



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISCELLANEOUS APPLICATION NO. 106 OF 2017

OKOTH AND COMPANY ADVOCATES.....ADVOCATES/ APPLICANT

VERSUS

MOUNT KENYA UNIVERSITY.....CLIENT/ RESPONDENT

RULING

1. Falling for determination in this ruling is a Chamber Summons application dated 17th December 2019 brought forth by the Applicant in which they seek an extension of time to file a reference against the decision of the Taxing Officer Hon. I. N. Barasa delivered on 4th December 2017. The orders sought are:

i. That the Honourable court be pleased to enlarge time within which to file a reference against the decision of the Taxing Officer delivered on 4/12/2017.

ii. That the reference filed herein be deemed as properly filed though out of time.

iii. That the costs of this application be provided for.

2. The Applicant via the supporting affidavit dated 17th December 2019 by Jacob Auma Okoth claims that the taxing officer declined to tax their Bill of Costs dated 30th May 2017 without giving reasons for dismissal and despite their request dated 18th December 2017 to be supplied with reasons for the decision, the same was not availed. This led them to file a reference vide **Miscellaneous Application No. 23 of 2018** on 19th February 2018. On 7th November 2019, the court delivered a ruling striking out the reference indicating that it had been filed in the wrong cause. Following this ruling, the applicant then filed the current application seeking for extension of time.

3. The Applicant claims that the delay in filing the reference is excusable since the applicant had to wait for the Court's decision in **Miscellaneous Application No. 23 of 2018**. They added that should their prayers be disallowed, they stand to lose Kshs. 60,864,390 as their professional fees for services rendered.

4. The respondent in their replying affidavit dated 23rd November 2020 sworn by Anthony Mwangi, Director of Administration of the respondent deponed that the ruling by Hon. I.N. Barasa clearly articulated the reasons for disallowing the Bill of Costs and the applicant had been indolent in filing a reference on time and their reasons could not be explained. As such the application should be disallowed with costs.

5. This application was canvassed by way of written submissions.

Applicant's submissions

6. The Applicant filed their written submissions dated 28th June 2021. It was submitted that Paragraph 11 (4) of the Advocates Remuneration Order provides that High Court has power in its discretion to enlarge the time fixed under sub paragraph (1) notwithstanding that the time sought may have already expired. That they had sought to be supplied with reasons for the dismissal of their Bill of Costs on 18th December 2017 failure to which led them to file Misc. Application 23 of 2018 on 19th February 2018 which was later struck out on 7th November 2019.

7. It was also submitted that paragraph 11 (4) of the Advocates Remuneration Order was the same as Rule 4 of the Court of Appeal Rules, 2010 on extension of time to file a reference. In this regard, reference was made to the Court of Appeal Case **Vishva Stones Suppliers Company Ltd v. RSR Stone [2020] eKLR, Nairobi Court of Appeal Civil Application No. 55 of 2020** where it was stated that;

“the mandate under Rule 4 is discretionary, unfettered and does not require establishment of “sufficient reasons”... The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained”.

8. The Applicant avers that the ruling in **Misc Application 23 of 2018** was delivered on 7th November 2019 and this instant application was filed two months later, which does not amount to inordinate delay. To this end, the Applicants cited the case of **Addax Kenya Limited v. National Environment Management Authority & Another [2017] eKLR** in which the court held that there was an unexplained delay of about 20 days in which though unexplained, it was not inordinate the circumstances. Reference was also made to the case of **Jubilee Insurance Co. Ltd v John Njeru Kariuki [2014] eKLR**, where the court held that;

“...It is settled law that delay of less than a month is excusable provided that an explanation is given to the satisfaction of court.”

9. Other cases cited in reference to the issue of delay in filing a reference included **Purity Gathoni Githae & Another v Excelo Structures Ltd & Another [2018] eKLR**, **Nairobi ELC No. 406 of 2008** and **Cecilia Wanja Waweru v Jackson Wainaina Muiruri & Another [2014] eKLR**.

Respondent's submissions

10. The Respondent/Client filed their written submissions dated 5th August 2021, where they outlined the background of the case stating that the Applicant was the author of his own misfortune since the inordinate delay had been caused by them. They pointed out that the applicant had taken over three years to file the instant application without explanation for the delay. They submitted that the Applicant filed a fresh suit in **Misc Application No. 23 of 2018** out of time instead of filing a reference on this same suit.

