



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION NO. 242 OF 2007

KAHUTHU AND KAHUTHU ADVOCATES.....APPLICANT

VERSUS

KENYA TEA DEVELOPMENT AGENCY LTD.....1ST RESPONDENT

GITHAMBO TEA FACTORY LIMITED.....2ND RESPONDENT

RULING OF THE COURT

1. The application before me is the Chamber Summons dated 3/03/08 by which the Applicants seek leave of the Honourable Court to give notice in writing to the taxing officer of the items of taxation to which they object. The second prayer is for provision of costs. The application is brought under paragraph 11(4) of the Advocates (Remuneration) Order made under the Advocates' Act Cap 16 Laws of Kenya. For clarity, paragraph 11 of the Advocates (Remuneration) Order provides –

“11 (1) 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.

(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 reasons 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 subparagraph (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 its discretion

by order 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 Chamber Summons upon giving to any 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.”

2. The application is premised on six (6) grounds on the face thereof –

1. *That the Respondents were inadvertently not represented on 26th September, 2007 when this matter came up for taxation and the applicant chose not to inform the Respondent of the date of delivery of the ruling on 8th November 2008.*

2. *That the Clients/Respondents only learned about the delivery of the ruling on perusal of the court file by M/s Riunga Raiji Advocate on 26th February 2008.*

3. *That the Clients/Respondents intend to file a reference and object to the taxation of item number 1,2,6,7,10,11,16,43,154,213 and 214.*

4. *The awards of instruction fees of Kshs.30,000,000/= when the basic instruction fee is Kshs.20,000/= and the further award of Kshs.3,000,000/= as instruction fees for a Chamber Summons (basic is Kshs.2,500/=) are so manifestly excessive as to clearly amount to an error of principle on the part of the taxing officer.*

5. *That the taxation of the bill of costs at Kshs.58,274,915/= is so manifestly excessive as to amount to an error in principle on the part of the taxing officer.*

6. *That no prejudice will be occasioned to the advocates if this application is allowed.*

3. There is also an affidavit in support of the application sworn by **Rebecca Mbithi** and dated 3/03/07. She says that as head of the legal and regulatory matters of the 1st Respondent she received the client/advocate bill of costs in this matter together with a letter from the Applicant requesting for a meeting to discuss the bill. A copy of the letter is annexed to the affidavit and marked “**RM1**”. By the said letter dated 17/05/07, M/s Kahuthu & Kahuthu Advocates, who are the respondents in the instant application intimated that if the parties did not agree on the costs within 30 (thirty) days, then they (respondents) would proceed with taxation. The deponent says that in light of the contents of M/s Kahuthu’s letter, the respondents did not instruct an advocate to appear for them in the matter until 3/08/07 when the respondents instructed the firm of Riungu Raiji & Co. Advocates to represent them. According to paragraph 6 of the affidavit the respondents letter of instruction did not reach their advocates and thus the respondent’s failure either by themselves or their advocates, to attend court on 26/09/2007 for taxation of the client – advocate bill of costs. The deponent also says that they did not become aware of the taxation even as at 8/11/07 when the period allowed for objections under paragraph 11 of the Advocates (Remuneration) Rules began to run. She also says that up to the date of the affidavit the Applicant had not forwarded to the respondent the notice of taxation although the notice is said to have been issued on 8/11/07. The deponent prays that the respondent be allowed to file its objection to the taxation out of time on grounds that –

(a) *The award of instruction fees of Kshs.30,000/= by the taxing officer when the basic fees provided for is Kshs.20,000/= and the award of instruction fees of Kshs.3,000,000/= for a Chamber Summons against a basic instruction fees of Kshs.2,500/= provided for under Schedule VII of the Advocates (Remuneration) Order is so manifestly excessive as to amount to an error of principle on the part of the said taxing officer.*

(b) *That the taxation of the Advocate/Client bill at Kshs.58274915/= cannot be justified in the circumstances of this matter considering that the subject matters were declarations, injunctions and general damages.*

4. The application is opposed. The Replying Affidavit dated 3/04/08 is sworn by Mr. G.J. Kahuthu who avers that the application as filed offends Order 50 Rule 15(2) of the Civil Procedure Rules which provides –

“15(2) Every motion or summons shall bear at the foot the words –

“If any party served does not appear, at the time and place above-mentioned such order will be made and proceedings taken as the court may think just and expedient.”

