



REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

Misc Appli 1019 of 2006

PETER O. NGOGE

T/A O. P. NGOGE & ASSOCIATES.....APPLICANT/ADVOCATE

VERSUS

VIRGINIA KATHAMBI..... RESPONDENT/CLIENT

RULING

This is an application by Virginia Kathambi (hereinafter called “*the Client*”) whereby an order is sought to enlarge time within which to file a Notice of Objection to taxation. The taxation took place on 27.10.2006 before a Taxing Officer of this court. The application is expressed to be brought under the provisions of Rule 11 (4) of the Advocates Act.

The substance of the grounds in support of the application is that the client was not served with the bill of costs and the notice of taxation and she is desirous of challenging the taxation through a reference. The application is supported by an affidavit sworn by the client in which it is deponed inter alia that neither the bill of costs nor the notice of taxation were served upon her personally and that the deponent of the affidavit of service has made a false return. She also swears that she only came to learn of the existence of the taxation upon receipt of the bill of costs by post after the taxation had taken place.

The application is opposed and there is a replying affidavit sworn by Peter O. Ngoge (hereinafter called “*the advocate*”). In that affidavit the advocate swears that he personally served the client at her business premises located along Accra road L. R. No.209/2455/12 but she refused to acknowledge service by signing or stamping at the back of the original copies prompting him to send other copies of the documents by registered post and the clients allegations are only meant to delay the matter. The advocate further swears that the client is guilty of laches and the court’s discretion should not be exercised in her favour.

The application was canvassed before me on 25.5.2007 by Mr. Muchoki Learned counsel for the client and Mr. Kenyatta Learned counsel for the advocate. Both counsels took the positions taken by their respective clients in the affidavits aforesaid.

I have considered the application, the affidavits of both the client and the advocate. I have also given due consideration to the submissions of counsels appearing. Having done so, I take the following view of the matter.

On whether or not to grant extension of time within which the client may give notice of objection the court has an unfettered discretion under sub-paragraph (4) of rule II of the Advocates Remuneration Order. However, like all judicial discretions the same is to be exercised judicially and not whimsically or idiosyncratically the main concern of the court being to do justice to the parties.

The client states that she was not served with the bill of costs and the notice of taxation personally and that the same documents posted to her were received after taxation had taken place. The advocate swears otherwise. There is therefore an obvious conflict in the affidavit evidence. Although the client in her affidavit in support of the application deponed that it would be in the interest of justice that the advocate be cross-examined on his affidavit of service, no application was made for the same and the advocate did not offer himself for cross-examination. So as service is asserted by the advocate and denied by the client, the issue remains unproven. The advocate has not in any event demonstrated that he will be prejudiced if the extension sought is granted.

In the result, I think this is an appropriate case for the exercise of the court's discretion to extend time as prayed. The client's application is therefore allowed as prayed. She may give notice of objection to the decision of the taxing officer given on 27.10.2006 within seven (7) days from the date hereof. Costs in the reference.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JULY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Mureithi holding brief for Muchoki for the client.

F. AZANGALALA

JUDGE

16/7/07