



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 229 OF 2018

SHAH AND PAREKH.....APPLICANT

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT

RULING

1. The Notice of Motion dated 11th June 2020 is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules 2010; paragraphs 11(1), (4) & (5) of the Advocates (Remuneration) Order 1997. It seeks the following orders:

- 1. THAT this Honourable Court be pleased to enlarge time to the Applicant to file a Notice of Objection against the decision of the Taxing Master dated 15th May 2020.**
- 2. THAT this Honourable Court be pleased to enlarge time to the Applicant to file a reference against the decision of the Taxing Master delivered on the 15th May 2020.**
- 3. THAT the costs of this application be provided.**

2. It is supported by the affidavit of **Hasmukhrai Manilal Parekh** sworn on 7th February 2019 plus the grounds on its face. A summary of the grounds and affidavit is that after the filing of written submissions in respect to the Taxation of the Advocate and Client bill of costs a Ruling date was given. However, due to the corona virus the courts were closed and the Ruling remained pending.

The same was delivered and sent electronically to the parties to their emails without the knowledge of the Applicant.

3. It is the Applicant's assertion that on 20th May 2020 he received an email from the Respondent's advocates asking for banking details to advise their client. This email made him suspect that the Ruling may have been delivered. He responded to the email on 26th May 2020 seeking more details but the same has never been responded to.

4. He has further averred that it took him time to obtain a copy of the Ruling due to the closure of the courts. He faults the Taxing Master for not considering his submissions, failing to award costs on instruction fees on general damages and other pleaded costs. In a nutshell he is not happy with the Ruling on taxation.

5. It is his contention that for the above reasons he was not able to file a Notice of Objection and Reference to the Ruling on the taxation, hence the present application.

6. A replying affidavit dated 27th July 2020 sworn by **Winnie Awuor** was filed on behalf of the Respondent. She is the head of the Respondent's legal department. It is her assertion that although the Applicant's averments are not contested the same do not explain his inordinate delay in filing a Reference against the taxing master's Ruling within the required time.

7. She has further averred that it was the Applicant who sought to have the Ruling delivered via email, to which the Respondent consented. It was not therefore the Respondent's duty to keep appraising him of the progress. According to her the Applicant had sufficient notice of the delivery of the Ruling. On the taxed bill she has supported it saying it was taxed to scale and should not be interfered with.

8. In a further affidavit sworn on 27th August 2020 **Hasmukharai Manilal Parekh** referred to annexures HMP1 & 2 saying the Respondent had equally delayed in filing its replying affidavit and that there was sufficient reason for the court to allow his application. The rest is an affirmation of what is in the supporting affidavit.

9. Both parties filed written submissions. **Mr. H.M. Parekh** for the Applicant has submitted that failure to be notified of delivery of the Ruling contributed to the delay in filing the Objection and Reference hence the present application. He adds that the application was ready for filing on 11th June 2020 but for the challenge of registering the firm under the Judiciary's e-filing system.

10. Counsel has therefore asked the court to find that there was no inordinate delay in filing the present application. Further that the Respondent will not suffer any prejudice if the time for filing the Objection and Reference is extended. On the other hand he contends that it's the Applicant who will be prejudiced if the orders sought are not granted.

11. Learned Counsel argues that the Deputy Registrar did not take into account his submissions on the taxation of the bill. To support this he has cited some portions from the Ruling. He has also enumerated grounds where the Deputy Registrar allegedly failed to assess figures properly.

12. **Mr. Nyamwaya** for the Respondent in his submissions argues that this application was filed in bad faith, lacks merit and is otherwise an abuse of the court process. He has submitted that the Applicant has failed to explain his inordinate delay in filing a reference as sought. He contends that the Applicant was well aware of delivery of the Ruling online and so should not be aided in his indolence by the court. Further that the bill of costs was taxed to scale and the Applicant did not attach the intended notice of objection and/or reference.

