



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELECTION PETITION NO.6 OF 2017

DANIEL ONGONG'A ABWAO.....PETITIONER/APPLICANT

VERSUS

1. MOHAMEDALI MOHAMED

2. MWANAJUMA GANDANI

3. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION..... RESPONDENTS

RULING

1. What is for determination is a **Notice of Motion** application dated **22nd March, 2021** filed under certificate of urgency and brought under **Rule 11 (1) of the Advocate Remuneration Order, Order 10 Rule 11 and Order 42 Rule 6 of the Civil Procedure Rules** and all other enabling provisions of the law in which the Applicant seeks for orders that: -

1. Spent;

2. Spent;

3. THAT this Honourable Court be pleased to set aside the Taxing Masters Orders issued on the 11th December, 2019, issued ex-parte, and the consequent Certificate of Taxation issued thereon pending the hearing and determination of the intended reference filed herein.;

4. THAT the time within which to file a Reference arising out of the Decision of The Taxing Master issued on the 11/12/2019 be extended in the interest of justice and fairness;

5. THAT costs of this application do abide by the outcome of the intended reference.

2. The application is supported by the grounds on the face thereof and the **affidavit** sworn by **Daniel Ongong'a Abwao**, the Petitioner/Applicant herein on **22nd March, 2021** .

3. He has deponed that he was the Petitioner in Election Petition herein and having lost the Petition the court awarded costs to the 1st Respondent herein.

4. It was deponed that on **11th December, 2019**, the Deputy Registrar *ex parte* taxed costs as against the Petitioner/ Applicant for the sum of **Kshs.5,827,987.00/=**.

5. That a after the Ruling which was delivered on **11th December, 2019**, the 1st Respondent took out a Notice to Show Cause dated **16th September, 2020** with the intention to execute.

6. The Petitioner/Applicant states that he was not aware of the Taxation proceedings and the Notice to Show Cause as his erstwhile Advocates on record did not brief him of the said proceedings and thus was condemned unheard. It was stated that although **Ms Balala & Abed Advocates** were on record for her, they did not represent the Petitioner's/Applicant's interests and their mistake should not be visited on him.

7. According to the Petitioner/Applicant, he was alarmed when he was arraigned in court on the **21st October, 2020** and during the hearing of the Notice to Show Cause he committed to pay **Kshs.10,000.00/=** monthly, but later out of fear of incarceration committed to pay **Kshs.300,000.00/=** before the close of business. He stated that he solicited for **Kshs.400,000.00/=** from family members and friends and paid the same to ensure his release.

8. Further, the Petitioner/Applicant stated that out of imminent fear of committal, he made a proposal to pay **Kshs.3,000,000.00/=** to secure his freedom. He averred that he was under immense pressure and desperate to secure his freedom and as such, the proposal was made out of duress.

9. He averred that due to hard economic conditions, he has been unable to live up to his proposal, to pay **Kshs.3,000,000.00/=**. The Petitioner/Applicant stated that he is employed as a Sub-County Administrator earning **Kshs.110,000.00/=** gross salary, which salary educates, clothes, house and feeds his young family. He stated that he is thus unable to pay colossal amounts in settlement of the taxed amount if at all the same were properly taxed.

10. It was deponed by the Petitioner/Applicant that the taxing of the bill of costs *ex parte* infringed on his right to a fair trial as enshrined under the Constitution of Kenya.

11. The Petitioner/Applicant deponed that he has commenced proceedings to file a review of the decision of the Taxation Master made on **11th December, 2019** and has urged the court to allow the application herein in the interest of justice, fairness and equity to avoid a situation where he is condemned to pay the sum of **Kshs.5, 827,987.00/=** without being accorded an opportunity to be heard.

12. In opposing the application, the 1st Respondent filed a **Replying Affidavit** sworn on **5th April, 2021** by **Mohamed Ali Mohamed**, the Respondent herein.

13. It has been deponed that the application dated **22nd March 2021** is *res judicata* for reasons that the prayers sought therein were sought and denied in an application dated **18th February, 2021**. The 1st Respondent averred that the instant application is an abuse of the due process of court as it does not raise any new grounds to be litigated upon.

14. **Mr. Mohamed**, has also deponed that the approach by the Applicant to file a Reference to the taxing master's decision issued on **11th December, 2019** is an afterthought because as at **6th October, 2020** when matter came up for the hearing of the Notice to Show Cause, the Applicant did not have an issue with the taxation results.

15. It has been stated that the Applicant was amply represented when the Party and Party Bill of Costs was heard, and a copy of the Certificate of Taxation dated **5th March, 2020** was served upon the Applicant's erstwhile Counsel.

16. The 1st Respondent has stated that the Applicant has not given any reasons to this court as to why he did not file a Reference within the required period as provided for by law.

