



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 662 OF 2012

IN THE MATTER OF: THE ADVOCATES ACT, CAP 16

AND

IN THE MATTER OF: TAXATION OF COSTS BETWEEN ADVOCATES AND CLIENT

WAMBUGU, MOTENDE & CO. ADVOCATES.....APPLICANT

VERSUS

KAJULU HOLDINGS LIMITED.....1ST RESPONDENT

KISUMU CONCRETE LIMITED.....2ND RESPONDENT

LALJI KARSAN RABADIA.....3RD RESPONDENT

ARVIN JADUA RABADIA.....4TH RESPONDENT

CHANDARAKANT LALJI RABADIA.....5TH RESPONDENT

SUDHIR BRAHMBHATT.....6TH RESPONDENT

RULING

1. On 22nd July 2013, the Taxing Officer taxed the Advocate/Client Bill of Costs in the sum of Kshs. 468,619.92. At the time when the Ruling on the Taxation was being delivered both parties were represented by advocates. Mr. Ngige advocate was present for the Advocate, whilst Mr. Orunga advocate held brief for Mr. Amuga, the advocate for the client.

2. Pursuant to the provisions of paragraph 11 (1) of the Advocates Remuneration Order, any party who was dissatisfied with either the process of the Taxation or with the Ruling on the said Taxation, was entitled to file a Reference before a Judge. Such Reference should have been filed within 14 days of the Ruling in issue.

3. It is common ground that the clients herein did not file their Reference within the prescribed period.

Instead, the Reference was filed on 30th August, 2013.

4. When the clients' application came up for hearing before Havelock J., the Advocate raised a Preliminary Objection.

5. In a Ruling dated 19th June 2014 Havelock J. upheld the Preliminary Objection, and struck out the client's Reference.

6. The clients have now come before this court seeking orders that would enlarge the time when the Reference could have been lodged. It is that application by the clients which is now before this court.

7. Mr. Amuga, the learned advocate for the clients, told this court that after the Taxing Officer delivered his Ruling, the clients filed an objection.

8. However, they did not immediately file a Reference. The reason why they did not do so was that Mr. Amuga was under the impression that the Taxing Officer had not yet given the reasons for his decision.

9. It was only when the Advocate served the clients with an application for judgment that Mr. Amuga realized that the Ruling delivered on 19th June 2014 had contained the Taxing Officer's reasons for his said decision.

10. That realization is said to have come about because the Advocate's application for judgment was accompanied with a copy of the Taxing Officer's Ruling.

11. The clients then moved quickly and filed a Reference on 30th August 2013.

12. But the Advocate raised a Preliminary Objection to the Reference because it had been lodged late.

13. In an endeavour to have an opportunity to challenge the Ruling of the Taxing Officer, the clients have now asked this court to enlarge the time for the filing of a Reference.

14. The Advocate contends that because the clients were represented by an advocate at the time when the Taxing Officer delivered his Ruling, it must be presumed that the clients knew, from the moment when the Ruling was delivered, that there were reasons which they could use to file a Reference.

15. Of course, when a Judicial Officer reads out his Ruling or Judgment, the parties present would get to know the reasoning embodied in the said decision.

16. I also acknowledge that the best practice demands that Judicial Officers should deliver their decisions by reading them out in open court. However, the reality does not always accord with the best practice. I say so because I am well aware that due to the large number of cases handled by the courts, the Judicial Officers often read only the decision, without going over the portion containing the respective submissions or the reasons given by the court for arriving at its decision.

17. If that were to happen, then the parties would need to later read the whole Ruling or Judgment in order to be able to appreciate the court's reasons for arriving at the decision.

18. There is also the possibility that when an advocate holds brief for another one, the details contained in the Ruling or Judgment may not be relayed either clearly or at all.

19. Of course, the advocate who sent a colleague to hold his brief ought to take responsibility for the failure or limitations on the part of the person he had sent. He cannot find fault with the opposite party for the mistake of his own agent.

