



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1412 OF 2013

MOUNT PLEASANT LIMITED.....PLAINTIFF

VERSUS

JOHN KIMELY BIRECH.....DEFENDANT

RULING

On 30/9/2019, the Plaintiff withdrew this suit with an order made for the costs which were awarded to the Defendant to be taxed by the taxing master. The Defendant filed its bill of costs on 11/10/2019. It was taxed at Kshs. 1,890,375/=. The Defendant filed the application dated 11/8/2020 seeking to have judgement entered in his favour against the Plaintiff for Kshs. 1,890,375/= being the costs taxed by the taxing master. Further, he sought to have that sum attract interest at court rates from the date of filing suit until payment in full.

The application was supported by the Defendant's affidavit to which he attached copies of the certificate of taxation and the ruling given by the taxing master. He also attached a copy of his advocates' email of 2/4/2020 forwarding the certificate of taxation together with the ruling to the Plaintiff's advocate. He averred that although the ruling was detailed and well-reasoned, the Plaintiff requested for reasons for the ruling through its letter of 12/3/2020 and email of 18/5/2020. The taxing master responded by the email dated 19/5/2020 and indicated that the reasons for the taxation were contained in the ruling delivered on 5/3/2020. He deponed that as at 11/8/2020 no reference had been filed against the decision of the taxing master. Mr. Birech deponed that it was unnecessary for the Plaintiff to seek the reasons for the taxing master's decision in accordance with Rule 11 (2) of the Advocates Remuneration Order. He averred that the Plaintiff was outside the period prescribed for filing a reference and he therefore sought entry of judgement in his favour.

The Plaintiff filed an application dated 5/8/2020 seeking leave to file a reference out of time and to have the court set aside the decision of the taxing master dated 5/3/2020 so that the matter can be taxed afresh. The application was made on the grounds that the delay in filing the reference was occasioned by the delay in obtaining reasons informing the taxing master's decision pursuant to the Advocates Remuneration Order (ARO). Further, that the delay was also occasioned by the disruption of court services resulting from the Covid-19 pandemic in the country. The Plaintiff averred that they collected the letter dated 19/5/2020 giving the reasons for the taxing master's findings from the court on 29/7/2020. It contended that the taxing master misdirected herself on points of law when she taxed the Defendant's bill of costs dated 1/10/2019 at Kshs. 1,890,375/=. That the taxing master exercised her discretion on grounds which were unclear, unreasonable and legally untenable. It faulted the taxing master for basing the value of the subject matter on Kshs. 152,000,000/= which it claimed it was neither found in the pleadings nor was it discernible from the judgement or the settlement of the parties.

Amin Manji, a director of the Plaintiff swore the affidavit in support of that application. He explained that the delay in filing the reference was occasioned by the delay in obtaining the reasons for the taxation. He attached a copy of the ruling to the application.

Mr. Amin Manji swore a replying affidavit on 10/12/2020 in opposition to the Defendant's application dated 11/8/2020 for entry of judgement for the costs taxed by the Deputy Registrar. He reiterated the reasons he gave in support of the application for leave to file a reference out of time and invited the court to take notice of the impact that the Covid-19 pandemic had had in limiting the operations at the court registry. He averred that this occasioned delay in the Plaintiff's advocate getting a response from the court. He averred that Rule 11 (2) of the ARO was specific in its requirement for the taxing master to record and forward to the objector the reasons for his decision. He argued that the Plaintiff's application for leave should take precedence and that the Defendant's application should abide the outcome of the Plaintiff's application. He averred that the Plaintiff stood to suffer extensive financial loss based on the sum the taxing master awarded to the Defendant.

