



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL CASE NO. 60 OF 2010**

**JUBILEE INSURANCE CO. LTD.....APPELLANT/RESPONDENT**

**VERSUS**

**JOHN NJERU KARIUKI.....RESPONDENT/APPLICANT**

***(An Appeal from the Judgment of M. WACHIRA Chief Magistrate in CM's Misc.***

***Civil Application No. 104 of 2009 of 22nd June 2010)***

**RULING**

This is the application dated 1st October 2014 brought under Rule 11 (4) of the Advocates Remuneration Order seeking for the following prayers:-

- 1. That the honourable court be please to grant the applicant leave to file reference to the Judge under Rule 11(II) of the Advocates Remuneration Rules out of time having been aggrieved by the taxation of the bill of costs in this matter.*
- 2. That costs of this application be borne by the appellant/respondent.*

The applicant relied on grounds set out on the face of his application and in his supporting affidavit sworn on 1st October 2014. The application was argued by his counsel Mr. Mugambi Njeru who submitted that the applicant was aggrieved by the decision of the tax master in this matter which was made on the 16th April 2014. Due to an oversight, the applicant filed an appeal against the decision instead of filing a reference before the judge as required by Rule 11 of the Advocates Remuneration order. The appeal was struck out due to the procedural technicality of filing an appeal contrary to the rules. The applicant now prays for enlargement of time to file the reference to the judge as required since the 14 days allowed by the law have elapsed.

It is the contention of this applicant that he is not guilty of laches because this application was filed without delay after the striking out of the appeal.

The application was opposed by the respondent in its ground of opposition of 27th October 2014 and filed on 28/10/2014. Ms. Odipo of C. Oraro & Co. Advocates argued in favour of the respondent dismissing the application as frivolous, vexatious, unmerited and an abuse of the court process. It is the respondent's contention that the application is an afterthought intended to delay the respondent's enjoyment of the fruits of his judgment. The applicant is guilty of laches and ought to be ordered to deposit a security of costs of the full decretal amount. The respondent contend that the applicant has not given any grounds of

justifying the exercise of this court's discretion. It was also argued the applicant is barred from filing a reference because he instead chose to appeal.

The relevant law in this application is the Advocates Remuneration Order Rule 11 which states:-

- 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 the parties concerned, setting out the grounds of his objection.*
- iii. *Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.*
- iv. *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 the 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 applicant was not entitled to appeal against the order of the tax master because the law only provides for one remedy; that of filing a reference to the judge. The applicant is now aware of the blunder he made by filing the appeal which was later struck out.

The applicant is supposed to satisfy the court of the following:-

(a) *That he is not guilty of undue delay.*

(b) *That he is not barred by his earlier act of filing an appeal.*

(c) *That he has advanced good grounds upon which the court can exercise its discretion to extend time.*

The record is clear that the appeal was struck out on 9/9/2014 on the facts leading to this application which was filed on 6/10/2014. The period of 27 days is of course less than one month. However, considering the existing circumstances, the applicant ought to have filed his application within a shorter period. I wish to refer to the case of **EVANS THIGA GATURU, ADVOCATE VS KENYA COMMERCIAL BANK LIMITED [2012] Nairobi High Court Misc. Application No. 343 of 2011** where it was observed by Odunga, J.:-

*“in my view he (a party) would be bound to apply for extension of time under Rule 11(4) of the Advocates Remuneration order upon lapse of the 14 days allowed by the law.”*

The Court therefore has discretionary powers to extend time limited by the rules on application of the party who was unable to comply.

In the case of **NELSON KANANDU ADVOCATE VS BONIFACE KANANDU MATHENGE Nairobi High Court Commercial Division Misc. Application No. 1 of 1999.**

*“The power to enlarge time is vested in the Court by Rule 5 of Order XLIX of the Civil Procedure Rules and enlargement of time may be ordered on terms (if any) as the justice of the case may require. The rule also empowers the Court to enlarge the time notwithstanding that the time for doing the act has long expired. The rule also provides that where enlargement of time is granted the costs thereof shall be borne by the applicant.”*

Order 49 Rule of the Civil Procedure Rules served the objective of avoiding injustice to a party who has

failed to comply with time limited by the law provided that party satisfied the court that the delay was neither inordinate nor unreasonable.

As it was held in the case of **MOKUA OTWORI Alias RICHARD MEROKA ONARI VS MOSOTA OTWORI Court of Appeal Civil Application No. 158 of 2007** that:-

*“The position is now clear and well settled that where there is a delay, some explanation ought to be offered for it, otherwise there would be no reason for settling down timelines”.*

In this application, the applicant relied on Article 159 of the Constitution. 159(2) In exercising judicial authority, courts and tribunals shall be guided by the following principles

*d. justice shall be administered without undue regard to procedural technicalities.*

The applicant has explained himself on the cause of delay. The filing and striking out of the appeal which was not a remedy under the Advocate Renumeration Order consumed a lot of time about five months from the time the taxing master made his decision. The application before me was filed less than a month from the time the appeal was struck. It is settled law that delay of less than a month is excusable provided that an explanation is given to the satisfaction of the court.

The argument of the respondent that the applicant is barred to file a reference having preferred an appeal is not based on any law. The relevant rule does not give an aggrieved party a choice to either appeal or file a reference. Under Article 159(2)(d) the Act of filing an appeal by the applicant is in fact a procedural technicality which should not be used to deny him justice .

It is my finding that this application is merited. It is hereby allowed in terms of prayer (1). The costs of this application shall be born by the applicant. The reference should be filed within 14 days from the date of this ruling.

It is hereby so ordered.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 8TH DAY OF DECEMBER, 2014.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Ithiga for Omondi for Respondent**

**F. MUCHEMI**

**JUDGE**