20. In this case, Havelock J. has already cast doubts on the evidence of the clients, as to the date when

they received a copy of the Taxing Officer's Ruling dated 22nd July 2013.

21. I perfectly understand the reasons for the serious doubts expressed by the Learned Judge. I say so because it cannot be true that the clients only got the Ruling on 30th August 2013, whereas the Advocate had annexed a copy of the said Ruling to the affidavit of **JOHN WACIRA WAMBUGU** advocate, filed on court on 22nd August, 2013; and that affidavit was served upon the clients on that same date.

22. At paragraph 5 of the Supporting Affidavit of PAUL AMUGA, the learned advocate for the clients, it is deponed thus:

*“**THAT** my firm waited for a typed copy of the Ruling containing reasons for taxation until 22nd August, 2013 when the Applicants served my firm with their application dated 22nd August, 2013 in which a copy of the typed ruling was annexed. I then learnt that the ruling had been typed and on making a follow up, my firm was supplied with a typed ruling on 30th August, 2013”.*

23. That means that by 22nd August 2013, Mr. Amuga advocate had become aware of the contents of the Ruling dated 22nd July 2013.

24. Notwithstanding that fact, the 22nd of August 2013 was still many more than 14 days from the 22nd of July 2013. Therefore, it would still have been too late for the clients to file a Reference on 22nd August 2013. In effect, even if the clients had known of the contents of the Taxing Officers Ruling by that date they could not have filed a Reference.

25. Having become aware of the contents of the Ruling the clients then filed a Reference without first seeking an extension of time.

26. To my mind that action can only be blamed on the advocates for the clients. They knew or ought to have known that a Reference could not be sustained if it was filed late.

27. Although the Advocate expressed the view that Havelock J. dealt conclusively with the issue of enlargement of time, I find that that is inaccurate. That question concerning enlargement of time to file a Reference was not ever in issue before Havelock J.

28. In the Reference dated 30th August 2013, the clients intended to proceed as if the said Reference was competent. In other words, they presumed that it had been filed in accordance with the law, including the law governing the time within which a Reference ought to be filed. The client did not seek any enlargement of time, and Havelock J. did not therefore have to determine that issue.

29. The Reference was struck out after the Advocate persuaded the learned Judge that the court ought not to delve into the merits of the Reference, as the said Reference was filed late.

30. In effect the Reference was not determined on its merits. Thus the doctrine of *Res Judicata* did not arise.

31. Having given due consideration to the application, I find and hold that the Law Firm of Amuga & Company Advocates had erred by not filing the Reference timeously. However, I do not think that the mistakes of the lawyers should be visited on the clients. The said clients had instructed their lawyers to challenge the decision of the Taxing Officer. From that point, it was the lawyers who were expected to take appropriate action, to safeguard their clients' interests. But the lawyers slipped up, and filed a Reference late, which led to the said Reference being struck out.

32. In my considered opinion it would be unfair to the clients, to deny them the opportunity to challenge a decision which they believe was wrong, and in respect to which they had properly instructed their lawyers to mount a lawful challenge.

33. I also find that the inconvenience to the Advocate may be compensated by an award of costs.

34. The parties would, if extension of time is granted, have an opportunity to canvas their respective cases. If, as the Advocate believes, the Taxing Officer's determination is fair and just, the Advocate will have an opportunity to persuade the court accordingly.

35. The converse is also equally true: that if the Taxing Officer's decision was not based on a sound foundation, the clients would persuade the court in that respect.

36. In the result, I do allow the clients' application. The clients are given **SEVEN (7) DAYS** from today to file and serve the Reference.

37. However, although the application is successful, I direct that the applicants should bear the costs. I so order because the Advocate played no irregular role in the situation which the clients found themselves in. The situation was borne out of an error on the part of the lawyers of the clients.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of November 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Kinyanjui for the Applicant

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the 3rd Respondent

.....for the 4th Respondent

.....for the 5th Respondent

.....for the 6th Respondent

Collins Odhiambo – Court clerk.