



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONST. PETITION NO. 22 OF 2019

IN THE MATTER OF ARTICLE 23 AND 165(3) (A), (B) & 6 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19(2), (3), 20(1), (2), (3), (4), 21(1), 22(1), (4), 23(1), (3), 28, 50(2)(B) (C) OF THE CONSTITUTION

BETWEEN

PREMIER FOOD INDUSTRIES LIMITED.....PETITIONER

VERSUS

PUBLIC HEALTH PROSECUTOR – KISUMU.....RESPONDENT

RULING

The application dated 23rd November 2020 was filed by the **PUBLIC HEALTH PROSECUTOR, KISUMU** (hereinafter “*the Prosecutor*”).

1. It is an application for extension of time for filing of a Reference from the Ruling delivered by the Taxing Officer on 16th September 2020.
2. The Applicant also sought orders to set aside the Ruling in contention.
3. Thirdly, the Applicant asked the court to order that the Bill of Costs dated 22nd May 2020 be taxed afresh.
4. After being served with the Application, the **PREMIER FOOD INDUSTRIES LIMITED** (hereinafter, “*Premier Food Industries*”) lodged Grounds of Opposition dated 25th January 2021.
5. Premier Food Industries asserted that there had been inordinate and therefore inexcusable delay by the Prosecutor, in bringing the application.
6. They also asserted that, because the Prosecutor had already received payment of the taxed costs, they should not be permitted to approbate and reprobate.
7. Finally, they described the application as one that was against the public interest and public policy, because it Offends the principle that litigation must come to an end.
8. When canvassing the application the Prosecutor said that the reason why there was a delay is that they are a public body, which may experience delay in issuing instructions.
9. It was the Applicant’s case that the Petitioner would not suffer any prejudice if the Applicant was granted an extension of time to file a reference, because the money which had already been paid would be considered as part payment, in the event that the Bill was taxed afresh and if a higher sum was awarded.
10. The Applicant then went ahead to submit that the reference, if filed would have very high chances of success.
11. I have given due consideration to the application.

12. It is common ground that the Bill of Costs was taxed on 16th September 2020.

13. The advocates for the Applicant were well aware that their client had 14 days within which to file a reference, if they so wished. That knowledge is expressly stated in the letter dated 26th September 2020, when the advocates sought instructions from the Client.

14. As the Premier Food Industries pointed out, there is no explanation for the delay of 10 days before the Prosecutor's advocate wrote to their client to ask for instructions.

15. The Prosecutor invited the court to take cognizance of the fact that it is a public body which may experience delays in issuing instructions. As the Prosecutor was well aware of the possibility of experiencing delays in issuing instructions, it was incumbent upon them and their legal advisors to commence early, the process of seeking instructions, on the one part, and of issuing instructions, on the other part.

16. Notwithstanding the express caution issued by the Advocate concerning the limited period of time within which a reference could be filed, the prosecutor waited until 17th November 2020, before giving instructions.

17. In the supporting affidavit sworn by Advocate **MOSES MUNUANG'O**, he said that;

“..... the client took long to give instructions , which instructions were later given by a telephone call on 17/11/2020 by Dancun Ogango.”

18. I find that that deposition does not constitute any explanation as to why the prosecutor delayed. The prosecutor should have told the court why it took long to give instructions to their advocate, especially considering that the advocate had made it explicitly clear that the law allowed a very limited amount of time for lodging a reference.

19. In the case of **JOSEPH OUMA ONDITI Vs JANE KISAKA MUNG'AU, ELC NO. 38 OF 2012**, at Kitale M. Njoroge J. quoted the following words from the case of **GAHIR ENGINEERING WORKS LTD Vs RAPID KATE SERVICES & ANOTHER (2015)eKLR**;

“It is worth considering that it is the norm and good practice for advocates to advise their clients and further seek their client's instructions on the way forward. Obviously this is not a one day business. There are some factors that may, in some cases, occasion delay which delay is excusable.”

20. I am alive to the fact that advocates ordinarily seek further instructions from their clients, before taking substantive steps in a case. Therefore, it was to be expected that in this case, the advocate would seek instructions about whether or not to file a reference after the Taxing Officer had delivered the Ruling on taxation.

21. If there was a delay in either the giving of advice to the client or the issuance of instructions by the client, the said delay ought to have been explained.

22. In the case of **JOSEPH OUMA ONDITI** (above-cited), the court rejected the application because the delay in bringing the application had not been explained in any manner.

23. In the case of **NICHOLAS KIPTOO ARAP KORIR SALAT Vs IEBC & 7 OTHERS, SUPREME COURT APPLICATION NO. 16 OF 2014** the Court said;

“Time is a crucial component in dispensation of justice, hence the maxim: justice delayed is justice denied. It is a litigant's legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined.”

24. However, it is appreciated that a party may encounter delay, resulting in the lapse of time within which a particular step ought to have been taken.

25. Where there has been a delay, the party may seek an extension of time.

26. In the case of **NICHOLAS KIPTOO ARAP KORIR SALAT** (above-cited) the Supreme Court noted the 4 principles which the Employment Appeal Tribunal had laid down in **UNITED ARAB EMIRATES Vs ADDELGHAFAR & OTHERS (1995) IRLR 243**. The fourth principle was set out as follows;

“An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one.

His only reasonable or legitimate expectation is that the discretion relevant to his expectation to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the delay.”

27. Based on that decision, as well as on a number of other cases which the Supreme Court had cited, the Court said;

“From the above case law, 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.”

28. In this case the Applicant has not provided any explanation for the delay in filing the reference and also for the delay in bringing the application to seek an extension of time.

Accordingly, I find no basis upon which the court could judicially exercise its discretion in favour of the Applicant.

29. Secondly, I note that the Applicant had already received payment of the taxed costs. The said payment was made on the basis of the decision by the Taxing Officer, who had awarded the costs in the sum of Kshs 200,550/=.

30. Having received payment on the strength of the Ruling dated 16th September 2020, the Applicant was now seeking leave to challenge the very same Ruling. In effect, the

Applicant was seeking to challenge the validity of the decision from which it has been conferred with a benefit, whilst at the same time retaining the said benefit.

31. In the case of **EVANS Vs BARTLAM (1937) 2 ALL. E.R. 649**, at page 652 Lord Russel of Killowen said;

“The doctrine of approbation and reprobation requires for its foundation, inconsistency of conduct, as where a man, having accepted a benefit given him by a judgement cannot allege the invalidity of the judgement which conferred the benefit.”

32. It is well settled that the court cannot approve an attitude in which a party approbates and reprobates. For that reason, too, the application before me fails.

33. Accordingly, the application dated 23rd November 2020 is dismissed, with costs to Premier Food Industries.

DATED, SIGNED and DELIVERED at KISUMU This 5th day of May 2021

FRED A. OCHIENG

JUDGE