



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 56 of 2006

S. MUSALIA MWENESI ADVOCATES.....APPLICANT

VERSUS

KAN GENERAL SUPPLIERS LTD.....1ST RESPONDENT

AGNES KARUANA NYAMU.....2ND RESPONDENT

BENJAMIN MUSEMBI NGANDA.....3RD RESPONDENT

JOSEPHINE MUTHINI NGANDA.....4TH RESPONDENT

R U L I N G

I have before me an application by Benjamin Musembi Nganda and Josephine Muthini Nganda (herein after “**the clients**”) whereby an order is sought to enlarge the time fixed by rule 11(1) of the Advocates (**Remuneration**) Order to enable them file a notice of objection to the decision of the taxing officer dated 14.7.2006. An order is also sought to stay execution of the said order of taxation pending the hearing and determination of the intended reference from the said decision of the taxing officer. The application is expressed to be by Notice of Motion under Section 3A of the Civil Procedure Act, Order L Rules 1, 2 and 3, Order XLIX Rule 5 and Order XLI Rule 4 of the Civil Procedure Rules, Rule 11(4) of the Advocates (**Remuneration**) Order and all other enabling provisions of the Law.

The application is made upon the following grounds:-

- (1) That the clients wish to object to the amount arrived at in the taxation.**
- (2) That the delay in filing the notice of objection was occasioned by the inability of the clients to convey their instructions to their counsel in time.**
- (3) That the delay in filing objection is not inordinate nor prejudicial to the Advocates.**
- (4) That execution of the order for costs shall render the intended reference nugatory.**

The application is supported by an affidavit sworn by Benjamin Musembi Nganda aforesaid. He has deponed that when the ruling on the taxation was made on 14.7.2006 he had together with Josephine Muthini Nganda traveled up-country and did not receive their advocate’s letter informing them of the ruling. He has further deponed that he returned from upcountry in mid August 2006 and on learning of the said ruling he wished to object to the same but was advised that the prescribed time to object had

lapsed. Hence this application.

The application is opposed and there is a replying affidavit sworn by Stephen Musalia Mwenesi (*hereinafter the advocate*). There are also Grounds of Opposition. In a nutshell, the advocate objects to the application upon the main grounds that the application is incompetent as the same should have been by Chamber Summons and not by a Motion on Notice. The advocate also contends that the clients are guilty of inordinate delay and further that the intended reference is without merit as the taxing officer's decision was fair and equitable.

The application was canvassed before me on 3.10.2006 by Ms Kamende Learned counsel for the clients and Ms Lavuna, Learned counsel for the advocate. The Learned advocates recited the averments in the respective affidavits of their clients and briefly explained their client's respective positions.

I have considered the application, the affidavits of both the clients and the advocate and the grounds of opposition. I have finally given due consideration to the submissions of counsels appearing. Having done so, I take the following view of the matter. With regard to the competence of the application, I am of the view that whereas an application to enlarge time within which a party may object to a decision on taxation should be by way of a Chamber Summons by dint of the provisions of Rule 11(4) of the Advocates (**Remuneration**) Order, an application for stay of execution by dint of Order L Rule 1 should be by way of a Notice of Motion and since a Motion is the wider jurisdiction of the two, the clients were entitled to move the court as they have done. I cannot therefore strike out the application for incompetence.

On the issue of extension of time, within which the clients may give notice of objection, it is not in dispute that the court has an unfettered discretion under sub-paragraph (4) of rule 11 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 clients state that when the ruling on taxation was delivered on 14.7.2006 they had traveled up-country and did not receive their advocates' letter informing them of the taxation. I have no reason to doubt that explanation. However, the clients state that they traveled back from up-country in mid August, 2006 and expressed their desire to challenge the said ruling on taxation. Yet the clients brought this application on 6.9.2006 a period of three (3) weeks after they had notice of the ruling. That period of delay is not explained. Notwithstanding the absence of explanation for that delay I do not think that the delay is inordinate.

As regards the prima facie merits of the intended reference if the time to lodge the objection is extended, the clients expressed no view in the affidavit in support of the application and in the submissions of counsel. That failure to state whether or not the intended reference has chances of success in my view is not fatal to this application. The clients have an undoubted right to object to the ruling on taxation and desire to do so. The advocate has not demonstrated that he will be prejudiced if the extension sought is granted. In my view the advocate can adequately be compensated in costs for the delay in payment of his dues which will be the result of the extension.

In the result, I think that this is an appropriate case for the exercise of the court's discretion to extend time as prayed. The application is therefore allowed in terms of prayer 2 of the Notice of Motion. The client may give notice of objection to the decision of the taxing officer dated 14.7.2006 within seven (7) days of today.

With regard to the prayer for stay of execution, I have found as follows. The advocate has not taken any step towards obtaining judgment for the taxed costs. There is therefore in my view no threat of execution. In any event the Court of Appeal has expressed doubt as to whether there is jurisdiction to order stay of execution of an order on taxation. Prayer 4 of the application is accordingly declined.

The clients shall pay to the advocate costs of this application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF NOVEMBER, 2006.

F. AZANGALALA

JUDGE

6.11.2006

Read in the presence of:-