



REPUBLIC OF KENYA



Toywa v Kimunguyi & 3 others (Environment and Land Miscellaneous Application 1 of 2021) [2022] KEELC 4898 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4898 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2021
BN OLAO, J
SEPTEMBER 21, 2022**

BETWEEN

SAMSON TOYWA APPLICANT

AND

BRENDA NELIMA KIMUNGUYI 1ST RESPONDENT

SARAH MATEYI KIPTENGELE 2ND RESPONDENT

MARY LUMBASI 3RD RESPONDENT

ROSEMARY MAKOKHA 4TH RESPONDENT

RULING

- [1] On September 16, 2021 Hon EN Mwenda this Court's Deputy Registrar delivered a ruling on the plaintiffs Bill of Costs as against the 2nd defendant.
- [2] Aggrieved by that ruling, the 2nd defendant moved to this Court vide his Chamber Summons dated November 8, 2021 and filed on the same day predicated under Order 47 Rules 8 and 9 of the *Civil Procedure Rules* and Rule 11(1) (2) (3) and (4) of the *Advocates Remuneration Order* as well as all other enabling provisions of the law.
- [3] By that application the 2nd defendant (Applicant herein) seeks the following orders: -
1. Spent
 2. That this Honourable Court be pleased to extend time within which to filed the reference herein.
 3. That consequent to the grant of prayer (2) herein above, the decision of the Taxing Officer issued on September 16, 2021 in respect of the plaintiffs Bill of Costs dated May 4, 2021 vide Bungoma Elc Case No 50 of 2011 be set aside and/or reviewed.



4. That the plaintiffs' Bill of Costs dated May 4, 2021 vide Bungoma Elc Case No 50 of 2011 be taxed afresh.
 5. That costs be provided for.
- (4) The application is based on the grounds set out therein and is supported by the affidavit of Samson Toywa the Applicant (2nd defendant in the main suit).
- [5] The gravamen of the application is that the decision of the Deputy Registrar as Taxing Officer taxing the plaintiffs/Respondent's Bill of Costs in the sum of Kshs 427,136/= is so high particularly on the instruction fees. That the Applicant was only notified about the ruling on taxation on October 15, 2021 while in Nairobi nursing his wife who had been diagnosed with cancer hence the delay in getting back to his Counsel in good time. That the delay in filing this reference was neither deliberate nor intentional and this Court should therefore be pleased to extend time for filing the reference.
- [6] That it was unfair for the Taxing Master/Deputy Registrar to enhance the instruction fees from Kshs 80,000/= to Kshs 250,000/= when he was not the party that contributed towards the long time which this case took. That infact it was the Respondents who occasioned the delay through their numerous applications each time the suit came up for hearing. That it is against that backdrop that this Court is beseeched to set aside and review the orders of the Deputy Registrar dated September 16, 2021 and order that the taxation be done afresh.
- [7] The Applicant has annexed the following documents to the Chamber Summons: -
1. Respondents Bill of Costs dated May 4, 2021.
 2. Ruling of the Deputy Registrar dated September 16, 2021.
 3. Notice of Objection by the Applicant in respect of: -
 1. Item 1: Instruction fees.
 2. Item 2: Getting up fees for trial.
 4. Letter by Deputy Registrar dated September 29, 2021.
 5. Documents from MP Shah hospital in respect of Gladys Nasambu Toywa
- The application is opposed and Ms Vivian Ratemo Counsel for the 1st Respondent has filed a replying affidavit dated February 14, 2022 in which she has deponed, inter alia, that there is inordinate and un – explained delay in filing this application as the ruling on the Bill of Costs was delivered on September 16, 2021. That the Applicant failed to file the reference within 14 days as directed by the Deputy Registrar. That the Applicant cannot purport to claim that he was attending to his ailing wife as per the medical reports annexed to the application which show that she attended hospital on September 6, 2021 way before the ruling on the Bill of Costs was delivered. No reasonable explanation has been given on the delay and extension of time is an equitable remedy only available to a deserving party. That the Applicant is only trying to delay the Respondents enjoyment of the fruits of the Judgment having initially sought 45 days stay of execution upon delivery of the ruling.
- [8] Further, that the Applicant was given an opportunity to file his submissions before the taxation of the Bill of Costs but failed to do so. That the Deputy Registrar as Taxing Master is vested with the jurisdiction to either reduce or increase the fees payable and the ruling dated September 16, 2021 is well reasoned and there was no error in awarding instruction fees of Kshs 250,000/=. This application



suffers from great destituteness in merit, reason and justification and should be dismissed with costs to the 1st Respondent.

