



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUSIA**

**MISCELLANEOIUS APPLICATION 311 OF 2003**

**ASHIOYA & CO. ADVOCATES.....APPLICANT**

**VS**

**JOAB ROGERS WAFULA.....RESPONDENT**

**RULING**

The respondent, Joab Rodgers wafula, filed a summons under paragraph 11 (4) of the Advocates (Remuneration) Order and sought to have time enlarged by 7 days to allow him give notice to the taxing officer to give reasons he based on while taxing the Advocates – client bill on 10th August, 2004. He also applied for an order of stay of recovery proceedings of the taxed costs. A supporting affidavit was filed to buttress the summons sworn by the respondent on 1st October, 2004. An objection was raised by the firm of Ashioya & Co. advocates, the applicant, against the summons in the grounds of opposition dated 6th October, 2004.

The Respondent argued that he delayed to file the notice in writing of his intention to object to the decision of the taxing officer of 10th August, 2004 within 14 days as required under paragraph 11(1) of the Advocates (Remuneration) Order when he took the wrong path to appeal. He blamed himself for taking a misconceived path for lack of legal advise. He later sought for legal advise upon which he discovered that time to issue the notice had lapsed. He has urged this Court to rule that this was an excusable mistake and extend time to serve the requisite notice.

He further prayed for stay of recovery proceedings of the taxed costs until the intended objection is heard and determined. He also pointed out that he had genuine grounds of objection against the decision on taxation by the taxing officer which are arguable. The applicant opposed the summons on various fronts. First, it was averred that the Respondent should not be heard until he pays costs arising out of Bungoma HCCA no.4 of 2004.

Mr. Ashioya was of the view that this Court should stay further proceedings until the Respondent settles costs arising out of the aforesaid appeal which was withdrawn with costs to the applicant. Secondly, the applicant was of the view that the Respondent should have offered to deposit security just like in the case provided for under Order XLI rule 4 of the Civil Procedure rules before an order for stay can be granted. He was further of the view that the Respondent should be made to deposit the undisputed amount of taxed costs in Court before being granted the orders he prayed for in this summons.

The history leading to this summons began when Joab Rodgers Wafula the Respondent herein, instructed the firm of Ashioya & Co. advocates to institute Civil proceedings against Kenya Industrial Estates Ltd to recover assets which the later had seized from the former is company known as Busia Joinery Works Ltd. It would appear the firm of Ashioya and Co. Advocates dutifully acted on those instructions by filing Busia HCCC No. 20 of 2002. Before the suit was heard the firm of Ashioya & Co. advocates withdraw from acting for the Respondent. This obviously culminated to the filing of the Advocate – client bill of costs. Taxation proceeded as planned and on the 10th day of August, 2004, the taxing officer of this Court awarded the firm of Ashioya & Co. Advocates the applicant herein a sum of Ksh.228,312/50 as advocates costs.

This prompted the Respondent herein who was by then unrepresented to file an appeal against the decision on taxation vide Bungoma HCCA no.40 of 2004. It would appear the Respondent at this point sought for legal advise which led to the withdrawal of the appeal hence this summons. The Respondent

now urges this court to come to the conclusion that he made a genuine mistake which led to the delay in complying with the provisions of paragraph II

(1) of the Advocates (Remuneration) order. He says the mistake is excusable. Mr. Ashioya did not address this Court over whether or not the Respondent made a genuine Mistake which was excusable. He opted to argue that the proceedings should be stayed until the Respondent settled the costs arising out of the appeal which he withdrew when he obtained proper legal advise from his current advocates on record. I will first deal with the matter raised by the Respondent. This Court has unfettered discretion under paragraph 11 (4) of the advocates (remuneration) to extend time limited by paragraph 11(1). However this discretion must be exercised judicially depending on the circumstances of each case. I think the reasons for the delay have to be plausible.

This Court also will consider the merits of the intended action. I will begin by stating that the applicant was prompt to file this summons upon obtaining sound legal advise. He is not guilty of inordinate delay in filing this application. I am convinced the Respondent made a genuine mistake when he opted to appeal against the decision on taxation instead of following the laid down procedure under the Advocates (Remuneration) Order. He took the wrong direction for lack of legal advise. His misconceived action to appeal in my view is the mistake ordinarily made by ordinary citizens not versed with the law and the laid down legal procedures.

There is no evidence that the Respondent intentionally misguided himself. His misconceived action made him time barred under paragraph 11(1) of the Advocates (Remuneration) Order. I think the delay is excusable. The intended issues which should be included in the proposed notice to the taxing officer appear to me to be well merited and arguable. The issue raised by Mr. Ashioya that this application should be stayed pending payment of costs arising from Bungoma HCCA no.40 of 2004, appears to be based on the provisions of Order XXIV rule 4 of the Civil Procedure Rules which requires that subsequent suits should be stayed pending payment of costs arising from previous suits already withdrawn. With great respect to Mr. Ashioya, I think this is not the case here.

The matter which was withdrawn was an appeal which is not a suit as contemplated by Order XXIV rule 4 of the Civil procedure rules. Even if the matter was to fall within the ambit of order XXIV rule 4, then the applicant must move the court by motion pursuant to the provisions of Order L rule 1 of the Civil Procedure rules. The remaining issue is whether or not to issue a stay of execution. The respondent has annexed to the supporting affidavit a copy of a notice to show cause as evidence in support of his assertion that the applicant is likely to execute to recover the taxed costs.

I think I am satisfied that the Respondent is likely to suffer substantial loss if an order of stay of execution is not granted. This takes me to the final issue raised by Mr. Ashioya as to whether or not the respondent should deposit the sum which is not disputed. I will not hesitate to state that this Court has the inherent power to make an Order of stay on the basis of an application made under the Advocates (Remuneration) Order. There is no allegation that the Respondent will not be able to settle the sum if ordered to do so. Hence I will not attach any terms to the orders I am going to grant in this dispute.

In the final analysis therefore the chamber summons dated 4th October, 2004 is allowed. The Respondent is granted leave of 7 days to comply with the provisions of paragraph 11 (1) of the Advocates (Remuneration) Order. There be a stay of execution of recovery of taxed costs pending the filing of the intended objection pursuant to the provisions of paragraph 11(3) of the Advocates (Remuneration) Order. Costs of this summons shall be awarded to the firm of Ashioya & Cop. Advocates in any event.

**DATED AND DELIVERED THIS 8th DAY OF April 2005.**

**J. K. SERGON**

**JUDGE**