



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

MISCELLANEOUS CIVIL APPLICATION NO. 14 OF 2020

MAZINGIRA WELFARE AND SPORTS ASSOCIATION.....APPLICANT

VERSUS

MUTURI S. K & CO. ADVOCATES.....RESPONDENT

RULING

What is before Court for determination is the Applicant's Chamber Summons application dated the 17th March, 2021 where it seeks for the following orders:

- a) There be a stay of execution of the Order of the Taxing Master dated 19th October, 2020 pending the hearing and determination of this application.
- b) That this Honourable Court be pleased to enlarge the time within which the Applicant is to file and serve its reference challenging the decision of the Taxing Master dated 19th October, 2020.
- c) That the notice objecting to the decision of the Taxing Master expressed through the letter dated 30th October, 2020 be deemed to have been properly filed on time.
- d) The draft Reference filed herein be deemed as duly filed within time, by Order of this Court, upon payment of the requisite Court fees, within which such time as may be ordered by the Court.
- e) The costs of this application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of ERICK NJERU NYAGA who is the Acting Manager for the Applicant. He explains that the Respondent filed their Bill of Costs dated 11th June, 2020 to which the Applicant filed a Preliminary Objection on Grounds of Jurisdiction. He contends that the Deputy Registrar gave directions that the Preliminary Objection was to be canvassed by way of written submissions to which it filed and served its submissions on the Respondent. He confirms that on 19th October, 2020, the Deputy Registrar delivered a Ruling dismissing its Preliminary Objection on the basis it did not file any documentation to support its assertion that it had a Remuneration Contract with the Respondent. Further, the Deputy Registrar proceeded to tax the Respondent's Bill of Costs dated the 11th June, 2020. He contends that after delivery of the Ruling on 3rd March, 2021, it was not able to get a copy of the said Ruling as it was yet to be printed and only got the same on 11th March, 2021 upon which it instructed an advocate to file the instant application. Further, that it exercised due diligence and any delay in filing a Reference is based on an inadvertent belief that what was before the court was proper application. He avers that there is a looming execution against the Applicant for the taxed amount. Further, the Applicant is a membership organization comprising of 4000 members who are civil servants and are willing to deposit a Bank Guarantee equivalent to the amount to be ordered as security. He reiterates that the application has been made within reasonable time and the Respondent will not suffer any prejudice from it being allowed, save to having the dispute settled on merit.

The Respondent opposed the application and filed a replying affidavit sworn by SAMMY MUTURI KARIUKI where he confirms that the Taxing Master delivered his Ruling to the Respondent's Bill of costs dated 11th June, 2020 on 19th October, 2020 taxing the same at Kshs. 3, 627, 745. 64. He contends that the Applicant with total disregard to the law chose to file an application on 27th October, 2020 seeking orders of review and stay of execution contrary to what is prescribed by the law. Further, the Applicant on 30th October, 2020 as an afterthought decided to file a Notice to the Deputy Registrar objecting to the Taxing Master's decision. He avers that it is now six (6) months since the Taxing Master delivered his Ruling on 19th October, 2020 and the Applicant now seeks enlargement of time to file a Reference after it failed in its application seeking review. He insists the Respondent has not consented to an application for enlargement of time as envisaged in Order 50 Rule 6 of the Civil Procedure Rules. Further, that this instant application is res judicata and an abuse of the court process. He reiterates that the intended Reference is premised on the allegation that there was an agreement on fees which is less than candid, as no such agreement ever existed. Further, the Applicant should produce the said duly signed Agreement in accordance with section 45 of the Advocates Act.

The application was canvassed by way of written submission.

Analysis and Determination

Upon consideration of the Chamber Summons dated the 17th March, 2021 including the respective affidavits as well as the rivalling submissions, the following are the issues for determination:

- Whether the Court should enlarge time to enable the Applicant to lodge a Reference challenging the decision of the Taxing Master dated 19th October, 2020
- Whether the Court should Grant an Order staying the execution of the Order of the Taxing Master dated 19th October, 2020.

As to whether the Court should enlarge time to enable the Applicant to lodge a Reference challenging the decision of the Taxing Master dated 19th October, 2020 as well as Grant an order of Stay of Execution of the said decision.

The Applicant seeks for enlargement of time to lodge a reference against the Ruling of the Taxing Master dated the 19th October, 2020. It explains that it exercised due diligence and any delay in filing a Reference is based on an inadvertent belief that what was before the court was a proper application. The Applicant contends that it deserves the discretion of the Court for enlargement of time. Further, it is in the interest of justice to enable it file a Reference out of time as Article 50 of the Constitution guarantees a right to fair hearing. It insists the application has been made promptly. Further, that the only prejudice the Respondent will suffer is the delay in having this matter heard and the can be compensated with costs. It reiterates that it had made a case for granting of stay of execution. To support its arguments it relied on the following decisions: **Edith Gichugu Koine V Stephen Njagi Thoithi (2014) eKLR; Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR; Charles Karanja Kiiru V Charles Githinji Muigwa (2017) eKLR; and Labh Singh Herman Singh V Attorney General & 2 others (2016) eKLR**: The Respondent opposed the Application and submitted that the Applicant has not accounted for time as required by law. Further, that it will be prejudiced if the time was extended and the intended Reference is not competent. It insists the Applicant has not satisfied the conditions to warrant a stay of execution. To support its averments, it relied on the following decisions: **County Executive of Kisumu V County Government of Kisumu & 8 Others (2017) eKLR; Eldoret Express Limited V Margaret Kinaro Kimere (2021) eKLR; KTK Advocates V Baringo County Government (2017) eKLR; and Gathenji & Company Advocates V David Thuku & Another (2019) eKLR; HGE V SM (2020) eKLR**, which I deem relevant.