The Defendant swore the affidavit dated 6/10/2020 in opposition to the Plaintiff's application dated 5/8/2020. He averred that the Deputy Registrar delivered her ruling on the taxation on 5/3/2020 in the presence of the advocates for both parties in open court. He averred that that Plaintiff did not follow up on its inquiry seeking reasons for the taxation in its letter of 12/3/2020 and that the Deputy Registrar sent an email on 19/5/2020 clarifying that the reasons for her decision were contained in the body of the ruling. He averred that as at 19/5/2020 the Plaintiff was aware that the reasons for taxation were in the ruling which the parties could access after the ruling was delivered on 5/3/2020. The Plaintiff was required to file the reference within 14 days of 5/3/2020 because it was furnished the reasons for the taxation and even if

one to were to go by the Deputy Registrar's email of 19/5/2020 for purposes of computing time, then the reference ought to have been filed by 2/6/2020. The Defendant averred that the failure to file the reference within time was deliberate and inexcusable. The Defendant pointed out that as at 29/7/2020 all court operations and communications were being conducted electronically and the Plaintiff's advocate could not have collected the letter from court on 29/7/2020. On the challenge of the value of the subject matter which the taxing master placed at Kshs. 152,000,000/=, the Defendant clarified that that figure was contained in the Plaintiff's pleadings and urged the court to dismiss the Plaintiff's application.

Parties filed submissions which the court considered. The Plaintiff submitted that it sought the reasons for the taxation from the Deputy Registrar vide the letter dated 12/3/2020 and blamed the delay on the outbreak of the Covid-19 pandemic which necessitated the shutting down of courts from 16/3/2020. It relied on the letter from the Deputy Registrar dated 19/5/2020 and claimed that that letter was furnished to its advocates on 29/7/2020 due to the difficulty in accessing the court. The Plaintiff relied on the decision in **Republic v Kenyatta University & Another, Ex parte Wellington Kihato Wamburu [2018] eKLR** on enlargement of time while urging the court to exercise its discretion in its favour. It maintained that the Deputy Registrar availed to its advocates the reasons for the taxation on 29/7/2020 while urging that the delay in filing the reference was occasioned by factors beyond its control. It argued that the suit related to trespass and faulted the taxing master for basing the instruction fees on the value of suit property of Kshs. 152,000,000/= in the sale agreement. It pointed out that it withdrew the suit after the trespass ceased and urged the court to take the Defendant's conduct into consideration which it submitted demonstrated that it was undeserving of costs.

The Defendant submitted that ruling on taxation was delivered in open court in the presence of the Plaintiff's advocate on 5/3/2020. That the ruling was self-explanatory and the Plaintiff ought to have filed its reference within 14 days of 5/3/2020. The Defendant pointed out that the Deputy Registrar sent an email to both parties on 19/5/2020 explaining that the reasons for her taxation were contained in the body of the ruling. He submitted that the amount awarded by the taxing master was not excessive.

Should the court enlarge the time for the Plaintiff to file a reference against the party and party costs awarded in the taxation of the Defendant's bill of costs? The Plaintiff explained that the delay in filing the reference was occasioned by the delay in receiving the reasons of the taxing master and the shutdown of courts in March 2020 due to the Covid-19 pandemic.

The court record shows that the Plaintiff's advocate was in court when the ruling on the taxation was delivered. The Defendant's advocate forwarded a copy of the ruling to the Plaintiff's advocate vide the email dated 2/4/2020. The taxing master responded to the Plaintiff's advocate's email of 18/5/2020 seeking the reasons for the taxation on 19/5/2020 and explained that the reasons for the taxation were contained in the body of the ruling. The Plaintiff's advocate's email address in both the emails dated 18/5/2020 and 19/5/2020 is the same. Even if one were to suppose that the Plaintiff's advocate had not received the reasons for the taxation by 18/5/2020 when she wrote the email to the taxing master, the taxing master informed the advocate via email on 19/5/2020 that the reasons for the taxation were in the ruling hence the Plaintiff ought to have filed the reference within 14 days of 19/5/2020. It is unlikely that the Plaintiff's advocates collected the letter dated 19/5/2020 from court on 29/7/2020 as it contended because by 29/7/2020 communication with the court was being done electronically. The Plaintiff's advocate's email of 18/5/2020 lends credence to this fact.

The court declines to grant the orders sought in the application dated 5/8/2021. The costs of that application are awarded to the Defendant.

The court enters judgement for the Defendant in the sum of Kshs. 1,890,375/= being the costs taxed as evidenced by the certificate of taxation dated 11/3/2020.

Delivered virtually at Nairobi this 6th day of July 2021.

K. BOR

JUDGE

In the presence of: -

Ms. Asli Osman for the Plaintiff

Mr. Edgar Busiega for the Defendant

Mr. V. Owuor- Court Assistant