[9] The application has been canvassed by way of written submissions filed both by Mr Murunga instructed by the firm of JO Makali & Company Advocates for the Applicant and by MS Ratemo instructed by the firm of Ocharo Kebira & Company Advocates for the 1st Respondent.

[10] I have considered the application, the rival affidavits and annexures as well as the submissions by Counsel.

[11] The Applicant seeks two remedies from this Court being: -

1: Extension of time within which to file a reference.

2: Consequent upon the grant of (1) above, the Decision of the Deputy Registrar dated September 16, 2021 be set aside and the Bill of Costs dated May 4, 2021 be taxed afresh.

[12] It is common ground that the Respondents filed their Bill of Costs dated May 4, 2021 and on July 12, 2021 the Deputy Registrar directed that the disposal of the taxation be by way of written submissions. However, when the matter came up before the Deputy Registrar on August 11, 2021 to confirm compliance with the directions of the Deputy Registrar, Counsel for the Applicant sought an additional 14 days to file submissions and was granted upto August 28, 2021 to do so. On that date however, Counsel for the Applicant informed the Court that he had not been able to file his submissions and asked the Court to give a ruling date. That ruling was delivered on September 16, 2021 by way of e-mail to the address of both Counsels and it contained the reasons as to why the Deputy Registrar allowed the Bill of Costs in the all-inclusive sum of Kshs 427,135.00.

[13] The Applicant therefore had 14 days from September 16, 2021 to file a reference to this Court setting out his grounds of objection to any item in the Bill of Costs. Rule 11 (1) (2) (3) (4) and (5) of the Advocates Remuneration Order provides as follows: -

' 11(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 fourteen days from the receipt of the reason apply to a Judge by Chamber Summons, which shall be served on all the parties concerned setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the Judge upon any objection referred to such Judge under sub paragraph (2) may, with the leave of the Judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in it's discretion by order to enlarge the time fixed by sub paragraph (1) or sub paragraph (2) for the taking of any step; application for such an order may be made by 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 expires.' Emphasis mine.



- [14] This Court must therefore first determine whether there are sufficient grounds to enlarge the time within which reference shall be filed because if that prayer is declined, that will be the end of this application.

Extension Of Time: -

- [15] The ruling delivered on September 16, 2021 contained the reasons of the Deputy Registrar on each of the item on the Bill of Costs. The Applicant therefore had upto October 1, 2021 to file a reference to this Court. However, as is clear from Rule 11 (4) of the Advocates Remuneration Order, this Court may 'in it's discretion' enlarge such time. In the case of *Nicholas Kiptoo Korir arap Salat v Independent Electoral & Boundaries Commission & 7 Others 2014 eKLR*, the Supreme Court laid down the principles that should guide a Court in exercising it's discretion in extending any time set out in the law. These are: -

- 1: Extension of time is not a right of a party. It is an equitable remedy which is only available to a deserving party at the discretion of the Court.
- 2: A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.
- 3: Whether the Court should exercise the discretion to extend time is a consideration to be made on a case by case basis.
- 4: Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.
- 5: Whether there will be any prejudice suffered by the Respondents if the extension is granted.
- 6: Whether the application has been brought without undue delay.
- 7: Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

- [16] Having failed to file his reference within 14 days from the date when the Deputy Registrar delivered his ruling on September 16, 2021, the Applicant was at liberty, as he has done, to approach this Court to exercise it's discretion in his favour and extend the time. However, such discretion being a Judicial function, can only be exercised on the basis of evidence and sound legal basis. It is not to be exercised in a whimsical manner nor is leave to do any act be granted as a matter of course. And as the Court put it in the case of *Nicholas Kiptoo Korir arap Salat (supra)*, it is an 'equitable remedy' which means that the Applicant must approach the Court with clean hands.

