



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 419 OF 2015**

**ECOBANK KENYA LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**DEFTECH KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**ASHRAF ANITA ANAIDA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**ABDULLAN KHATIB ASHRAF.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. This ruling is in respect to the application dated 7<sup>th</sup> October 2020 wherein the applicants seeks orders that: -

**1. Spent.**

**2. Spent.**

**3. That this honourable court do enlarge the time within which to file a Reference against the Ruling delivered by Honourable S. Githogori (DR) on 8<sup>th</sup> September 2020, and be pleased to deem the Reference filed herein as properly filed.**

**4. That this honourable court do set aside in its entirety the Ruling delivered by Honourable S. Githogori (DR) on 8<sup>th</sup> September 2020, awarding the respondent costs in the sum of Kshs 435,092 against the applicants.**

**5. That this honourable court do reinstate the Applicant's Bill of Costs dated 8<sup>th</sup> June 2020, for taxation by the Deputy Registrar and issue appropriate directions to the Deputy Registrar as the court shall deem fit.**

**6. That this honourable court do remit the Respondent's Bill of Costs dated 9<sup>th</sup> December 2019, to the Deputy Registrar for a fresh taxation with appropriate directions of the Deputy Registrar as the court shall deem fit for reconsideration.**

**7. That the costs of this application be in the Appeal.**

2. The application is supported by the 3<sup>rd</sup> applicant's affidavit and is premised in the grounds that: -

**1. As the record shall bear out, the respondent filed its Party and Party Bill of Costs dated 9<sup>th</sup> December 2019, pursuant to the Ruling delivered on 13<sup>th</sup> March 2017, by Honourable Onguto wherein he entered judgment summarily against the 1<sup>st</sup> defendant in the sum of € 86,989.67 at a conversion rate of Kshs 102,506.9 (Kshs 8,917,04) plus costs on the said judgment amount.**

**2. The said Ruling further provided that the assessment of the costs would be conducted only after trial of the pending issues as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' liability and the interest payable, if any.**

**3. However, on 4<sup>th</sup> November 2019, the plaintiff withdrew its claims against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on their liability and on the interest payable with costs being awarded to the defendants on the claim for interest.**

**4. As such, there being no pending issues for trial, the respondent filed the Bill of Costs dated 9<sup>th</sup> December 2019, and**

consequently, the applicants filed the Bill of Costs dated 8<sup>th</sup> June 2020, pursuant to this honourable court's orders issued on 4<sup>th</sup> November 2019.

5. On 8<sup>th</sup> September 2020, the Deputy Registrar delivered her Ruling on the applicants' and respondent's respective Bill of Costs, wherein she inadvertently failed to consider this honourable court's order issued on 4<sup>th</sup> November 2019, and declared that the defendants were not awarded costs and as such lacked locus standi to file the Bill of Costs dated 8<sup>th</sup> June 2020, hence it was dismissed.

6. Importantly, the Deputy Registrar erred in law and fact by misapprehending this honourable court's orders issued on 4<sup>th</sup> November 2019, and disregarding the same by dismissing the Applicant's Bill of Costs.

7. Moreover, in the said ruling, the Deputy Registrar failed to consider the applicant's submissions dated 8<sup>th</sup> June 2020, against the Respondent Bill of Costs and as such she fundamentally violated the applicant's right to fair hearing.

8. Additionally, the Deputy Registrar erred in law and fact by failing to consider that this matter never proceeded to full trial since it was determined in a summary manner hence the instruction fees assessed of Kshs 303,892 is inordinately high because it should be 75% of the fees chargeable under Schedule 6A item 1 (b) of the Advocates Remuneration Order.

9. Notably, the Deputy Registrar's findings and decision was defective and unjust since she did not consider the Applicants' Submissions and particularly objections in respect of items No. 2-35, 37, 39 - 46 and disbursements under the Respondent's Bill of Costs, which she allowed as drawn, unfairly, despite the applicant's objections to the same.

10. Significantly, the Deputy Registrar's findings and decision were not supported by the law and she failed to give guidance and requisite direction to the applicants on their submissions against the Respondent's Bill of Costs.

11. In view thereof, the Deputy Registrar erred in law and fact by assessing and taxing the Respondent's Bill of Costs at Kshs 435,092.

12. The applicants were granted 30 days stay of execution which lapse on 8<sup>th</sup> October 2020, and the applicants are apprehensive that if the order sought herein are not granted, the respondent shall execute the Certificate of Taxation to the detriment of the applicants who shall suffer losses, damages and a grave miscarriage of justice.

3. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination whether the applicant has made out a case for the granting of the orders sought in the application.

**a) Enlargement time within which to file the reference.**

4. The impugned ruling on taxation was delivered on 8<sup>th</sup> September 2020 and the instant application filed on 7<sup>th</sup> October 2020 which was 29 days after the delivery of the impugned ruling on taxation.

