



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI COMMERCIAL DIVISION,

MILIMANI MISCELLANEOUS APPLICATION NO. 1 OF 1999

Nelson KinanduApplicant

Versus

Boniface Kinandu Mathenge Defendant

RULING

This ruling relates to the Respondents application by way of a Chamber Summons dated and lodged in Court on 19.08.2004 in which the Applicant, Boniface Kinandu Mathenge seeks the following orders -

- (1) That the Applicant be granted leave to file his Notice of Objection out of time (I think he means his reference against the taxation)
- (2) That the court sets aside the Taxing Officer's Ruling made on 5.06.2001
- (3) That the taxation be set down again for fresh hearing and determination.

The application is supported by the Affidavit of the Applicant sworn on 19.08.2004 and the grounds which will readily appear in the course of this Ruling once we determine whether the applicant may bring his Reference out of time. This Application stands on two limbs, if the Applicant succeeds on the first limb, then we will consider the second limb.

The power to enlarge time is vested in the Court by rule 5 of Order XLIX of the Civil Procedure Rules and enlargement of time may be ordered on terms (if any) as the justice of the case may require. The rule also empowers the Court to enlarge the time notwithstanding that the time for doing the act has long expired. The rule also provides that where enlargement of time is granted the costs thereof shall be borne by the applicant.

Some background on this matter is useful before determining these issues. The Bill of Costs, the subject of the application was filed on 8.10.1999. It was served upon the Applicant in person on 14.01.1999, a Return of Service was filed on 11.02.1999. The Applicant appointed the firm of Kasyoka and Associates who filed a Notice of Appointment of Advocates on 10.02.1999. A Notice of Taxation of the Bill of costs was issued by the Court on 5.07.2000, and was served upon the firm of Kasyoka & Associates on 30.08.2000 for a taxation due on 15.09.2000. An Affidavit of Service was filed on 14.09.2000. The Court record as per the copy of the typed proceedings attached to the Applicant's Supporting Affidavit shows the following:

1. 15.09.2000 there was non-attendance by both parties and the matter was stood over generally.
2. 20.03.2001 - The Bill was fixed for taxation on 18.04.2001.

3. 18.04.2001 - Both the Advocate, (Mr. Kaburu), and the Applicant's Counsel, Mr. Kasyoka were present, but the taxation was again adjourned. Mr. Kasyoka the Applicant's Advocate, was not ready to proceed. The taxation was fixed for 11.5.2001, and an order was made that the Principal file in HCCC No. 4085 of 1992 be availed for purposes of taxation.

4. 11.05.2001 - Mr. Kasyoka was bereaved. The taxation was adjourned, and fixed for taxation on 5.06.2001.

5. 05.06.2001 - Mr. Kaburu, the Advocate attended before the Deputy Registrar, Mrs. Lesiit (now Lady Justice Lesiit). There was no attendance by the applicant's Advocate, Kasyoka despite the date having been taken with concurrence of his colleague a Mr. Akinda.

The typed draft says that the Bill was taxed at Kshs.150,444.90. It is this figure the Applicant Boniface Kinandu Mathenge finds great difficulty with. This figure is clearly a typographical error for three reasons. Firstly, Mr. Kaburu the Advocate himself concedes that it is a typographical error. Secondly, the actual hand written and computed figure at the end of the Bill is Kshs.105,444.90 and thirdly, this is the figure given in the Certificate of Taxation issued by C. O. Kanyangi, the Deputy Registrar on 15.06.2001 and attached to the Applicant's Supporting Affidavit.

Still on the match of events in this minor saga, the Applicant filed a Notice to Act in Person on 6.03.2002, and in that capacity he applied for certified copies of the proceedings relating to the taxation. He paid for and collected certified copies on 26.03.2002. Upon perusal of the proceedings, he found that the Bill was taxed on 5.06.2001 in the absence of his Counsel then on record. Stung by this knowledge, he addressed a letter dated 13.11.2003, accusing Mr. Nelson Kaburu (the Respondent herein) with fraudulently obtaining a Certificate of Taxation issued by the Deputy Registrar 15.06.2001 as indicated. The Deputy Registrar by his letter dated the same day, 13.11.2002, advised the Applicant that the Bill was properly taxed and any dissatisfaction be addressed through laid down legal procedure.

