REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. Kemei - J

MISC. APPLICATION NO. 302 OF 2018

IN THE MATTER OF ADVOCATE-CLIENT BILL OF COSTS

BETWEEN

MUKA MUKUU FARMERS CO-OPERATIVE SOCIETY LTD.....APPLICANT/CLIENT

-VERSUS-

BM MUNGATA & COMPANY ADVOCATES.....RESPONDENTS/ADVOCATES

RULING

1. What is before me is a Notice of Motion dated 6th February, 2020 filed on 7th February, 2020 by the Applicant/Client against the Respondent/Advocate. The Applicant/Client seeks leave to file an application for reference for review out of time on the Ruling and a certificate of taxation on the bill of costs dated **4th September, 2018** issued by the taxing master on **23rd May, 2019**.

2. The application is brought under the provisions of **Section 4(1) and 22 of the Limitations of Actions Act, Section 11 of the Advocates Act, Schedule 6 of the Advocates (Remuneration) Order 2009, Article 50 and 159 of the Constitution of Kenya and ALL Other Enabling Provisions of the Law).**

3. The application is predicated on the grounds that: -

*i. **THAT** the Ruling of the Bill of Costs dated 4th September, 2018 was delivered on the 23rd May, 2019 by the taxing master awarding the Respondent a colossal sum of Kshs. 3, 127,088 for drawing of a lease agreement.*

*ii. **THAT** at the time the court gave directions for hearing of the bill of costs; the Respondent did not serve the Applicant's Advocate with documents in support of the said bill of costs including the lease Agreement despite Court Orders to do so.*

*iii. **THAT** the Respondent only served the Applicant's Advocates with the list of documents on 15th January, 2020 way after the ruling had been delivered.*

*iv. **THAT** upon perusal of the said documents and especially the Lease Agreement, the Applicant's Advocates realized that the taxing officer was misled into using a wrong acreage of the property subject of the lease thus arriving at a wrong decision.*

*v. **THAT** the acreage of the land as disclosed in the Lease Agreement is 400Ha which translates to 988 acres yet the taxing officer mistakenly or erroneously used 28, 384 acres.*

*vi. **THAT** the delay in filing the reference was not deliberate but inadvertent and was occasioned by the fact that the Respondent failed to serve the necessary document on time and therefore, this information was not within their knowledge to enable them to file a reference on time.*

*vii. **THAT** had the taxing master applied the correct acreage of land, the bill would have been taxed at **195, 716/= and not 3, 127,088/=.***

*viii. **THAT** similarly, the taxing officer was only able to supply the Applicant's Advocates with the reasons on the 12th November 2019, which was also a little too late hence the delay.*

ix. ***THAT*** *it is in the interest of justice that this application be allowed so as to allow for re- taxing of the bill to obviate a miscarriage of justice and curb unjust enrichment by the Advocate/Respondent.*

x. ***THAT*** *it is in the interest of justice an*d fairness that this application be allowed as prayed.

4. The second application attached to the Notice of Motion is by a Chamber Summon dated 6th February, 2020. It is filed by Muka Mukuu Farmers' Co-operative Society Limited (hereinafter referred to as the client). By that application, the client seeks Orders that this Court be pleased to set aside the taxing master's Ruling and subsequent Orders delivered on 23rd May, 2019 and the Certificate of Taxation; leave to be granted to the client to defend the Advocate/Client bill of costs and the bill of costs be taxed afresh; that the costs of this application be provided for.

5. The Advocate/Respondent in answer to the Notice of Motion did file a Replying Affidavit dated 12th March 2020 in which he vehemently denied the claims of the Applicant/Client and averred that the reasons for delay to file a reference on time has not been sufficiently explained by the applicant.

6. Learned counsels filed written submission. The applicant's submissions are dated 27.1.2021 while those for the respondent are dated 2.11.2020.

7. Learned counsel for the applicant relied on the principles in the case of Keziah **Gathoni Supeyo-Vs-Yano t/a Yano & Co. Advocates (2019**) where the Court in making its decision was guided by the case of **Macharia & Company Advocates- vs- Magugu 2002 2 EA 248** where **Ringera J** held as follows:

> ***"Secondly as I understand the practice relating to taxation of bills of costs, any decision of the taxing officer whether it relates to a point of Law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of reference to the judge in accordance with paragraph 11 of the Advocates Remuneration Rules"***

Counsel further quoted the case of **Salat v Independent Electoral & Boundaries Commission & 7 others {2014} eKLR** where the court set out the under-lying principles that a court should consider while exercising the discretion to extend time as follows:

> ***i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party.***
>
> ***ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.***
>
> ***iii. Whether the Court ought to exercise discretion to extend time, is a consideration to be made on a case to case basis.***
>
> ***iv. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court.***
>
> ***v. Whether there would be any prejudice suffered, the respondent if the extension was granted.***
>
> ***vi. Whether, the application had been brought without undue delay and,***
>
> ***vii. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time."***

8. The Applicant/Client's gravamen is that the grounds which form the basis for filing a reference were not within their knowledge as Advocates on record for the Applicant as at 23rd May, 2019 when the impugned ruling was delivered by the taxing master did not supply them with the requisite documents. It was argued that the Respondent refused/declined to serve them with the documents in support of their Bill of Cost despite the Court orders on them to do so on the 5th of February, 2019 and the 19th of February 2019. It was contended that the service of Court documents to parties is mandatory and had the Respondents served a list of documents upon them they would have addressed the taxing master on the appropriate acreage and which is an apparent error on the face of the record that ought to be reviewed and the bill of costs be re-taxed according to the law and the lease document itself.