17. According to the 1st Respondent, this application has been filed in an effort to deny him the right to enjoy the fruits of his judgment. He avers that this Honourable Court should not lend its discretion to a party, whose main intent is to abuse the Court's discretion. The 1st Respondent avers that he stands to be greatly prejudiced if the orders as sought by the Applicant are granted as he will be denied the opportunity to enjoy the fruits of his Judgment.

18. The 1st Respondent further filed a **Notice of Preliminary Objection** dated **5th April, 2021**. The **Notice of Preliminary Objection** is based on the following grounds: -

a. That this Court lacks jurisdiction to hear the application herein by virtue of express provisions of Section 7 of the Civil Procedure Act.

b. That there is already a concluded application between the same parties touching on the same subject matter herein and whose ruling was delivered on 9th March, 2021 hence this application is thus res judicata.

c. That this application is therefore frivolous, vexatious and an abuse of the court process and ought to be struck off with costs to the 1st Respondent.

DIRECTIONS OF THE COURT

19. Following the directions given by the court, the matter was disposed of by way of written submissions. The Applicant's submissions are dated the **20th April, 2021** and filed on **22nd April, 2021** whilst the Respondent's submissions are dated the **10th May, 2021** and filed on **11th May, 2021**.

20. Parties relied on their written submissions in their entirety.

THE APPLICANT'S SUBMISSIONS

21. On whether the court should extend time for the Applicant to file a Reference, it has been submitted that this Court has jurisdiction to

extend time beyond the 14 days provided for under **paragraph 11** of the **Advocates Remuneration Order**.

22. The Applicant relied on the Supreme Court case of **County Executive of Kisumu –vs- County Government of Kisumu & 8 Others [2017]eKLR**, that set the guidelines for court to consider on an application for extension of time, which are that the application ought to be brought without unreasonable delay and the court ought to consider whether the Respondent will suffer any prejudice.

23. The Applicant has submitted that the instant application was brought without undue delay as he was aware of the Ruling on taxation of costs for reasons that his erstwhile Advocates failed to inform him of the same. He states that he became aware of the said Ruling sometime in **October, 2020** when he was served with a Notice to Show Cause. It is also submitted that the mistake of Counsel should not be visited on him.

24. The Appellant has further submitted that before he pursued a Reference, he filed an application for review which occasioned a further delay as an application for review ought to be heard first before a Reference application can be filed.

25. It is averred by the Applicant that time to file a Reference should be extended as the Bill of Costs was taxed on wrong principles and the Respondents were awarded a manifestly high amount and yet the amount to be taxed was capped by the judge and the matter was devoid of complexities, thus there was no justification of the Deputy Registrar's decision. Further, that time should be extended as the Applicant was not given an opportunity to challenge the quantum of the Bill of Costs.

26. The Applicant submitted that the Respondents will not suffer any prejudice that cannot be compensated by way of costs if the application herein is allowed.

27. On stay of execution, the Applicant states that he seeks to exercise his right of appeal and that stay should be issued pending the hearing and determination of the Reference, to avoid the same being rendered nugatory.

28. It has been submitted that the application herein is not *res judicata* as the application dated **18th February, 2021** was one for review under **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules** while the instant application seeks for leave to file a Reference brought under **paragraph 11** of the **Advocates Remuneration Order**. The Applicant has emphasized that the two applications are distinct from one another.

1ST RESPONDENT'S SUBMISSIONS

29. The 1st Respondent has submitted that the application herein is *res judicata* to the application dated **18th February, 2021** and filed on **19th February, 2021**. To the 1st Respondent, both applications challenge the Notice to Show Cause dated **16th September, 2020** and that this issue was already dealt with and a Ruling delivered on **9th March, 2021**. It has been stated that the instant application does not raise anything new.

30. On extension of time to put in a Reference, the 1st Respondent has submitted that extension of time is a matter of discretion of the Court, but the Court must consider in detail the reasons advanced as to what occasioned the delay as was held in the case of **Monicah A S Ougo & Lebuneei Diversity –vs- Samson Robert Misango [2015]eKLR**.

31. The 1st Respondent has submitted that the cases in court belong to the litigant and not Counsel, hence the argument that the Applicant was not aware of the Bill of Costs nor the Notice to Show Cause as he was not informed by his Counsel, does not hold water.

32. It has been stated that the Applicant is not desirous of prosecuting the Reference as he has been aware of the Taxing Master's decision from October, 2020, he proceed to enter a consent on a payment plan of the taxed amount.

33. The 1st Respondent has submitted that if the Court is to allow the instant application, the Applicant be ordered to deposit the entire taxed costs in a joint interest earning account in the name of the Counsel for the Applicant and the 1st Respondent in strict compliance with **Order 42 Rule 6(2)** of the **Civil Procedure Rules**.