However, before this stage, the applicant has deponed in paragraph 3 of his Supporting Affidavit that the Advocate had not complied with the requirements of paragraph 62 A (1) 3 of the Advocates Remuneration Order. The Applicant has correctly interpreted those requirements, that where a previous Advocate has acted for the Client the current or present Advocate ought to draw a bill and obtain a Certificate from the previous Advocates, and that this is a mandatory requirement of the Rules before the Taxation could proceed to hearing and determination. Indeed this matter was raised by Mr. Kasyoka the Client's Advocate then and was upheld by the learned Deputy Registrar (Mrs. M. Muigai). The client says that unless this order was either set aside, or complied with the taxation could not be proceeded with. For this reason, and the reason that the proceedings have a different figure (Kshs.150,144.90) and a certificate of taxation another figure Kshs.105,444.90 the Client says that there are glaring errors of law and procedure and it is only fair and just the proceedings be reviewed and heard again - to establish a true and proper position.

Mr. Nelson Kaburu (the Advocate) opposes this view of the matter against the Client. In a Replying Affidavit sworn on 16.09.2004 and lodged in Court on 22.09.2004 the Advocate narrates in brief, the fact that Client was previously represented by the firm of Kauma Mussilli, trading as Mussilli & Mussilli, that he obtained the requisite certificate in terms of paragraph 62 A, (3) of the Advocates Remuneration Order and attached both a copy of the Certificate (filed in Court on 20.04.1999) together with a copy of the official receipt also of the same date. Thus when the Bill was taxed on 5.06.2001, the Taxing Officer was satisfied as to compliance with the earlier order and proceeded to tax the Bill at shs.105,444.90 as per the Certificate of Taxation. **The figure of Kshs.150,444.90 appearing in the typed proceedings is clearly a typing error which the client seeks to exploit unfairly.**

The Advocate also depones that there has been undue delay in bringing the application since 6.03.2002 when the Client filed Notice to Act in Person and on 26.03.2002 when he got certified proceedings, and complains that the Client has tried to make a police case out of nothing instead of making a proper application in court; and to that extent the applicant was being outrightly malicious and mischievous and that Civil matters are not to be criminalised. The Client's Advocate failed to attend Court despite proper

notice. The Advocate also depones that there is no evidence of any prejudice to the applicant and it is not demonstrated what useful purpose a re-taxation will serve - the services rendered are not disputed in the Court or in the Affidavit in Support of the application herein. The Advocate prayed in his submissions that the Client's application be dismissed with costs.

Despite the above narrated facts. The Client filed a Further Affidavit (with leave of the Court) (sworn on 14.10.2004) on 15.10.2004. In this Further Affidavit the Client in essence states on oath, that the Advocates Certificate issued under Paragraph 62 A (3) and filed in court on 20.04.1999 and for which on official Receipt No. K 812822 on 20.04.1999 was still to be issued in September 2004, and in similar vein he states on oath, that in September 2004, he confronted a clerk in the firm of Mussilli and Mussilli Advocates, and in the presence of Mr. Mussilli, and that Mr. Mussilli himself confirmed to him that he, Mr. Mussilli had not issued such Certificate and requests that Mr. Mussilli should be compelled to attend Court to confirm the issue of the certificate.

In response to this particular plea of this Client I would say that it was up to the Client to prove his allegations in his application and not the Advocate. It was for him to procure from the clerk of Mr. Mussilli; and Mr. Mussilli himself confirmation in a manner acceptable to the Court that Mr. Mussilli did not issue the certificate of 9.03.1999. He cannot call upon the Advocate to do so, and this Court will not allow him to do so. If it were not a waste of extremely valuable judicial time, I would have ordered this Court to summon both the clerk, and Mr. Mussilli, he swears he spoke to on a date not specified in September 2004 to show that this Client cannot be allowed to abuse the Court process at his pleasure. I will not do so because I am satisfied that a Certificate under paragraph 62 A (3) was issued by the then Client's firm of Advocates namely Kauma Mussilli Esq. or Mussilli & Mussilli Advocates Nairobi, and that the Certificate was duly filed and that before the taxation of the Bill, the Taxing Officer satisfied herself as to the compliance by the Advocate with the provisions of paragraph 62A rule (3), and the order of the learned Deputy Registrar already referred to above proves this point.

Having disposed of this factual position of the application I will now consider the merits of the Client's application, namely enlargement of time, and review of the ruling of the Taxing Officer made on 5.06.2001.

