



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Appli. 1231 of 2003

QUEENSWAY AIR SERVICES LIMITED ::::::::::::::::::::: PLAINTIFF

VERSUS

THE COMMISSIONER OF INCOME TAX ::::::::::::::::::::: DEFENDANT

RULING

The Respondent to this application presented its bill of costs to Court for taxation on 13th October 2005. Notice was issued for the taxation of the same on 7th July 2006. A perusal of the court record shows that on 7.7.2006 the matter was stood over by consent for taxation on 2.10.2006. On 2.10.2006 it is noted on the record that the date for taxation had been taken by consent and since there was no reason for non attendance the current respondent prayed to proceed ex parte. The Deputy Registrar noted that indeed the date had been taken by consent and no explanation had been given for none attendance. Being satisfied that due notice of the taxation had been given allowed the applicant to proceed with the taxation. The taxation was done on 2.10.2006 and the ruling of the taxing master was given on 27.10.2006. Rule 11(1) of the Advocates remuneration rules requires any party wishing to object to the decision of the taxing master to give notice of objection on the items objected to within 14 days. 14 days counted from 27.10.2006 less weekends and holidays fell on a date before mid November, 2006. Rule 11(1) states"-

"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."

The current applicant was late in presenting the notice for objection hence the application under consideration subject of this ruling. The same is brought under Section 3A of the Civil procedure Act and Rule 11 (4) of the Advocates Remuneration Order. The applicant seeks this courts intervention to enlarge the time within which to give notice in writing to the taxing master to object to certain items allowed by him. The grounds are set out in the body of the application, supporting affidavit and oral submission in Court. The major ones are that:-

- (1) The taxation was done ex parte and the ruling deferred.
- (2) Neither the taxing master or the respondent to this application notified the applicant of the date on which the taxation ruling was to be given.
- (3) The Respondent attended the taxing master on the day of the delivery of the ruling on taxation alone.
- (4) After delivery of the said ruling ex parte, neither the taxing master nor the Respondent notified the applicant of the delivery.

(5) That the applicant came to learn of the delivery of the ruling 40 days later by which time the objection had expired.

(6) That counsel seized of this matter on behalf of the applicant did not attend court on 7.7.2006 but another counsel held his brief. That the date for 2.10.2006 was taken on their behalf but due to inadvertence it was not diarized in their master diary hence in ability to attend Court on 2.10.2006.

(7) That this court has jurisdiction under the rules to extend the said time and no prejudice will be caused if the same is extended.

In response Counsel for the Respondent has opposed the application on the ground that:-

(1) There is no basis for the application.

(2) The costs were awarded way back in December 2003 but the applicants refused to settle the same hence the necessity for filing of the bill for taxation.

(3) That it is not true that they were not aware of the date for taxation as the same was taken by consent.

(4) That they notified them of the taxation vide their letter of 6.12.2006 and if they had any genuine complaint they should have raised it immediately.

(5) That there was no response to their letter of 6.12.2006 and that is why they issued a demand letter dated 9.2.2007 and they have no doubt this is what has prompted the filing of this application to forestall the impending execution.

(6) That the Respondent who has no control over the applicants manner of running their office should not be penalized for wrongs committed by them.

(7) That Counsel on record for the Respondent tried to reach the applicants advocates on the date of 2.10.2006 through their mobile phones but both were switched off.

(8) That the applicants cannot complain because they gave notification of taxation 40 days later as alleged but they have not explained why they took 72 days to file the application.

In response Counsel for the Applicant submitted that there was a long vacation in between.

On the courts assessment of the facts herein there are two questions to be answered by this court namely:-

(i) Whether the court has jurisdiction to extend the time for presenting objection

(ii) Whether justification has been shown to justify the court exercising its discretion in their favour. Rule 11(4) states *“The high court shall have power in its discretion by order to enlarge the time fixed by sub paragraph 1 of subparagraph (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 3 clear days notice in writing or as the court may direct, and may be so made not with standing that the time sought to be enlarged may have already expired”*

From the above provision jurisdiction exists to enlarge time. This power is discretionary. It is now trite law that where a court has a discretion to do something, it has to be exercised judiciously.

Judicious exercise of a discretion calls for fairness to both sides. Fairness herein demand that the court should not loose sight of the fact that:-

(1) Costs were awarded way back in 2003, they were demanded but not paid

- (2) Taxation was exparte and notice of the same given to the applicants on 6.12.2006 but they took no action.
- (3) A Demand Notice was issued on 9.2.2007 and that is when the application was filed.
- (4) Paragraph 15 of the supporting affidavit does not specify the items to be objected to.
- (5) The taxing master has given reasons for allowing the bill of costs at 712, 657.00 as opposed to the 3.8 million which had been asked for. The applicant has not stated what was left out.

The foregoing factors call for a conditional enlargement of time in order to safe guard the interests of both parties and to ensure fairness and justice to all.

The upshot of the foregoing assessment is that the applicant will have time enlarged for them to lodge notice for the taxing master to give reasons for his ruling on the items to be specified on condition that the taxed amount is deposited into court within 60 days from the date of the reading of this ruling.

- (2) Upon the deposit being made the applicant to have 14 days to issue notice under rule 11(1) of the Advocates remuneration order. The 14 days are to start running from the date of the deposit.
- (3) The Respondent will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 28TH DAY OF MAY 2007.

R. NAMBUYE

JUDGE