13. Counsel has referred the court to paragraph 11 of the Advocates' Remuneration Order which deals with the court's discretion to enlarge time. He also cited the case of **County Executive of Kisumu v County Government of Kisumu and 8 Others [2017] eKLR** where the Supreme Court of Kenya held:

"[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 cases, like election petitions, public interest should be a consideration for extending time."*

14. Counsel contends that since the application was made more than 30 days after the delivery of the Ruling the same should be found to be undue delay. Further that the Respondent was under no obligation to keep the Applicant apprised on the date of delivery of the said Ruling.

Lastly he requested the court to take note of the fact that the Applicant did not attach a copy of his intended notice of objection nor reference that he was seeking leave to file out of time.

Analysis and determination

15. I have considered the application, supporting grounds and affidavit, replying affidavit and both submissions. The issue I find falling for determination is whether the Applicant has satisfied the conditions to make this court exercise its discretion in his favour.

16. Paragraph 11 of the Advocates' Remuneration Order 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 given 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."

17. The Advocates' Remuneration Order at Paragraph 11 sets out the procedure and timelines in regard to challenging the taxing officer's decision. The same Rules bestow upon the High Court power to enlarge time in exercise of its discretion. I am guided by the said Rules and the Court of Appeal decision cited.

18. A quick perusal of the record shows that on 20th January 2019 the Deputy Registrar confirmed that submissions to the taxation had been filed. A Ruling date for 8th March 2019 was set.

On 29th July 2019 the Ruling was deferred to 24th September 2019. Nothing happened until 15th May 2020 when a Ruling is said to have been delivered and sent electronically to the parties' counsel.

19. It is not disputed that on 30th April 2020 the Applicant had by email informed the Deputy Registrar of his willingness to have the Ruling delivered via email. According to the Respondent the Applicant's confirmation placed responsibility on him to be checking the email for the Ruling. I quite disagree with the Respondent on this.

20. The proper procedure would have been for the Court to notify the parties when the Ruling would be delivered by sending a Notice to their respective email addresses. I have perused the record and there is no such notification by the court. The Applicant would not be expected to be daily checking the email for the Ruling.

21. The email communication (HMP5 & 6) between the counsel for the parties clearly shows that the Applicant was not aware of the delivery of the Ruling. In annexure HMP5 the Respondent's counsel does not make any mention of the Ruling. I therefore find that in the special circumstances within which the courts were operating it was incumbent on the Deputy Registrar to issue a Notice of the intended delivery of the Ruling via email. This did not happen.

22. True, the Ruling was delivered on 20th May 2020. As per the Rules the Applicant ought to have given notice to the Deputy Registrar for any explanations on or before 3rd June 2020. Upon receipt of the explanations the Applicant would have had 14 days to file his objection to the Judge. The explanation by the Deputy Registrar should be immediate/forthwith as per the Rules. Had everything moved as required the last day for filing the objection with the High Court should have been 18th June 2020 or thereabout.

23. In this particular case, the Applicant prepared his application which is dated 11th June 2020 but only filed it on 25th June 2020. *(He has given an explanation for it, and the same has not been challenged).*

The delay in filing the application cannot therefore be said to have been so inordinate to make the court to decline to give the Applicant an opportunity to ventilate his case. I make this finding after considering the steps the Applicant took after receiving the Respondent's email on 22nd May 2020. It's also not lost to this court's mind that all this was happening in the background of the closure of the courts due to the Covid-19 pandemic thus making it difficult for litigants to approach the courts physically.

24. I will not get into the assessment of the merits of the application as that will be for the court that will handle the Reference.

25. I find merit in the application which I hereby allow and grant the leave sought for filing the objection and the Reference, on the following terms;

- (i) The Applicant to lodge his objection with the Deputy Registrar within 7 days of this Ruling.
- (ii) The Deputy Registrar to respond to the objection immediately.
- (iii) If dissatisfied with the Deputy Registrar's explanation the Applicant to file a Reference to the High Court within 7 days of receipt of the reasons by the Deputy Registrar.
- (iv) The timelines set are of essence.
- (v) Costs to be in the cause.

Delivered, signed and dated this 9th day of March 2021 in open court at Nairobi.

H. I. ONG'UDI

JUDGE