The Applicant's Counsel further submits that in line with clause 11(1) and (2) of the Advocates Remuneration Order, they wrote to the taxing master on 24th May, 2019 within 14 days as required to be supplied with the reasons for the taxation made on 12th November, 2019. It was after being served with the reasons and the supporting documents that the Counsel noticed that the taxing officer had been misled into using the wrong acreage of the subject property as 28,384 acres while the correct one was 988 acres.

It was submitted that the delay in filing the reference was not by design nor was it deliberate as it was occasioned by the Respondent who declined/neglected to serve the necessary support documents as ordered by the court.

9. Learned counsel for the Respondents submitted from the outset that there was no merit in the Applicant's notice of motion. For the general legal position on exercise of discretion underpinning applications of this nature, counsel urged this Court to be guided by the case **of Andrew Shisala Angalushi v Zephania. K. Yego & Aginga Asiligwas Chanzu (2020) eKLR** reasoning of the **Supreme Court in County Executive of Kisumu vs. County Government of Kisumu & 8 Others (2017) eKLR** where 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 the exercise of such discretion:

i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party.

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

iii. Whether the Court ought to exercise discretion to extend time, is a consideration to be made on a case to case basis.

iv. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court.

v. Whether there would be any prejudice suffered, the respondent if the extension was granted.

vi. Whether, the application had been brought without undue delay and

vii. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time."

10. It was submitted that the Applicant had 14 days to apply to the judge vide Chamber Summons application setting grounds of its objection. It was submitted that the Applicant alleges to have received the reasons for taxation on 12th November 2019 yet he did not file the reference within the stipulated 14 days but instead the application seeking extension of time has been filed 10 months after the delivery of the ruling in this matter. It was argued that the application by the Applicant is not in conformity with the provisions of **Paragraph 11** of Section 11 of the Advocates Act which provides as follows:

11. Objection to decision on taxation and appeal to Court of Appeal.

(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), [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*."*

11. It was also submitted that the Applicant has not explained satisfactorily the delay in bringing this application. The Respondent contends that it will suffer prejudice should the application is allowed as the services were rendered by the Respondents way back in 2009 as evidenced by the lease agreement and that the Applicant is hell bent to delay the payment of fees.

12. It was further submitted that the Applicant's application before court has been filed in the wrong format. Reliance was placed in the case of **Alfred vs Export Hydro Pump & Services (Africa) Limited (2018) eKLR adopted with the approval ruling of the Court in Moses Mwicigi & 14 Other vs. Independent Electoral and Boundaries Commission & 5 Others (2016) eKLR** where the Court stated thus:

"This Court has on a number of occasions remarked upon the importance of rules of procedure in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of case, that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinent of ***Article 159 (2) of the Constitution,*** *which proclaims that" …. Courts and tribunals shall be guided by….. (the principle that) justice shall be administered without undue regard to procedural technicalities." this provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts."*

The Respondent's counsel finally submitted that the Applicant should not invoke **Article 159 of the Constitution** to breathe life into its application which is already dead on arrival as it is not merited and should be dismissed with costs to the Advocates/Respondents.

13. I have considered the rival affidavits and the submissions plus the authorities cited. I find the only issue for determination is whether the applicant has shown cause to justify the granting of the extension sought. It is a principle of law that the applicant must demonstrate good and sufficient reasons why such a party should be allowed to file the reference out of time.

14. At the Client filed its application, the Advocate/ Client bill of costs dated 4th September, 2018 and a certificate of taxation issued by the taxing master dated 23rd May, 2019 had already taken place. Owing to the said background, the salient question is ''how should the client have challenged that taxation?'' That answer, is found in the Advocate Remuneration Order. Paragraph 2 of that Order provides in part:

> ***"this order shall apply to the Remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof...."***

It is not disputed that the advocate with the bill of costs had previously acted for the client herein. It is on that basis that the advocate raised the Advocate/Client bill of costs, whose taxation the client contests by its application under consideration. Having established that there was that relationship between the advocate and client, and having noted that by the time the client filed its application, the bill of costs had been taxed, there is but one way that the client should have challenged that taxation. That challenge should have been mounted pursuant to **paragraph 11 of the Advocates (Remuneration) Order**. Paragraph 12 of that order, permits a reference by consent of the parties. In this matter, there is no such consent and the Client was therefore bound to follow the process set out in paragraph 11. It is as provided under that paragraph 11 that a party aggrieved by the taxation should access the High Court or the Court of Appeal as the case may be.