- [17] The delay from September 16, 2021 upto November 8, 2021 when this application was filed is certainly unreasonable bearing in mind that the ruling of the Deputy Registrar was dispatched to Counsel on the same day. The record shows that by a Notice of Objection dated September 27, 2021 and filed on September 28, 2021, Counsel for the Applicant filed a Notice of Objection to the Deputy Registrar's decision on items 1 and 2 of the Bill of Costs. That was not necessary because the Deputy Registrar's ruling dated September 16, 2021 contained the reason for his decision. In the case of *Abmednasir Abdikadir & Company Advocates v National Bank Of Kenya Ltd (2) 2006 1 EA 5*, the Court held that: -

' Although rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed item is in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because



of the unfortunate wording of sub rule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.'

See also *Evans Thiga Gaturu Advocate v Kenya Commercial Bank Ltd 2012 eKLR* where Odunga J stated that: -

However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons.'

The above explains why in response to the Notice of Objection dated September 27, 2021, the Deputy Registrar vide his letter dated September 29, 2021 replied as follows: -

We refer to the above matter and your notice of objection dated September 27, 2021 and received in Court on the September 28, 2021.

The reason for the taxation on the items objected to are contained in the reasoned ruling delivered on the September 16, 2021.

You may move the Court by reference.”

The Applicant’s Notice of Objection dated September 27, 2021 was therefore unnecessary and only served to eat into the Applicant’s 14 days within which to file a reference to this Court.

[18] What then is the Applicant’s explanation for the delay in filing the reference? This is contained in paragraphs 11, 12, 13 and 14 of his supporting affidavit where he has averred as follows: -

’ 11: ‘That I was notified of this information by my Counsel on record on October 15, 2021 however I informed my advocate that I was in Nairobi nursing and/or taking care of my wife who was diagnosed with cancer.’

12: ‘That however due to the nature of my wife’s ailment I was unable to get back to my advocates on record in good time hence the delay.’

13: ‘That I therefore wish to state that the delay in filing the reference was neither deliberate nor intentional but due to the fact that I was taking care and/or nursing my wife in Nairobi.’

14: ‘That I therefore pray that this Honourable Court be pleased to enlarge time for filing this reference.’

[19] The medical documents produced by the Applicant show that his wife Gladys Toywa was admitted at the MP Shah Hospital on September 6, 2021 and was discharged on the same day. The other documents show that she was treated in the same hospital on March 26, 2021 and May 6, 2021. Therefore, the only time that she was in hospital in September 2021 was September 6, 2021 a week before the ruling on taxation was delivered on September 14, 2021. And although the Applicant alleges that his Counsel only notified him about the ruling on October 15, 2021, there is nothing to show for it. And even then, there is no explanation as to why it took him another three (3) weeks to file this application. Clearly, the delay in filing this explanation is not only unreasonable but it has also not been explained to the satisfaction of this Court.

[20] It is also not lost to this Court that the Applicant hardly conforms to Court directions nor abide by his own undertakings. It is clear from the record that notwithstanding the fact that on August 11, 2021 the Applicant sought an extension of 14 more days to file his submissions on the Bill of Costs, he did not do so. Further, it is also clear from the ruling dated September 14, 2021 that the Applicant asked



for a stay of execution for costs in order to organize himself for payment. As a matter of good faith, the Court would have expected the Applicant to make an offer to pay the items on the Bill of Costs over which he has no objection. After all, he is not disputing the whole Bill of Costs and his Notice of Objection is primarily hinged on items 1 and 2. That can only lend credence to the averment in paragraph 12 of the replying affidavit that 'the Applicant is only trying to delay the Respondent from enjoying the fruits of the Judgment.' That is clearly to the prejudice of the Respondents.

- [21] The up – shot of all the above is that the Applicant has not satisfied this Court that there are sufficient reasons to warrant an extension of time within which to file a reference to this Court. That prayer must therefore be rejected.
- [22] As a consequence of the foregoing, there can be no proper reference before this Court upon which the Deputy Registrar's decision dated September 16, 2021 can be reviewed or set aside.
- [23] The Chamber Summons application dated November 8, 2021 is devoid of merit. It is hereby dismissed with costs to the 1st Respondent.

Boaz N. Olao.

J U D G E

21st September 2022.

RULING DATED, SIGNED AND DELIVERED ON THIS 21ST DAY OF SEPTEMBER 2022 AT BUNGOMA BY WAY OF ELECTRONIC MAIL.

Boaz N. Olao.

J U D G E

21st September 2022.

