



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC. CASE NO. 198 OF 2018

JOE N. MWANTHI & CO. ADVOCATES.....ADVOCATE/APPLICANT

V E R S U S

JAVISAPA ENTERPRISES LIMITED.....1ST DEFENDANT/RESPONDENT

NALO CONSTRUCTION COMPANY LIMITED..... DEFENDANT

RULING

(1) Before this Court is the Chamber Summons dated 25th November 2019 by which the Applicant/Advocate **JOE N. MWANTHI & CO. ADVOCATES** seeks the following orders:-

“1) THAT the time for giving notice of objection of the entire decision and/or Ruling of the Deputy Registrar dated 26th March 2019 be enlarged or dispensed with.

2) THAT the time for filing the reference against the entire decision and/Ruling of the Deputy Registrar dated and delivered on 26th march 2019 be enlarged.

3) THAT costs of the application be provided for.”

(2) The application is premised upon **Rule 11(4)** of the **Advocates Remuneration Order, Article 159(2)** of the **Constitution of Kenya 2010**, and all other enabling provisions of the law and was supported by the affidavit of even date sworn by the Applicant.

(3) The 1st Respondent/Client **JAVISAPA ENTERPRISES LIMITED** opposed the application through the Replying Affidavit dated **28th February 2020** sworn by **JACQUILINE WAMBUI NJERU**, the Managing Director of the 1st Respondent. The application was canvassed by way of written submissions. The Applicant / Advocate filed his written submissions on **28th February 2020** whilst the 1st Respondent / Client filed written submissions dated **6th May 2020**.

BACKGROUND

(4) The Applicant / Advocate filed in the High Court his Advocate – Client Bill of Costs dated **23rd April 2018** vide **Miscellaneous Cause Number 198 of 2018**. The said Bill of Costs was served upon the 1st Respondents who entered appearance through their Advocates **K. M. MBURU & ASSOCIATES ADVOCATES**.

(5) The Bill of Costs dated **23rd April 2018** was taxed by the **Hon. Deputy Registrar** who delivered her Ruling on **26th March 2019** dismissing the Bill of Costs.

(6) By a letter dated **4th April 2019** the Applicant notified the Taxing Master of his Objection to her Ruling and Sought to be supplied with the reasons for that decision. The Applicant avers that by an honest mistake his letter was referenced **High Court Misc. No. 197 of 2018** instead of **Misc. No. 198 of 2018** and that owing to this error the Applicants objection to the Ruling of **26th March 2019** was not received within fourteen (14) days as per the requirements of **Rule 11(iv)** of the **Advocates Remuneration Order**.

(7) That as a result of the mix-up and the consequent failure to give notice of his objection in **Misc. No. 198 of 2008**, the Taxing Officer did

not furnish the Applicant with the reasons for her decision. It was only on **31st May 2019** when the Applicant perused the Court file that he realized that the reasons for the Taxing Masters decision were infact contained in her Ruling of **26th March 2019**.

(8) The Applicant asserts that he has good grounds to support his objection and urges that he be granted an opportunity to ventilate the same through a Reference.

(9) The Applicant went on to aver that on **7th June 2019** the Applicant filed an application seeking to file a Reference instead of seeking an order for enlargement of time within which to file a Reference. The application of **7th June 2019** was withdrawn on **19th September 2019** paving the way for this present application. The Applicant urges the Court to grant him the orders sought in this Chamber Summons.

(10) In opposing the application the Respondent contends that the actions alleged to be advertent errors are actually a pointer to the Applicants indifference to this matter. The Respondent further contends that the Applicants objection has no basis as the Taxing Master correctly dismissed the Bill of Costs dated 23rd April 2018. The Respondent urged the Court to dismiss this application in its entirety.

ANALYSIS AND DETERMINATION

(11) I have carefully considered the Summons before me, the written submissions filed by Counsel as well as the relevant law. The only issue for determination is whether in the circumstances this Court should enlarge the time for filing a Reference.

(12) **Paragraph 11** of the **Advocates Remuneration Order** provides as follows:-

“(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the Judge but not otherwise, appeal to the Court of Appeal.

(5) 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.”

(13) The Respondents in urging the Court to dismiss the application submit that the Applicant failed to satisfactorily explain their delay in filing a Reference to the Ruling of the Taxing Master.

(14) The Applicant however has endeavoured to explain how due to a mix-up he filed the objection in the wrong file. A copy of the letter dated **4th March 2019** which the applicant wrote notifying the Hon. Deputy Registrar of their intention to object and seeking reasons for her decision is annexed to the Supporting Affidavit dated **25th November 2019** as Annexure ‘JNM 5’. This letter was dated **4th March 2019** thus it was written barely one week after the Taxing Master delivered her Ruling. I note that the letter is referenced **Misc. Cause No. 197 of 2018** instead of **Misc. Cause No. 198 of 2018**.

(15) To err it is said is human. There is nothing to dispute the contention that this was a genuine inadvertent error as averred by the Applicant. In **STANLEY KAHORO MWANGI & 2 OTHERS –VS- KANYAMWI TRADING COMPANY LIMITED [2015]eKLR** the Court was of the view that:-

“A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised.”

(16) In Supreme Court in the case of **COUNTY EXECUTIVE OF KISUMU –VS- COUNTY GOVERNMENT OF KISUMU & 8 OTHERS [2017]eKLR** the Court held that:-

“23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:-

“The under-lying principles that a Court should consider in exercise of such discretion:-

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;

3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain case, like election petitions, public interest should be a consideration for extending time.”

(17) In view of the foregoing I am satisfied that the delay has been satisfactorily explained. Accordingly this Court is inclined to exercise its discretion in favour of the Applicant. In my view the Respondent will not suffer any prejudice if the enlargement of time is allowed. I therefore allow this application in terms of prayers (1) and (2).

(18) I direct that the Applicant file and serve the Reference within **twenty-one (21) days** hereof. Costs of the application are awarded to the Respondent.

Dated in Nairobi this 5th day of March, 2021.

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MAUREEN A. ODERO

JUDGE