CIVIL PROCEDURE

- A consent order containing no order for costs
- Whether taxation valid – a factor in exercising discretion to allow challenge in the High Court outside the periods stipulated in Rule II of the Advocates Remuneration order
- An important point of law –a factor in exercising discretion even in the face of lengthy delay
- Challenge outside time allowed

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO 53 OF 2004

KIAMBU SERVICE STORE LIMITED..... PLAINTIFF

VERSUS

JOSEPH MUCHINA MURKUKI..... 1ST DEFENDANT

VERA PROPERTIES LIMITED..... 2ND DEFENDANT

RULING

This application is a reference to this court under Rule 11(4) of the Advocates Remuneration Order. It is also expressed to be brought under s 3A of the Civil Procedure Act and Order XXI rule 2 of the Civil Procedure Rules.

It is supported by an affidavit of Mbuthi Gathenji sworn on 13th March 2003 and Joseph Muchina Muriuki of 5th November, 2002.

The relief sought is that time for granting of the objection to the decision of the Taxing Officer made on 16th October, 2002 under clause 11(1) of the Advocates Remuneration Order be extended and that time for filing application to the Judge under paragraph 11(2) of Advocates Remuneration Order be extended accordingly. The third relief is that a stay of execution of the certificate of Taxation dated 24th October, 2002 be granted and finally that costs be provided for.

The grounds are outlined in the body of the application and the affidavit but the main grounds are:

1. That the taxation subject matter of the application was done ex-parte and the applicant and his advocates were not present to make application for reasons

2. That there is no inordinate delay in the matter

3. That the applicants have good grounds for objection to the taxed items and is meet and just that the extension be granted to enable the applicant to file the objection

4. That there was no order for costs granted in the main suit and taxation was contrary to s 27 of the Civil Procedure Act cap 21

There were two replying affidavits by Maurice Otieno Omuga and Kirtish Chandulal Karania sworn on 9th May 2003 and 31st March, 2003 respectively.

The main grounds of opposition are

a) That the application is invariably defective for being grounded upon defective affidavits. This is because the Jurats appear on a different page from the rest of the affidavit in each case.

b) It has not been explained why the applicant did not comply with the correct procedure within the period of time limited by the law

c) Costs were neither included nor excluded by the consent order and had to be taxed

d) The costs followed the outcome of the suit and were not extended by the provisions of paragraph 53 of the Remuneration Order.

I have considered the submissions made on behalf of each party including the authorities cited.

On the issue of delay it is common ground that taxation did take place ex-parte on 16th October, 2002. There are contentions that the then advocate for the applicant was served with a taxation notice. The stipulated time under the Rule was due to expire on 30th October 2002 whereas following a change of advocates the current firm came on record on 24th October, 2002.

They had six days to take instructions in order to comply and meet the deadline. Subsequent to this on 6th November, 2002 the applicants applied to set aside the certificate of costs which application was dismissed by the Registrar on 21st February 2003. There was an attempt to appeal.

On 28th February 2003 they filed another related application which was subsequently withdrawn as part heard. On 7th March, 2003 a similar application was filed and withdrawn on 18th March 2003.

The Respondents therefore quite rightly felt that in the face of the above litany of an meritorious application the delay cannot be properly explained and therefore the delay is inordinate.

The applicants response to the above is that the previous advocate did not attend the taxation and not until they had come on record on 25th October, 2002 and after perusing the court file on 5th November, 2002 did they ascertain that there was an ex-parte taxation on 16th October, 2002.

While I accept the factual position as set out by the learned counsel for the Respondent my inclination is to excuse the delay for the following reasons:

1. Between coming on record and the expiry of the stipulated time to comply the current advocates had only 6 days and after instructions they had to rely on a search or perusal of the court file to ascertain the position of the taxation and they were only able to do this on 5th November, 2002 which was only five days outside the stipulated time.

2. According to the court record there was one or two false steps which resulted in rulings against the applicant and an endevour to appeal being abandoned – there is obviously lack of skill in handling the

matter which did contribute to the delay but a close scrutiny reveals that the approach was largely inspired by the applicants belief and obsession that there was no valid order on costs and that this was a matter outside rule II

3. It is clear to this court that it is common ground that the current order upon which the taxation is based is silent on costs. The applicant contends that the ex-parte taxation has no basis in law in view of s 27 of the Civil Procedure Act.

On the other hand the Respondent contends that the costs must follow the event as per the proviso to s 27 of Civil Procedure Act unless the court orders otherwise. To my mind and without in any way determining the point the question to pose is whether or not a consent order is an event or is it a winwin situation for both parties of it is winner takes all.

On this point because the taxation was done ex-parte and there is a serious legal point concerning the validity of the taxation and the incidence of costs if any even in the face of what appears to have been considerable delay, this court is inclined to excuse the delay so that this important point of law can be ventilated and determined on merit.

Turning to the point on Jurat I am in full agreement with the applicants submissions that the requirements relied on that the Jurat must always end with the rest of the affidavit and not on the following page, this is an English requirement under their local law and does not apply to Kenya since we have our own. That is the Oaths Statutory Declarations Act cap 15 and Order 18 of Civil Procedure Rules which do not demand the same requirement.

In the unreported case of JOHANN DISTERLBERF v JOSHUA KIVINDA MUINDI HC MISC CA 1587 of 2003 I had the privilege of considering whether or not an affidavit was a document under s 3 of the Interpretation and General Provisions Act and as per the definition I arrived at the conclusion that an affidavit is a document. Although I did expunge the affidavits in that case for different reasons I did state that defects in affidavits which go to form only are admissible Order 18 rule 7 of the Civil Procedure Rules and s 72 of the Interpretation and General Provisions Act Cap 2 which reads:

> "Save as is otherwise expressly provided wherever a form is prescribed by a written law, an information or document which purports to be in that form shall not be void by reason of deviation therefrom which does not affect the substance of the information or document or which is not calculated to mislead."

The rules made under Oaths and Statutory Declarations Act s 6 and in particular rule 10 provides:

> "The forms of Jurat and of identification of exhibits shall be those set out in the Third Schedule"

The third schedule provides for the format of the Jurat and there is no requirement in the rules for it to be on the same page although I must point out that it is desirable to adopt the English practice.

However as per the Judicature Act this court's jurisdiction is exercised in this order:

a. In accordance with the Constitution

b. In accordance with written laws – eg Oaths and Statutory Declarations Act

c. Doctrines of common law and equity including statutes of general application as at 12th August, 1897.

It follows that for those who still have some doubts concerning the importation of our law our Judicature Act has strongly expressed our sovereignty and therefore English Practice and requirements are not applicable in this area. I therefore reject the objections based on the importation of the law on the point.

Putting everything on scale and for the reasons indicated above and in exercise of my discretion I hereby allow the application as prayed but award the costs of the application to the Respondents in any event.

It is so ordered.

DATED and delivered at Nairobi this 11th day of November, 2004.

J G Nyamu

JUDGE

Further order:

The file to be transmitted back to Milimani.

J G Nyamu

JUDGE