A major consideration for enlargement of time, is whether the application to enlarge time has been made without undelay delay. The Client filed a **Notice to Act in Person** on 6.03.2002. From 6.03.2002 to 26.03.2002 is a difference of just 20 days when he applied for and obtained copies of the proceedings of the taxation. From 26.02.2002, to 13.11.2003 when the Client complained to the Deputy Registrar about alleged fraudulent issue of a Certificate of Taxation was a period of approximately over one and half years. From 13.11.2003 to 19.08.2004 when the Client filed the application the subject of this Ruling is just over 10 months. In total the Client has known of his complaint for a period of over two and half years. The Client was trying to establish fraud where there really was none. The effect is that the client has brought his application late, very late in the ordinary circle of litigation.

The object of rule 5 of Order XLIX of Civil Procedure Rules is to give the Court discretion to extend time with a view to the avoidance of injustice to the parties (**Schafer vs. Blyth** [1920] 3 KB 140 at page 143; **Saunders vs. Pawley** (1885) 14 Q.B.D 234 at page 237. **When an irreparable mischief would be done by acceding to a tardy application, in being a departure from ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought not to be listened to and any injury caused by the delay may be compensated for by the payment of costs.** (per Bramwell L. J. in **Attwood vs. Chichester** (1878) 3Q.B.D. 722, at 723 C.A.) Under a special circumstances, however, such as excessive delay may induce a Court in its discretion to refuse to extend the time (per Jessel **M.R, Eaton vs. Storer**, (1882) 22 Ch. D . 91 at page 92 C.A.)

Turning to the case in point, there is no mischief of any kind to persuade the Court to accede to this tardy application. The delay has been excessive, and the only plausible reason for filing this application is nothing but malice and mischief on the part of the Client against his former Advocate. In as much as I have had occasion in these matters to say that a Client should not suffer due to the tardiness of his

Advocate, in this particular case, the Advocate should not suffer because of the tardiness of a former Client. For these reasons, I refuse to grant the application to extend or enlarge time.

Having come to the above conclusion on the first leg of the Client's application, there is no legal basis for considering the second leg of the Client's application namely that the Bill of Costs as taxed by the Taxing Officer is **manifestly excessive in the circumstances .. given that the Advocate withdrew from acting for me without informing myself or making a formal court application to withdraw** as required by the law.

However, even if the Client's application for enlargement of time were granted it would not have affected my view of the second leg of the Client's application which is expressed to be brought under paragraph 11 (1) of the Advocate's Remuneration Order.

These would have been my reasons -

(1) Paragraph 11 (1) of the Advocate's Remuneration Order enables any party objecting to the decision of the taxing officer to give notice in writing within fourteen days of the taxation listing the items of a which he objects.

(2) It is only after receiving the taxing officer's reasons for the taxation that the Client would within 14 days thereafter make a reference to the Court.

It is appreciated that the Client is acting in person having taken a deliberate decision to do so, and to sack his previous Advocates Mussilli & Mussilli & Co. Advocates. He is taken to have taken into account that he is not a qualified lawyer, and understood the consequences of his decision. He cannot plead that these matters are technical to him and therefore his errors are somewhat because he is a lay person. These are matters of law and legal procedure, and any Client who elects to act in person must realize that he is assuming all the consequences of his election. The consequences in this instance is that the Client's application even if enlargement of time were granted is incompetent for the reasons given in the foregoing passages of this Ruling and is also misconceived as the Client has allowed his deep mistrust of his former Advocate to colour his judgement even in respect of very clear matters.

Such matters include in particular that the figure of Kshs.150,444.90 in the body of the proceedings is merely a typographical error. I am satisfied as already stated above that it is a typographical error and that there is no cause for puzzlement in that the error is that of the Court staff and not of the Advocate. The Bill of Costs was taxed at Shs.105,444.90 as shown in the original bill itself, and from which the Deputy Registrar, C. O Kanyangi issued the Certificate of Taxation for Kshs.105,444.90. This is the proper fee payable, and not shs.150,444.90 erroneously typed at page 5 of the typed certified copy of the proceedings.

For these reasons, the Application dated and filed in Court on 19.08.2004 by Boniface Kinandu Mathenge (the Client) against Nelson Kaburu Advocate (the Advocate) is dismissed with costs payable to the Advocate.

Delivered and dated at Nairobi this 30th day of November 2004.

Anyara Emukule

Ag. JUDGE