The Supreme Court in a case pertinent to what is before this court had an occasion to consider the importance of adherence to the laid down procedure in approaching a court of law. This was in an appeal of an election petition that is the case of **Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR** where the court stated thus:

> ***"This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.***
>
> ***Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the constitution, which proclaims that, "...courts and tribunals shall be guided by... [the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts."***

The importance of following procedure of paragraph 11 of the Order, was underscored by **Justice R. E Aburili** in the case **Vishisht Talwar v Anthony Thuo Kanai T/a A. Thuo Kanai Advocates [2014] eKLR** where the learned judge stated:

> *"The Learned Judge referring to a decision in the Court of Appeal in* ***Machira & Co. Advocates – vs- Arthur K. Magugu & Another CA 199/2002[2012] eKLR*** *stated that:*
>
> ***"Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate's bill of costs through references under Rule 11 to a Judge in chambers."***

The Client did request for reasons to the decision of the taxing master within 14 days as provided under paragraph 11, to enable it file its reference objecting to the taxed costs but, failed to challenge service upon itself of the documents in support of the bill of costs including the Lease Agreement. It was not enough for the Client's advocate to depone that the client was not served despite the Court Orders to the Advocates/Respondent.

15. It is however noted that the Client has by it's application sought leave to file a reference out of time. The main grounds upon which the client seeks that leave is that: -

> ***i. the Advocate/Respondent failed to serve the Applicant/Client's Advocate with documents in support of the said bill of costs including the Lease Agreement;***
>
> ***ii. the taxed costs were exaggerated as the taxing officer was misled to use a wrong acreage of the property subject of the lease;***
>
> ***iii. the grounds unto which form the basis of filing for a reference were not within the Client's Advocates knowledge aa at 23rd of May, 2019 when the impugned ruling was delivered by the taxing master;***
>
> ***iv. the delay occasioned by the time taken by the taxing officer to provide reasons for the taxation.***
>
> ***v. Unfair decision of the taxing master and that the taxation amounted to miscarriage of justice.***

The Client further argued that the taxed costs were exaggerated and unfair clearly elaborating why the Client says so. The Client was able to attach relevant supporting documents and official correspondences clearly stipulating the acreage that was to be leased and the error on the face of record which ought to be reviewed. It follows that the application of the Client, not only is competent and meritious, but the same is

supported by grounds which would justify the setting aside of taxation.

16. Before concluding on my consideration of the Client's application, it is important to consider the advocate's objection to the Client's application on the ground that it should not have been filed by way of chamber summons but rather should have been filed by way of notice of motion and the subject of quoting the wrong legal provisions further marred the applicant's case.

17. In the first instance, the Client cannot be faulted for having filed a notice of motion. But more importantly, an application cannot be defeated by such failure because the only difference between the two formats is that a chamber summons is intended to be heard in chambers whilst notice of motion is intended to be heard in open court. The courts, however, presently hear all applications in open court whether they be by chamber summons or notice of motion. This change of attitude of hearing applications was captured by **M. J. Anyara Emukule, J** in the case **Susan K. Baur v Shashikant Shamji Shah & Another [2011] eKLR** where the learned judge stated:

> ***"The difference between a Summons in Chambers and a Notice of Motion is today very much blurred. In the olden days, summons in chambers was heard in chambers unless the court adjourned it for good reason to be heard in open court. Similarly, Motions were heard in open court unless the court as stated in Order L, rule 1 directed that it be heard in chambers. Today, both Chamber Summons and Motions may and are heard in chambers, and in open court. So that christening an application a Chamber Summons or a Notice of Motion when the rules provide otherwise does not go to the root or basis of the claim, and is merely a matter of form not substance. It does not render the application fatally defective."***

18. On the subject of quoting the wrong provisions of the law, this Honourable Court relies on the case of **Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR** where the court stated thus:

> ***"……In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2) (d) of the constitution, which proclaims that, "...courts and tribunals shall be guided by... [the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts."***

I wholly agree with the above quoted holdings. The advocate's objection in that regard is rejected.

19. In view of the foregoing and the reasons given in this application, I am satisfied that there is **MERIT** in the Notice of Motion to grant both the leave to extend time for filing of the reference. I am persuaded to give the applicant a chance to file the reference out of time as the explanation proffered is plausible. This court must strike a balance between the rights of the Applicant and the Respondent. The respondent will not suffer prejudice as an award of costs will cushion him while on the other hand the applicant gets an opportunity to ventilate his grievance against the taxation. As the delay cannot be attributed to the respondent, the respondent is entitled to costs of the application.

20. In the result, it is my finding that the application dated 6.2.2020 has merit. The same is allowed in the following terms:

> ***a) The Applicant is hereby granted leave to file a reference out of time for review of the Ruling on the Bill of Costs dated 4.9.2018 as well as the certificate of taxation within the next fourteen (14) days from the date hereof.***
>
> ***b) The costs of the application are awarded to the respondent.***

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF MARCH, 2021.

D. K Kemei

Judge