



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Miscellaneous Civil Application 4 of 2008

OBAGA & CO. ADVOCATES.....THE ADVOCATE/RESPONDENT

VERSUS

KIPKEBE LIMITED.....THE CLIENT/APPLICANT

RULING

- 1.The client's application filed by M/s Oguttu Mboya & Co. Advocates seeks two substantive orders as follows:
- 2.The Honourable Court be pleased to enlarge and/or extend time for the client/Applicant to lodge and/or file a Notice of objection to taxation, touching and/or concerning the Taxation of the Advocate-Client Bill of Costs dated 21st January, 2008 and lodged by Advocate/Respondent.
3. Consequent to prayer herein being granted, the Honourable Court be pleased to allow the client/Applicant to lodge her Notice of Objection against the Taxation held on the 30th day of June, 2008, within 14 days of the date of the order and/or such shorter time or otherwise, as the Honourable Court may deem fit and expedient."

The application was supported by an affidavit sworn by **Joseph Mboya Oguttu** whose contents may be summarized as hereunder:-

- The Advocate lodged an Advocate/client bill of costs for taxation on 22nd January, 2008.
- The bill was listed for taxation on 30th June, 2008 when the same was done **exparte** due to non attendance of the client and/or her representative inspite of service of a taxation notice having been duly effected.
- A certificate of taxation was issued on 3rd July, 2008.
- The client instructed M/s Oguttu Mboya on 7th July, 2008 but the letter of instruction was received on 10th July, 2008.
- The said firm filed a notice of appointment of Advocate on 16th July, 2008 but was unable to draw and lodge a notice of objection to Taxation within the statutory period in terms of **Rule 11(1)** of the **Advocates Remuneration Order**.

- The issue of drawing the notice of objection escaped Mr.Oguttu's attention until 2nd February, 2009 when the client sought to know what had been done on the matter. By that time the advocate held already levied execution vide attachment of the client's movable properties.
- M/s Oguttu Mboya & Company proceeded to file an application for stay of execution and review of the judgment which application was disposed of on 19th March, 2009.
- In the intended notice of objection to taxation, the client shall contend that the Advocate was never instructed by the client but by the firm of M/s Timany & Company Advocates.

The Advocate filed grounds of opposition and stated, **inter alia**, that:

- (i) **The Applicant/Advocate stands to suffer prejudice if the application is granted.**
- (ii) **The client is guilty of indolence.**
- (iii) **No reasonable and/or justifiable reason has been given for the delay in bringing the application.**
- (iv) **The application is made in bad faith and is meant to deny and/or delay payment of costs to the Advocate for Professional services rendered.**

Mr.Oguttu and Miss Obaga made brief submissions which I have duly considered.

The orders sought by the client herein are discretionary in nature. One of the decisions cited by Mr.Oguttu is **JERUSHA WAIRIMU KAMAU VS JOSEPHAT MBURU MONDOTH**, Civil Application No.NAI. 303 of 2005. In that application, the applicant was seeking an extension of time to file an appeal out of time. The court cited its earlier decision in **LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI** Civil Application No.NAI 251 OF 1997 (unreported) where it stated:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court take into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”

In my view, the aforesaid considerations also apply to similar applications made before this court. In applying the same, I will first consider the length of the delay and whether the same has been sufficiently explained.

It was not denied that the client was duly served with a notice of taxation of the bill of costs. The taxation was scheduled to be done on 30th June, 2008. No reason was given for non attendance of the client and/or her advocate. M/s Oguttu Mboya were instructed by the client on 7th July, 2008. They filed a notice of appointment of Advocates on 16th July, 2008. The letter of 7th July, 2008 was marked “MOST URGENT” because the client stated therein that the bill of costs had been taxed **ex parte**. M/s Oguttu-Mboya were requested to act on the matter promptly. The taxation having been done on 30th June, 2008, any party dissatisfied with the decision of the taxing officer should have, within fourteen days after the decision, given notice to the taxing officer of the items of taxation to which he was objecting, see **Rule 11(1) of the Advocates (Remuneration) Order**. By the 10th day of July, 2008 when M/s Oguttu Mboya Advocates received their client's most urgent letter, they knew that they had only four days to file not only a notice of appointment of Advocates but also give the appropriate notice to the taxing officer. They prepared a notice of appointment of advocates and dated it 11th July, 2008 but did not file the same until 16th July, 2008 yet they knew that time was of the essence in complying with the law. No explanation was given for that delay. But more important, no notice of objection was filed.

Neither the client nor M/s Oguttu Mboya made any follow up of the matter that had been described as “MOST URGENT” until execution proceedings were commenced, about seven months after the date of taxation of the bill of costs. I must state that an instructing party and her advocate have a responsibility to follow up on the progress of their matters in court, particularly those which are perceived to be of an urgent nature. A party cannot totally abdicate such responsibility simply because it has instructed an advocate.

On the part of Mr. Mboya, the only explanation for the delay is contained in paragraphs 18 and 19 of his affidavit. And what does he say?

“18. That the failure to lodge the Notice of Objection timeously was my mistake.

19. That nevertheless, the said mistake was innocent and/ or inadvertent. Consequently, same ought not to be punished.”

In the circumstances of this matter, I find that there was inordinate delay which has not been sufficiently explained.

I do not wish to state whether the intended appeal is arguable in view of the fact that there are several other related applications between the parties herein and any views expressed may be prejudicial to either of the parties.

As regards the fourth principle which this court ought to consider in exercising its discretion, that is, the degree of prejudice to the respondent, I am of the view that the scale tilts in favour of the respondent. The respondent taxed her bill of costs more than a year ago and a certificate of costs was issued on 3rd July, 2008. It is in the sum of Kshs. 111,226/=. The respondent has been kept out her money since then.

All in all, I am not inclined to extend time as prayed by the client and dismiss the application dated 23rd March, 2009 with costs to the Advocate.

DATED, SIGNED AND DELIVERED AT KISII THIS 30th DAY OF JUNE, 2009.

D. MUSINGA

JUDGE.

30/6/2009

Before D. Musinga. J

Mobisa – C.c

Miss Obaga for the advocate.

Mr. Oguttu for the client

Court: Ruling delivered in open court on 30th June, 2009.

D. MUSINGA

JUDGE.

Mr. Oguttu: I pray for typed copies of the proceedings and the ruling. I also pray for leave to appeal against the decision.

D. MUSINGA

JUDGE.

Miss Obaga: I have no objection.

D. MUSINGA

JUDGE.

Court: 1. Proceedings and Ruling (certified) to issue to the Client's Advocate upon payment of the requisite fees.

2. Leave to appeal is granted as prayed.

D. MUSINGA

JUDGE.