. That would be speculation. At this stage the only issue for determination by this court is:-

a. Whether the Applicant's delay in seeking the reasons for taxation, and filing a reference, if need be, is curable.

8. I have considered the parties submission in this respect. Under rule 11 (1) of the Advocate Remunerations Order:-

“Should any party object to the decision of the Taxing Officer, he may within 14 (fourteen) days after the decision give Notice in writing to the Taxing Officer of the items of Taxation to which he objects.”

9. In his submissions, the Applicant stated that he applied for a copy of the Ruling of the Taxation Officer on the same day that the same was delivered to wit the 22nd March 2012, and the same was only supplied to the Applicant on the 13th June 2012. That in the period between the 2nd March 2012 and 13th June 2012, the Applicant was not able to access the court file to peruse the Ruling so as to make an informed decision as to whether or not to give the requisite notice to the Taxation Officer under Rule 11 (1) of the Advocates Remuneration Order, 2009. By the time the Ruling was provided by the Honourable Court, the mandated fourteen (14) day period under Rule 11 (1) of the Advocates Remunerations Order, 2009 had already lapsed. They submitted that he inadvertently filed a Chamber Summons on the 22nd June 2012 against the Ruling of the Taxation Officer, instead of giving the requisite notice. In support of his application, the Applicant states that no undue prejudice will be occasioned to the Respondents by the granting of the orders sought for in the present application and it would be in the interests of doing justice between the parties for the prayers sought for to be granted.

10. In rejoinder, the Respondent submitted that the delay between the 22nd of March 2012 to the 8th of October 2012 when this application was filed is unreasonable and that the court should not exercise its discretion in favour of such an Applicant.

11. In my view, the Applicant knew of the outcome of the Ruling on the very day that the same was delivered. It is therefore correct that the Applicant did not necessarily require the typed Ruling before filing his notice to the Taxing Officer as it is not a requirement that a copy of the same be annexed to the Objection. The fact that there was delay in obtaining the typed Ruling therefore does not suffice as the Applicant has admitted in paragraph 7 of his affidavit in support to the application that he personally perused the court file in order to make up his mind as to whether to give the notice as required under the afore cited legal provision. The mere perusal of the court file was in itself sufficient to enable the Applicant make a decision as to whether or not to file the notice.

12. From the foregoing, it is evident therefore that the Applicant was not diligent enough. It is a maxim of equity that equity rewards the diligent and not the indolent. The Applicant failed in exercising due diligence and further, it is inexcusable that it took him three months to file a wrong application in court as admitted in paragraph 8 of this supporting affidavit. The delay in raising the Objection to the taxation was inordinate, unjustified and not convincingly explained.

13. In the case of **Kwengu & Company Advocates – Vs – Invesco Assurance Company Limited Misc Civil Application Number 145 of 2011**, the court upheld that unreasonable delay would deny an Applicant an order for extension of time.

14. My understanding is that this court has a wide discretion under rule 11 (4) of the Advocate Remuneration Order. However, that discretion must be exercised judiciously, and in relation to available evidence justifying a favourable discretion. The Applicant herein has not been able to succinctly and adequately explain the reason for delay. The Applicant simply submitted that the delay was occasioned by sufficient cause. Those causes that could cause such a delay were not shown to me to enable me exercise my discretion in favour of the Applicant.

15. For the foregoing reasons the verdict I return is that the chamber summons application dated 8th October 2012 fails with costs to the Respondents.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Kamau for Plaintiff

Gatheru for 3rd and 4th Respondent

Mwendwa holding brief for Judy Thongori for 1st and 2nd Respondent

Teresia – Court Clerk