5. The deponent also says that the application is vexatious, frivolous, oppressive and an abuse of the court process and is being used as a delaying tactic by the applicant. The deponent also says that the Applicant has not given cogent reasons why their advocates failed to appear for the taxation on 26/09/07 when the said advocates were already seized of the matter as per annexure “**GJK 1**” being copies of a hearing notice dated 20/05/07 and an application dated 29/05/07. Mr. Kahuthu says that the reason why the applicant’s counsel failed to attend court on 26/09/07 was because of disagreements between them and their clients over the fees payable by the Applicants to the advocates; that the firm of M/s Riunga Raiji were aware of the taxation as early as 28/03/07 or even before then as can be seen from annexure marked “**GJK 2**” which is a copy of an application by which the firm of Riunga Raiji & Co. Advocates sought leave to take over the conduct of the suit on behalf of the Plaintiffs instead of M/s Kahuthu & Co. Advocates. The reason for that application as per the certificate of urgency –

“? is that the Plaintiffs have been served with an exorbitant Client/Advocate bill of costs while there is a pending party and party bill of costs in this matter filed on 19th December, 2002 which the Plaintiffs have requested [us] to fix urgently for taxation.”

6. The deponent also says that with all the relevant information in their possession, the delay in bringing the instant application has not been adequately explained. He also says that the Applicant’s letter of 17/05/07 was not acted upon by the deadline of 17/06/07 but that all the same another letter dated 5/06/07 as a reminder that they were proceeding with taxation; that the applicant’s advocates’ failure to attend court on 26/09/07 for the taxation was deliberate and not excusable.

7. Mr. Mwaniki Kiura appeared for the Applicant and urged the court to allow the application for the reasons given in the Supporting Affidavit sworn by Rebecca Mbithi. Mr. Kiura also submitted that the taxing officer gravely erred as he did not tax the bill in accordance with the Advocates (Remuneration) Order and that even if the Applicant failed to turn up during the taxation, the taxing officer was still bound to apply the rules. That in any event, the Applicants are entitled to object to any items whose taxation aggrieved them and that in this case, there are only two items which the Applicant wants to contest – namely the instruction fee of Kshs.30,000,000/= which constitutes the bulk of the taxed costs. The Applicant cited two (2) authorities for guidance of the court –

(a) African Airlines International Ltd. –vs- Eastern & Southern African Trade & Development Bank (PTA BANK) [2003] KLR 140 in which the issue of extension of time within which to file an appeal arose, and how the court’s discretion in dealing with such an application should be exercised. In their ruling, the three learned JA’s said the following at page 142 of the judgment – lines 35 to 40.

“In dealing with the application for extension, the learned single judge had to take into account all the relevant matters when approaching the determination of the application before him. In our judgment, all the relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reasons for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendants if time is extended.”

(b) Njuguna –vs-Magichu & 3 Others [2003] KLR 507 in which the Applicant brought an application for extension of time within which to file and serve a Notice of Appeal and Record of Appeal out of time. His first Notice of Appeal had been struck out due to the mistake of his advocates in miscalculating dates and figures hence filing the same out of time. The Respondents opposed the application on the ground, *inter alia*, that indulgence would delay the day of enjoying the fruits of judgment.

