



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Application 36 of 2011

**M/S. NYAUNDI TUIYOO & COMPANY
ADVOCATES.....APPLICANT**

VERSUS

**TARITA DEVELOPMENT
LIMITED.....RESPONDENT**

RULING

I have before me an application by **Tarita Development Limited** (hereinafter “the applicant”) whereby orders are sought to enlarge the time fixed by rule 11(1) of the Advocate's (Remuneration) order to enable the applicant file a reference against the taxing master's ruling on taxation of Advocate/client bill of costs, made on 26th July, 2011 and that the annexed intended reference be deemed as duly filed upon payment of the requisite court fees. The application is expressed to be brought under the provisions of Rule 11 of the Advocates Remuneration Order Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.

The application is made on the following grounds:-

- (a) That the delay in filing the reference was due to circumstances beyond the applicant's control.**
- (b) That the application has been brought without undue delay.**
- (c) That the reference has merit and the applicant should be given an opportunity to ventilate it.**
- (d) That the Advocate/Respondent will not suffer any prejudice.**
- (e) That the wider interests of justice will best be served if the orders sought are granted.**

The application is supported by an affidavit sworn by **Desmond Odhiambo** an advocate practising in the firm of M/s. **Daly & Figgis** Advocates for the applicant. The substance of the affidavit is that the said firm of advocates received the ruling on taxation late and lodged this application as soon as instructions from the applicant were received. In counsel's view the intended reference is meritorious and it is in the interests of justice that the same be determined to facilitate a final decision.

The application is opposed on the basis of grounds of opposition the gist of which is that the same is incompetent.

When the application came up before me for hearing on 13th March, 2012, counsel agreed to file written submissions which were duly in place by 31st July, 2012. The respondents object to the application on

the grounds that ruling on taxation was on notice which ruling contained reasons for taxation and there was therefore no basis for seeking further reasons before lodging the reference; that the intended reference is defective as it challenges quantum; and that invoking section 3A of the Civil Procedure Act renders the application bad in law.

Having considered the application, the objection thereto and the submissions of counsel, I think the issues in this application are:

- (i) **Whether or not the application is incompetent,**
- (ii) **Whether or not time should be extended as prayed;**
- (iii) **If it is so extended on what terms.**

Subparagraphs (1) and (2) of paragraph 11 of the Advocates (Remuneration) (Amendment) Order read as follows:-

- (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 he objects.**
- (2) **The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within 14 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 application”**

And sub paragraph 4 of the same paragraph reads as follows:-

- “(4) The High Court may by order enlarge the time fixed by Sub paragraph (1) or sub paragraph (2) for the taking of any step;**
- (3) and application for such an order may be so made notwithstanding that the time sought to be enlarged may have already expired.”**

So, clearly the above provisions allow a party who has not taken any step within the period appointed to move the High Court to enlarge that period. That is precisely what the applicant has done. The application cannot be said to be incompetent merely because the timelines set in the order have not been met. With all due respect to the respondents the cases of **Kobil Petroleum Limited -Vs- Almost Magic Merchants Limited [Nairobi HCCC No. 1970 of 2000] [UR]** and **Postal Corporation of Kenya - Vs- Donald Kipkorir & 3 Others [2005] [KLR]** which they invoked involved different circumstances and are clearly distinguishable from the facts in the case at hand. The decision in **Kinandu - Vs- Mathenge [2004 eKLR]** which was also invoked by the respondents considered the issue of delay in filing an application to enlarge time to lodge a reference. It did not however determine that delay *per se* would render such an application incompetent.

The respondent have also contended that this application should not be entertained because the intended reference is defective. The defect alleged is that the proposed challenge is on quantum of the sum taxed by the taxing officer. To buttress that proposition, they invoked the decision in **Logan Kampel - Vs- Grosvenor [1989] KLR 362**. However, a perusal of the intended reference shows clearly that the applicant's challenges is not limited to quantum alone.

The final objection made by the respondents is that the application is incompetent as it invokes section 3A of the Civil Procedure Act when there are relevant express provisions under the Advocates (Remuneration) (Amendment) Order. A detailed consideration of that objection is in my view not merited as the applicant has also invoked Rule 11 of the Advocates Remuneration Order which is the relevant rule. Even if it had not, in my view, an application cannot be defeated merely because section 3A

has been cited when there are relevant express provisions which should be invoked.

Turning now to the merits or demerits of the application, the issue for determination is whether the applicant has demonstrated that the time for lodging the reference should be enlarged. The affidavit evidence adduced by the applicant shows that the taxing master delivered her ruling for taxation on 26th July, 2011 and objection thereto was lodged on time. Reasons for taxation were then sought by letter dated 4th August, 2011. The applicant has exhibited the Taxing Masters Letter dated 19th January, 2012 in which, she informed the applicant's advocates that reasons for taxation were contained in the ruling of 26th July, 2011. That letter was received by the said advocates on 23rd January, 2012 as per the stamp clearly visible on the Taxing Master's letter aforesaid. The applicant has also exhibited a copy of an e-mail to one **Daniel Kiptoo** by which e-mail a copy of the said ruling was forwarded. That e-mail was sent on 7th February, 2012 and this application lodged on 28th February, 2012.

The supporting affidavit has therefore explained the delay in lodging the reference. The explanation in my view is reasonable. In any event the respondent did not file a replying affidavit challenging the factual position as presented by the applicant in the said affidavit. I also do not detect any prejudice the respondent will suffer which cannot be compensated by costs. In the premises, I do not consider the delay as inordinate. I will, in the premises, exercise my discretion in favour of applicant. The applicant's application dated 27th February, 2012 and filed on 28th February, 2012 is allowed in terms of prayers 1 and 2 thereof.

The applicant shall pay the respondent's costs of the application.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF SEPTEMBER, 2012.

F. AZANGALALA
JUDGE

Read in the presence of:-
Mr. Ngetich H/B for Odhiambo for Applicant and
Mr. Omusundi for the Respondent.

F. AZANGALALA
JUDGE

18TH SEPTEMBER, 2012