11. The Respondent outlined the issues for determination as follows:

i. Whether the suit has been filed timeously or after inordinate delay.

ii. Whether this court has jurisdiction to deal with an advocate client bill and especially where there is a fee agreement between the parties.

iii. Whether the court ought to enlarge time for the applicant to file a reference.

iv. Whether costs should issue.

12. On the first issue, it was submitted that the delay by the applicant is inexplicable and the advocate had only been dragging their feet. They stated that reasons were duly given in the ruling delivered on 4th December 2017 by the taxing officer. Reference was made to the case of **Prabhulal Tejpal Haria & Another v Pravinshandra Meghji Dodhia & 2 others [2021] eKLR** where it was held that where a ruling by the taxing officer had given reasons, then an aggrieved party ought to file a reference within 14 days and should not again seek for reasons from the taxing officer before filing the reference. Other cases cited in support of this point are: **Evans Gaturu Advocate v Kenya Commercial Bank Ltd [2012] eKLR**, **Ahmed Nasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd [2006] EA** and **Odhiambo Owiti & Co. Advocates v Emmanuel Otieno [2021] eKLR**.

13. It was further submitted that the delay ought to have been explained as was stated in the case of **Joel Tirop Busienei v David Randichi [2016] eKLR** where court held that, every delay must be explained by a party at fault. Reference was also made to the case of **Gachuhi Muthanji v Mary Njuguna [2014] eKLR** where the court held that;

“...the extension of time is not a right of a party but a discretionary remedy that is only available to a deserving party...”

14. On the issue of whether the court has jurisdiction to deal with an advocate client bill, it was submitted that **Section 45 (1) and 45 (6) of the Advocates Act** stipulated that agreements with respect to remuneration that are in writing are valid and binding on the parties and cannot be subject to taxation. On this point reference was made to the case of; **Otieno Ragot & Company v National bank of Kenya Limited (2018) eKLR** which concurred with the decision of Court of Appeal in **D.N. Njogu & Co. Advocates v National bank of Kenya Limited [2016] eKLR**.

15. On the issue of enlargement of time to file a reference, it was submitted that the court should not extend time since the delay by the Applicant did not have a plausible explanation. To this end, reference was made to the case of **Dilpack Kenya Ltd v William Muthama Kitonyi [2018] eKLR** and **First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others [2002] 1 EA 65**.

16. The Respondent therefore concludes that the application is an abuse of the court process and should be dismissed with costs to the Respondent.

Analysis and Determination

17. This court has considered the application, affidavits, rival submissions together with the relevant legal framework and the prevailing jurisprudence. The court finds that the issue for determination is; **whether the court is satisfied that the applicant has made a compelling case to warrant enlargement of time to file a reference.**

18. The court, at this stage will not delve into the second issue raised by the Respondent on whether the court has jurisdiction to deal with an advocate client bill because to do so will prejudice the parties' case as the court would be delving into the merits of the proposed reference.

19. As articulated by both parties, the legal framework on extension of time is clearly stipulated under **Part 1 paragraph 11** of the **Advocates Remuneration Order** which provides:

“11. (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for 'his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

20. The above provision requires that a party aggrieved by the taxing officer's decision to apply to a judge by Chamber Summons setting out grounds for opposition within 14 days. If a party is still aggrieved by the decision of the judge, then they should appeal to the Court Of Appeal.

21. Section 95 of the **Civil Procedure Act** on the issue of enlargement of time provides:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

22. In the case at hand, the applicant stated that failure to abide by the set procedure was occasioned by the fact that they did not receive reasons of the dismissal of their application by the taxing officer. This court has had an opportunity to read the said ruling delivered on 4th December 2017. The court finds that the ruling undoubtedly set out reasons used by the taxing officer in arriving at the decision and as such the Applicant would have filed a reference without asking for more reasons.

23. In the case of **Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited [2012] eKLR** Hon. Odunga J. stated that;

“... In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles. However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons.”(Emphasis mine).

24. Additionally, the issue of extension of time has also unmistakably been set out by the Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** where the court categorically stated that:

“... Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigants' legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined.” Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it...

25. From the foregoing analysis this court is not convinced that the principles set out by the Supreme Court have been met by the applicant. The court finds that the applicant is going round in circles and forum shopping for a favourable decision. As such I find that the application is not merited. *The application dated 17th December 2019 is hereby dismissed in totality with Costs to the respondent.*

.DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

IN THE PRESENCE OF:-

ODOYO FOR ADVOCATE/APPLICANT

KAHIGA FOR THE RESPONDENT

COURT ASSISTANT: EDDEL