5. Paragraph 11 of the Advocates Remuneration Order provides as follows;

**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 subsection (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) 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."**

6. In *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others* [2015] eKLR the Supreme Court, laid out the general principles governing extension of time thus: -

*"As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:*

*"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.*

*“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*
- 5. whether there will be any prejudice suffered by the respondents, if 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”.*

7. On the issue of delay, Mohammed J. (as he then was) held as follows in *George Kagima Kariuki & 2 Others v George M. Gichimu & 2 Others* [2014] eKLR: -

*“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. 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 favorably exercisable.”*

8. The same position was taken in *Stanley Kahoro Mwangi & 2 Others v Kanyamwi Trading Company Limited* [2015] eKLR where 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 favorably exercised.”*

9. In the instant case, note that the applicants have neither in the affidavit in support of the application nor in the grounds thereof explained the reasons for the delay in filing the reference so as to justify their prayer for enlargement of time. The applicants have instead gone ahead to challenge the Taxing Master’s decision on taxation. This court finds it quite surprising that the applicants could overlook such a critical requirement in their application and fail to validate/justify the delay by assuming that the court would simply deem the reference as properly filed.

10. I find that the failure to give reasons for the delay, in filing the reference is an omission that can have the effect of invalidating the entire application. Be that as it may, this court is still minded to admit the reference in the interest of justice and consider the merits of the application.

#### **b) Setting aside the ruling of 8<sup>th</sup> September 2020.**

11. The applicants seek orders to set aside the impugned ruling and to remit the Respondent’s Bill of Costs dated 9<sup>th</sup> December 2019 for fresh taxation on the basis that their submissions dated 8<sup>th</sup> June 2020 were not considered and further, that the Taxing Master did not take into account the fact that the matter never proceeded to full hearing in which case, the applicable instruction fees should have been 75% of fees chargeable under schedule 6A 1(b) of the Advocates Remuneration Order.

12. I note that the Taxing Master stated as follows regarding the Plaintiff’s Bill of Costs.

*“The bill was not objected to by the defendants who were duly served but failed to object to any item on the said Bill of Costs. The bill will be taxed using schedule 6 of the Advocates Remuneration Order 2014. I find that the bill was drawn to scale and the same is allowed as drawn save for the following items;”*

13. I further note that the applicant’s annexure marked **KA-2** shows that the applicants not only filed their own Bill of Costs, but also filed their submissions thereto in which case, the Taxing officer’s finding that the Respondent’s Bill of Costs was not objected to was erroneous.

14. My finding is that despite the fact that the Taxing Master may not have considered the applicants’ submissions she went ahead to find that the Bill was drawn to scale before allowing it.

15. I am therefore unable to find that there was any error in principle in the taxation of the Plaintiff’s Bill of Costs so as to warrant this court’s interference with the award on costs.

16. The applicants further contended that the amount awarded to the respondent for instruction fees is inordinately high in view of the fact that the case was determined in a summary manner as it did not go to full trial.

17. According to the applicants, the instruction fees chargeable ought to have been 75% of the fees chargeable under Schedule 6A Item 1(b).

18. I have perused the impugned ruling of the Taxing Master and I note that besides taking into consideration the fact that the trial court entered summary judgment in favour of the plaintiff on 13<sup>th</sup> March 2017, she also rendered herself as follows on the subject of instruction fees: -

***“In this case the plaintiff filed a suit against the defendants claiming €99,452.67 or Kshs 10,194,584.90 taking the conversion rate of Kshs 102.5 as at 27<sup>th</sup> February 2015. The plaintiffs have claimed Kshs 843,421.00 as their instruction fees citing the numerous court attendances, numerous court correspondences and the nature of work this being the matter arose from an unpaid banking facility.***

***However, looking at the court proceedings the work done by the plaintiff's counsel was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in the legal field. I have to state that there was nothing novel in the proceedings on such a level as would justify any special allowance in costs. The instruction fees are therefore assessed at Kshs 303,892.00.”***

19. From the above extract of the Taxing Master's ruling, I am unable to find that there was any error in principle in the amount the awarded under instruction fees which was in fact reduced by more than a half of what was initially quoted by the plaintiff. I am therefore not persuaded that the applicants have made out a case for the interference with the Taxing Masters award on instructions fees.

**c) Reinstatement of the Applicant's Bill of Costs dated 8<sup>th</sup> June 2020.**

20. The applicants filed their Bill of Costs for taxation following the withdrawal of the plaintiff's claim against them on 4<sup>th</sup> November 2019. I have perused this court's proceedings of 4<sup>th</sup> November 2019 and I note that indeed, the plaintiff's suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in respect to liability and interest was withdrawn subject to costs. I however note that in the impugned ruling the Taxing Master found that the defendants were not awarded costs and that they were therefore not entitled to such costs. I find that this part of the ruling was erroneous as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were clearly awarded costs following the withdrawal of the claim against them.

21. Consequently, I find that the application dated 7<sup>th</sup> October 2020 is merited and I allow it, albeit partly, in the following terms: -

***i) That the Applicants' Bill of Costs dated 8<sup>th</sup> June 2020 is hereby reinstated for fresh taxation by a different Deputy Registrar other than Honourable S. Githongori.***

***ii) The costs of the application are awarded to the applicants.***

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 13TH DAY OF MAY 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. Musyoka for Kago for Defendants/Applicants.

Ms Njuguna for Rimui for Plaintiff/Respondent.

Court Assistant: Sylvia.