



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**MISC. APPLICATION NO. 163 OF 2018**

**D M MUTINDA & CO. ADVOCATES.....ADVOCATE/RESPONDENT**

**VERSUS**

**KENNEDY MUEMA MUSYOKA.....CLIENT/APPLICANT**

**RULING**

1. By a Motion on Notice amended on 15<sup>th</sup> January, 2020 but originally dated 17<sup>th</sup> December, 2019, the applicant herein seeks an order that the time within which The Applicant herein, **Kennedy Muema Musyoka** (hereinafter referred to as “the Client”) may lodge an objection from the decision of the taxing officer of 21<sup>st</sup> February, 2019, be enlarged. Upon the grant of the said order, the application do serve as the Client’s formal objection to the said decision on item 1 of the Bill of Costs dated 9<sup>th</sup> May, 2018. He further sought that he be allowed to defray the decretal sum as reviewed by way of installments of Kshs 5,000.00 payable on or before every 5<sup>th</sup> day of each subsequent month.

2. According to the Client, due to lack of legal training, he failed to take action following the decision of 21<sup>st</sup> February, 2019. For the same reason, he did not immediately seek to have time enlarged to him within which to lodge an objection before this application was filed.

3. It was his case that though it was agreed between him and the Advocate that the latter’s fees would be Kshs 85,000/= out of which he had paid Kshs 28,000.00 the taxing officer went ahead and taxed the fees notwithstanding the fact that the Advocate did not conclude the matter as agreed. It was his case that at no point did he discharge the advocate or fail to provide necessary instructions.

4. The Client averred that he is not a man of substantial means hence he will be greatly prejudiced unless he is permitted to pay the sum due in installments considering the fact that the services for which the Advocate was retained of collecting the debt remains unconcluded hence necessitating fresh instructions.

5. In response to the application, the advocate averred that the requirements of the law were duly followed and that the decision of the Taxing Officer cannot be faulted. According to the Advocate the fact that the Client has not made any prompt payment of a portion of the sum is evidence of lack of good faith and seriousness on his part in settling the claim as ordered by the Court.

6. It was averred that the Client is a man of means and has failed to provide sufficient reason why he should be allowed to settle the sum in Kshs 5,000.00 instalments instead of the sum ordered by the Court. However, the Advocate expressed his willingness to allow the Client settle the said sum in instalments of Kshs 20,000.00 per month.

**Determination**

7. I have considered the application. Although the parties herein have submitted at length on the merits of the intended objection, what is before me is a consideration whether or not this court should extend the time to the Client to lodge the Objection.

8. In **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others [2002] 1 EA 65** it was held that:

**“The court has unfettered discretion under sub paragraph (4) of rule 11 of the Advocates Remuneration Order to extend time prescribed by sub paragraph (1) and (2) of the same rule within which to give notice of objection to the decision on taxation and to file a reference to a Judge in respect of such taxation...Factors to be taken into account in an application for extension of time are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is an arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of**

justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant...The Court is clothed with inherent powers and jurisdiction all the time in all causes irrespective of legislative or other juridical foundations of any such cause or matter before it as the juridical root of the Court's inherent power does not lie in section 3A of the Civil Procedure Act but in the nature of the High Court as a Superior Court of judicature."

9. In this case, the Client contends that due to lack of legal knowledge, he was unable to lodge the Objection within time.

10. In Edward Maina Njanga T/A Maina Njanga & Co. Advocates vs. National Bank of Kenya Limited Civil Appeal No. 111 of 2005 the Court of Appeal held that:

**"In the circumstances of the matter there is no valid ground for distinguishing mistake of counsel and ignorance of law by Counsel. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better...Though ignorance may not be equated to a mistake, this case falls under the category in which the advocate's error is not necessarily a bar to the learned Judge exercising his discretion in favour of the respondent by granting an extension of time to him though he is in default. The fine qualification herein is unnecessary since a default had been occasioned and what mattered most was the interest of justice. It is unnecessary to make a distinction between the parties."**

11. In Margaret Apiyo vs. Jotham Chemwa Matayo Civil Application No. Nai. 257 of 1996, the same Court held that:

**"True, ignorance of the law is no excuse but the particular circumstances of this case do militate the court's grant of discretion in favour of the applicant. She is old and illiterate. She is aggrieved. The respondent is smart and educated...Where will the scale of justice tilt towards? Extension of time is granted."**

12. It was therefore held in George Roine Titus & Another vs. John P. Nangurai Civil Application No. Nai. 249 of 1998 that:

**"A mistake, though stupid, is a mistake whether or not it originates from an advocate's ignorance or negligence and so long as it is genuine it does not disentitle an applicant to the discretion of the Court being exercised in his favour."**

13. It was also held in Hezekiel Paul Osewe vs. Joyce Matete Civil Application No. Nai. 295 of 1997 that:

**"Even though the delay in making the application is inordinate (4 years) the circumstances such as the ignorance of procedure must be taken into account in extending time."**

14. The factors to be considered by the Court in deciding whether or not to extend time were restated in Grindlays Bank International (K) Limited (Now Stanbic Bank Kenya Limited) vs. Grindlays International Finance Limited (Now Stanbic Finance Kenya Limited) Civil Application No. Nai. 257 of 1995 as hereunder:

**"Although it is not only undesirable but also dangerous to enumerate all cases in which the Court will exercise its discretion under rule 4 of the rules, broadly speaking unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court's discretion, the Court should, in so far as it may be reasonable prefer, in the wider interest of justice, to have a case determined on its merits."**

15. I have considered the reason given by the Client herein for not taking a necessary step in the proceedings and I find that he has disclosed valid grounds.

16. As regards the merits of his intended Objection, his position is that the fees having been agreed between him and his Advocate it was erroneous for the Learned Taxing Officer to have taxed the fees in the manner he did.

17. The law as set out in Section 45 of the *Advocates Act* and by the decision in Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 1 EA 5 is that where there is an agreement as regards a particular item, that item cannot be the subject of taxation.

18. It the premises I find merit in this application and I extend the time within which the Client is to file his Objection with a period of 7 days but on condition that he pays to the Advocate a sum of Kshs 20,000.00 within the said period and in default the application shall stand dismissed with costs.

19. The costs of this application shall be in the reference.

20. It is so ordered.

**Ruling read, signed and delivered in Court this 9<sup>th</sup> day of March, 2021**

**G.V. ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Mutinda Kimeu for Mr D. M. Mutinda for the Respondent**

**CA Geoffrey**