REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. E421 OF 2019

VAGHJIYANI ENTERPRISES LIMITED.....APPLICANT

-VERSUS-

OSUNDWA & COMPANY ADVOCATES.....RESPONDENT

RULING

1. This ruling is in respect to three applications namely: -

a) The application dated 23rd September 2019 (hereinafter the "1st application") wherein the Applicant/Client seeks orders to set aside the ruling of the Taxing Master delivered on 25th July 2019 and to direct that the Respondent's Bill of Costs be taxed afresh with appropriate directions before a different Taxing Master.

b) The application dated 23rd October 2020 (hereinafter "the 2nd application") wherein the respondent seeks orders to strike out the application/reference dated 23rd September 2019.

c) The application dated 27th February 2020 (hereinafter "the 3rd application") wherein the applicant seeks orders to set aside the ruling of the Taxing Master delivered on 17th July 2019 and for orders that the Respondents Bill of Costs be taxed afresh before a different Taxing Master.

2. The 1st and 3rd applications are supported by the affidavits of the applicants Director **Mr. Hiten Vaghiyani** and the applicant's lawyer **Ms Lorraine Naswa Barasa** respectively. The applications are based on the main ground that there is an error apparent on the record contained in the Bill of Costs. The applicant's case is that having pegged the instruction fees at Kshs. 3,000,000, the taxing master was in error to hold that the getting up fees was Kshs. 1,500,000 instead of Kshs. 1,000,000 which represents 1/3 of the sum of 3,000,000.

3. The Respondent/Advocate opposed the applications through a replying affidavit and a Notice of Preliminary Objection dated 4th October 2019. The respondent also filed the 2nd application seeking to strike out the 1st application on the basis that it was filed outside the statutory timelines. The respondent's case is that the application is incompetent as it offends Paragraph 11(4) and 12 of the Advocates Remuneration Order (ARO) as they did not give notice in writing to the Taxing Officer on the items that it is objecting to so as to enable her give the reasons for her ruling on taxation. The respondent further states that the applicant issued a defective request for reasons out of the statutory timelines and maintains that the court therefore lacks the jurisdiction to hear and determine the applications as drawn. It is the respondent's position that the 1st and 3rd applications were filed out of time, without leave.

4. Parties canvassed the applications and the preliminary objection by way of written submissions which I have considered.

5. The first issue for determination is whether the respondent's preliminary objection is merited. It is only after considering the merits of the Preliminary Objection (P.O.) that this court can zero in into determining the merits of the applications.

6. Before delving into the merits of the P.O., I find that it is necessary to comment on the multiple applications that have filed by the parties herein. It is not clear to this court why the applicant filed two separate applications over the same subject of setting aside the Taxing Master's Taxation of the Respondent's Bill of Costs. In the supporting affidavit dated 27th February 2020 the applicant's deponent M/S Naswa Advocate explains that the application dated 23rd September 2019 had a typographical error indicating the taxation ruling date as 25th July 2019 instead of 17th July 2019 which error could be cured through an amendment. The court is however at a loss as to why the applicant did not seek to amend the application as suggested instead of filing a different application over the same subject matter. Similarly, the court is at a loss as to why the respondent chose to file the 2nd application to strike out the 1st application when a replying affidavit and the Notice of P.O. could have sufficed responses to the 1st and 3rd applications. This court is appalled by the emerging practice where parties swarm the

court with numerous applications even where a single application and response can settle the issues at hand. This is a practice that must be discouraged at all costs as it does not assist the court in its mandate to expeditiously dispose of cases as envisaged under Article 159 of the Constitution.

7. Be that as it may and the confusion over the respondent's application and the applicant's two applications notwithstanding this court will still go ahead and determine the merits of the P.O.

8. It is now a well settled principle that a preliminary objection must be on pure points of law not blurred by any factual details liable to be contested or proved through the production of evidence. In other words, a matter that requires investigation or the production of evidence for authentication does not qualify as a point to be raised in a preliminary objection.

9. *What constitutes a Preliminary Objection was discussed in the case of* ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*** **(1969) EA 696,** *where it was held that:*

> ***"a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration… a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."***

10. The question which then arises is whether the Preliminary Objection raised herein is on pure points of law. Paragraphs 11(4) and 12 of the Advocates Remuneration Order (ARO) stipulate as follows: -

> ***"11(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or sub paragraph (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."***
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> ***12. Reference by consent***
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> ***With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court. The procedure for such reference shall follow that of a case stated but shall be to a judge in chamber."***

11. In so far as Paragraph 11 of the ARO is concerned, an appeal against the decision of the Deputy Registrar shall be a matter to be lodged within 14 days from the date of the order or certificate of costs. In this instance, it is not disputed that contrary to the clear provisions of the ARO, the initial application to set aside the ruling on taxation was filed out of time, without the leave of the court, on 23rd September 2019 almost two months after the delivery of the impugned ruling on taxation.

12. In ***Patrick Kimathi Muchena T/A Arimi Kimathi & Company Advocates v Evans Ithira*** [2019] eKLR it was held that: -

> ***"The Applicant failed to seek to file the Reference out of time and the court can only say to him this, his Reference is incompetent for failing to abide by the timelines of the Advocates (Remuneration) Order Paragraph 11(1) and (2). Being incompetent there can but only be one result. It fails."***

13. The applicant averred that the issue of filing the application out of time could be cured by the court's invocation of its discretionary powers under Article 159 of the Constitution. I however note that the applicant did not move this court by filing an application for the extension of time within which to file the reference, in which case, the issue of the court's exercise of discretionary powers does not arise.

14. Courts have taken the position that they lack the jurisdiction to determine the merits of a reference filed outside the statutory stipulated period. This is the position that was taken in ***N. W. Amolo T/A Amolo Kibanga & Company Advocates v Samson Keenga Nyamweya*** [2016] eKLR where the court observed that the court is divested with jurisdiction to determine the merits of a reference that is filed outside the statutory stipulated period.

15. Guided by the dictum in the above cited cases and having regard to the reasons that I have stated in this ruling, I find that the Preliminary Objection dated 4th October 2019 is merited and I therefore allow it. Consequently, I strike out the applications dated 23rd September 2019 and 27th February 2020 with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF MARCH 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Nasimiyu for Osundwa for the applicant.

Mr. Naswa for Mosi for the applicant.

Court Assistant: Sylvia.