The legal provision governing lodging objection to a Taxing Master's decision as well as enlargement of time to file a Reference is contained in Clause 11 of the Advocates Remuneration Order which stipulates that: ‘

‘(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 subsection (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.’

In the current scenario, the Applicant had initially filed an application dated the 27th October, 2020 seeking to review and or set aside, the Taxing Master's Ruling dated 19th October, 2020 as well as stay of execution of the said Ruling, on the ground that its submissions in respect to the Notice of Preliminary Objection which it had filed were not considered in the said Ruling. This Court vide its Ruling dated the 2nd March, 2021 disallowed the application and stated as follows: **‘Insofar as the Applicant raises pertinent issues in the instant application, I opine that this is not the right forum for it as it involves reviewing of a Ruling and not an administrative function. It is my considered view that it ought to have filed a Reference as stipulated in Rule 11 of the Advocates (Remuneration) Order instead of seeking for review of the Taxing Master's decision under Order 45 of the Civil Procedure Rules. To my mind the Application as it is, is defective. I find that the Applicant has not met the threshold set for review by this Court. In the circumstance, I will decline to review the Order emanating from the Ruling of the Taxing Master dated the 19th October, 2020. Since I have declined to review the said Ruling and order emanating therefrom, I will not proceed to handle the issue of stay of execution of the said Ruling. ‘**

The Respondent has vehemently opposed this application insisting the Applicant has not accounted for time as required by law; it will be prejudiced if the time was extended and the intended Reference is not competent. It insists the Applicant has not satisfied the conditions to warrant a stay of execution. From a perusal of the averments in their respective parties' affidavits, noting that this Court actually observed that the Applicant had filed an application to review the Taxing Master's decision for failing to consider its submissions in respect to the Preliminary Objection raised over the Bills of Costs that was before it; instead of lodging a Reference. Further, noting that the Applicant had already filed a Notice of Objection against the impugned Ruling while associating myself with the case of **Peter Julius Njoroge V Fidelity Commercial Bank Limited & Another (2018) eKLR**, where the Court found a delay of 45 days not inordinate and allowed an application for enlargement of time. In this instant case, I note there was no Reference filed but an application for review. The Applicant has now sought

for enlargement of time to file the Reference. Even though the same is opposed, I note the Respondent has contended that this application is Res judicata but failed to demonstrate what prejudice he stands to suffer if time was enlarged.

From the Ruling which I have quoted above, this court had not made a determination on a Reference but an application for review. However, on the issue of res judicata, I will proceed to make reference to section 7 of the Civil Procedure Act, which stipulates thus: ‘ **No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**’

From a reading of this legal provisions while applying them to the circumstances at hand, I beg to disagree with the Respondent that this application is res judicata. To my mind, I find that the Respondent is simply seeking to rely on procedural technicalities to oppose the instant application.

Based on the facts as presented while associating myself with the above cited case as well as the legal provisions cited above, I will excuse the inadvertent mistake made by the Counsel for the Applicant as it led to the delay in filing the Reference against the Taxing Master’s Ruling dated the 27th October, 2020. In the interest of justice, while relying on Article 50 of the Constitution, I will proceed to enlarge time within which the Applicant ought to have filed and served the Reference herein from the Ruling of the Taxing Master delivered on 27th October, 2020 and I direct it to lodge the Reference within 14 days from the date hereof.

On the issue of Stay of execution of the Taxing Master’s Ruling dated the 27th October, 2020, I note in my Ruling, I never made a determination of the Application for stay of execution as alleged by the Respondent as I have highlighted above. In associating myself with the parameters set in the case of **James Wangalwa & Another V Agnes Naliaka Cheseto (2012) eKLR**, I find that since the taxed costs have not been entered as a judgement of the court, execution has not been put in motion hence there is no substantial loss the Applicant stands to suffer.

It is against the foregoing, that I find that the application dated that 17th March, 2021 partially succeeds in terms of prayer No. (b) and (c) only. I grant the Applicant leave of fourteen (14) days to file the Reference out of time and deem the notice objecting to the decision of the Taxing Master expressed through the letter dated 30th October, 2020 to have been properly filed on time. The rest of the prayers are declined.

Costs will be in the cause

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 28TH DAY OF JULY, 2021

CHRISTINE OCHIENG

JUDGE