



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**MISC (REFERENCE) APPLICATION NO. E145 OF 2021**

**JUST CHICKEN LIMITED.....APPLICANT**

**VERSUS**

**KIRAN MANUBHAI PATEL(Executor of the Estate of Joyce Roni Waiganjo)....1ST RESPONDENT**

**ANNE KIBUTU (Executor of the Estate of Joyce Roni Waiganjo).....2ND RESPONDENT**

**RULING**

**(Chamber Summons dated 6th August, 2021 seeking leave to file an Objection and a taxation reference out of time.)**

**Background**

1. The Application for determination before this Court is the Applicant's Chamber Summons dated the 6th August, 2021 under certificate of urgency seeking for orders that:-

**a. Spent**

**b. Spent**

**c. The Applicant be granted leave to file on Objection and Taxation Reference to this Honourable Court out of time against the Ruling of the Honourable Court's Taxing Officer delivered on the 8th April, 2021.**

**d. The leave granted do operate as stay of execution of the Certificate of Taxation dated the 25th May, 2021 and any other consequential proceedings.**

**e. The costs of this application be provided for in any event.**

2. The Application is premised on the grounds on the face of it and by the Supporting Affidavit of Nancy Kioko sworn on the 6th August, 2021.

3. The 1st Respondent opposed the aforesaid Application by way of a Replying Affidavit sworn on the 8th September, 2021 by **Kiran Manubhai Patel**.

4. The 1st Respondent submits that the Application is challenging the decision of the Taxing Officer given on the 8th April, 2021 and the Certificate of Taxation dated the 25th May, 2021 in ELC No. 60 of 2019 between the parties herein. Further, that the current Application filed as Miscellaneous Case Reference is incompetent and ought to be struck-out as it ought to have been filed in the main file, ELC No. 60 of 2019 where the taxation was done and Ruling given. The Applicant has not even attached the Certificate of Taxation, Ruling and/or Bill of Costs for perusal by this court.

5. The 1<sup>st</sup> Respondent contends that the reasons given by the Applicant for seeking extension of time to file a reference are mischievous and not tenable as the Applicant's Advocates participated in the taxation process. Their submissions were considered by the taxing master. That the Certificate of Costs issued after the taxation, was duly served upon the Applicant's Advocates who acknowledged receipt and indicated that they would seek instructions on payment of the costs.

6. The 1<sup>st</sup> Respondent further opines that no reason has been given for the intended objection yet the Applicant had admitted in its pleadings that the development carried out on the suit premises was worth Kshs. 30 Million. That was the figure upon which the Instructions Fees was assessed as per the Advocates (Remuneration Order) 2014.

### **Court's Directions**

7. The Court's directions were that parties canvass the Application by way of written submissions. Only the Applicant complied.

### **Submissions by the Applicant**

8. The Applicant submitted that the only issue for determination was whether Items 1 and 2 of the Bill of costs namely, the instruction fees and getting up fees were taxed to scale and whether the law on taxation was duly adhered to. The Applicant did not address the other issues raised by the 1<sup>st</sup> Respondent in his Replying Affidavit.

### **Analysis and Determination**

9. I picked on the objection by the 1<sup>st</sup> Respondent in his Replying Affidavit on the incompetence of the Application because after perusing the Application herein, I also noticed that it does not disclose the main case file where the taxation was done. I do not know how the Applicant intended the Court to consider the Application without making reference to the main case where the taxation he is seeking to challenge was done.

10. To add insult to injury, the Applicant did not attach the ruling, the certificate of taxation or the bill of costs he is objecting to; yet his Application is a miscellaneous Application.

11. The 1<sup>st</sup> Respondent in opposing the Application termed it as incompetent because, as he states, it ought to have been filed in the main case file ELC 60/2019, where the taxation of the party and party bill of costs was done and a ruling given. Instead, the Applicant opted for a Miscellaneous Application. The 1<sup>st</sup> Respondent too points out that the Applicant has not even attached the certificate of taxation, ruling or the bill of costs for the benefit of this court.

12. The Applicant filed written submissions dated 24<sup>th</sup> December 2021. In the submissions, the Applicant identified one issue for determination by the court. The issue identified by the Applicant is whether the items 1 and 2 of the bill of costs (instruction fees and getting up fees) are taxed to scale and whether the Honourable taxing master misdirected herself on the principles of law applicable and failed to exercise her discretion judiciously.

13. The Applicant went ahead to submit on that one issue urging the court to find in favour of the Applicant that the instruction fees awarded was excessive and unreasonable and that getting up fee was wrongly awarded. I do not know whether to term this as sloppiness or mischief on the part of the Applicant.

14. The Application before the court is seeking extension of time and leave to file an objection and a reference out of time. The Applicant's submissions however, were crafted as if the application had already been allowed.

15. This court agrees with the 1<sup>st</sup> Respondent that the Application by the Applicant is incompetent and incurably defective. The proper procedure for the Applicant herein would have been to file this application in the same case where the taxation it is aggrieved with was done. In that regard, I am guided by the case of ***Nyamongo & Nyamongo Advocates vs Pan Africa Insurance Co. Ltd & another (2016) eKLR***.

16. As presented, the Application is defective and cannot be cured. I note that the Applicant made reference to section 3A of the Civil Procedure Act on the face of the Application. Section 3A is the basis upon which the 'oxygen rule' is founded. In other circles the rule has been referred to as the "***Lawyers' saving grace***". The rule is invoked as a cure for defects in pleadings for the ends of justice to be met.

17. However, the Application before me is so defective that I am unable to 'breathe in life' into it. It does not require 'panel beating'; it needs a total overhaul. Surely, that is not the work of the court. I note that the Applicant has the benefit of legal counsel. I have no otherwise but to strike out the Application with costs to the 1<sup>st</sup> Respondent.

18. The upshot is that the Chamber Summons Application dated **6th August, 2021** is hereby struck out with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2022**

**M.D. MWANGI**

**JUDGE**

In the Virtual Presence of:-

Ms. Amutavi h/b Mr Okatch for the Applicant

Ms.Ooga h/b for Mr Mandala for the Respondent

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**