8. Waki JA delivered the ruling in the application in which he referred to **Civil Application NAI 337/96 – Jedida Alumasa & 3 Others –vs- SS Kositany (UR)** where Bosire Ag JA (as he then was) said –

“It is now trite law that a litigant – whose appeal has been struck out has the liberty to restart the appellate procedures provided he can be able to come to court promptly for an order extending time at

least to lodge a fresh notice of appeal;”

and also referred to **Civil Application NAI 64/1990 – Kenya Cannery Ltd. –vs- Titus Muiruri Doge (UR)** where a full bench of the Court of Appeal said,

“This court has held on many occasions that any litigant who wishes to be heard by this court should not be prevented or penalized due to the mistakes of his counsel. The advocate has admitted his mistake in failing to interpret the rules properly.”

9. Mr. Kahuthu for the Respondent argues that this application should be struck out for non-compliance with Order 50 Rule 15(2) (*supra*). Secondly, he says that since the Bill of costs was served upon the Applicant and further that because the Applicant was aware of the hearing date, then there is no good reason why this application should be allowed. That the application has been brought too late in the day and that the delay of 7 months is not only inordinate but is unexplained. Mr. Kahuthu also says that the Applicant should be censured for not being candid to the court by feigning ignorance of the matter when the Applicants’ advocates were fully briefed concerning the Bill of Costs.

10. It seems clear here, as Mr. Kahuthu says, that the Applicant’s advocates were fully in the picture about the taxation of the bill which had been fixed for taxation on 26/09/2007 – the annexure marked “**RM2**” – being a letter from the Applicant to their advocates, M/s Riunga Raiji & Co. Advocates contains clear instructions to the advocates to confirm the following:-

(i) that the advocates fees in the taxation would be Kshs.150,000/= inclusive of VAT and disbursements.

(ii) that the court file had now been found

(iii) that the advocates had filed their Notice of Appointment.

As it turned out there was no appearance on behalf of the Applicant on 26/09/07 when the Bill was taxed. Whose fault should this be? The advocates’ or the Applicants?

11. Distinguishing the authorities cited by the Applicant Mr. Kahuthu says that the circumstances of those two cases was for enlargement of time under the Civil Procedure Rules while the instant case in seeking enlargement under the Advocates Act and the rules made thereunder. The question that arises in this regard is whether applications under the Advocates Act, Cap 16 Laws of Kenya, are not subject to the Civil Procedure Rules.

12. There is indeed evidence on record that both the Applicant and its advocates were fully aware of the date for the taxation of the Bill which was taxed on 26/09/2007 but then the advocates did not appear. I think that the advocates failure to attend court on behalf of the Applicants who had already given instructions to the advocate should not be visited upon the Applicant. The principle here is that a party who wants to be heard by the court should not be shut out as long as such a party can obtain the leave of the court to do out of time that which ought to have been done. Paragraph 11(4) of the Advocates (Remuneration) Order gives this court unfettered power in its discretion to enlarge the time fixed under paragraph 11(1). The discretion that is given to the court is to be exercised flexibly depending on the circumstances of each case. I have looked at the two items of the bill that the Applicant intends to object to and I am persuaded that there is an arguable objection to those items. I also persuaded that the only prejudice likely to accrue to the Respondent is the possible delay in realizing the fruits of the taxed costs. In my view, greater prejudice would accrue to the Applicant if the order sought is denied.

13. There has been a delay of about seven months between the time of taxing the Bill and the time of filing the instant application but again the circumstances of this case dictate that that delay should not be held against the Applicant. There are indications that there was some dispute between the Applicant and the advocates concerning payment of fees to the advocate. Times have been hard in the recent past for most businesses, and it is therefore understandable that agreement was not reached early enough between

the Applicant and its advocates on record to enable the advocate attend court on 26/09/2007 for the taxation of the bill.

16. For the reasons above given, I will grant the application and make the following orders:-

(a) The time for giving notice in writing to the taxing officer of the items of taxation to which the Applicant wishes to object be and is hereby extended.

(b) That the said notice be given within Fourteen (14) days from the date of this ruling.

(c) The costs of this application to be agreed or taxed by the taxing officer to be paid by the Applicant to the Respondents within twenty one (21) days of agreement or taxation in default execution to issue.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of September, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Kiura (present) for the Plaintiff/Applicant

Mr. Kahuthu (present) for the Defendant/Respondent