ANALYSIS AND DETERMINATION

34. Having considered all the pleadings and written submissions by the parties, the issues that arise for determination are: -

i. Whether this application is res judicata;

ii. Whether this court can set aside the orders of the taxing master issued on 11th December, 2020 pending hearing and determination of the intended Reference;

iii. Whether this Court can extend time to the Applicant to put in a Reference as against the taxing master's decision issued on 11th December, 2020.

i) Whether this application is res judicata

35. The 1st Respondent has raised a **Preliminary Objection** that the application herein is *res judicata* as the issues raised therein have

already been determined vide the application dated **18th February, 2021** and a Ruling issued on **9th March, 2021**.

36. The principal of *res judicata* is found in **Section 7** of the **Civil Procedure Act** which provides that: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

37. I have looked at the application dated **18th February, 2021** vis a vis the instant application. I find that the application dated **18th February, 2021** was filed seeking review under **Section 80** of the **Civil Procedure** and **Order 45** of the **Civil Procedure Rules**. The instant application is for leave to file a Reference as against the taxing master’s decision out of time.

38. I have also established that the issue for leave to put in a Reference was never raised or addressed in the application dated **18th February, 2021** and thus the same cannot be *res judicata* to the instant application.

ii) Whether this court can set aside the orders of the taxing master issued on 11th December, 2020 pending hearing and determination of the intended Reference

39. In the second prayer of its application, the Applicant has sought for orders of the Taxing Master issued on **11th December, 2020** to be set aside pending the hearing and determination of the intended Reference. I wish to point out that if such orders were to issue at this interlocutory stage, the same would be of final nature as in the case of a reference, which this application is not. The result of it would render the filing of the intended reference nugatory.

iii) Whether this Court can extend time to the Applicant to put in a Reference as against the taxing master’s decision issued on 11th December, 2020.

40. As for whether or not the court can extend the time for filing a reference against the Taxing Master’s decision, it is a principle of Law that the applicant must demonstrate good and sufficient reasons as to why he or she was unable to bring the Reference within the set period as provided for under **paragraph 11** of the **Advocates Remuneration Order** which is fourteen days from the delivery of the Taxing Master’s decision.

41. The Supreme Court of Kenya of Kenya pronounced itself on the set principles on courts discretion when considering applications for extension of time in the case of **Salat –vs- Independent Electoral & Boundaries Commission & 7 Others {2014}eKLR**, where it held that:

“Discretion to extend time is indeed unfettered but its incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there were extenuating circumstances that could enable the Court to exercise discretion in favour of the applicant. In doing so the following principles are applicable thus:

- 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.”***

42. In the instant matter, the Party and Party Bill of Costs was taxed on **the 11th December, 2019**. The Application herein for extension has been made on the **22nd March, 2021**, which is over one(1) year later after the Taxing Master issued the said decision on the Bill of Costs. In so far as the **Advocates Remuneration Order** is concerned at **paragraph 11**, an appeal against the decision of the Deputy Registrar shall be a matter to be lodged within 14 days from the date of issuance with reasons on items objected thereto. In this instance, that did not happen and as prescribed under **paragraph 11** of the **Advocates Remuneration Order**, the Applicant did not bring the intended appeal/reference within the prescribed period by the rules.

43. The Applicant’s reason for filing this application one year later is that, he was unaware that a Party and Party Bill of Costs had been filed in the matter herein, as he was never served with said Bill of Costs by the **1st Respondents**. The Applicant has stated that he became aware of the Party and Party Bill of Costs sometime in October, 2020 when he was served with a Notice to Show Cause.

44. The claim that the Applicant was not aware of the Party and Party Bill of Costs was rebutted by the **1st Respondent** and he stated that the

Applicant's Counsel participated in the taxation proceedings and even offered to file submissions, but they did not file the same.

45. I have perused the court proceedings and established that when the Party and Party Bill of Costs first came up for taxation before the Deputy Registrar, the Applicant was represented and even took directions on the filing of submissions. After the parties took directions on the Bill of Costs, a Ruling was delivered on the **11th December, 2019** in the absence of parties. From the said proceedings, it is not clear if parties were aware of the set date for the Ruling to be delivered. What is evident is that both parties herein were not present when the taxing master delivered his Ruling and thus the reason given by the Applicant that he became aware of the matter when it came up for a Notice to Show Cause is plausible.

46. In view of the fact that there is no evidence that the parties herein were served with any notice of the delivery of the Ruling, the Taxing Master erred in delivering the said Ruling in their absence. Indeed, it was necessary that the Applicant or his Advocates be aware of the date set for the delivery of the said Ruling for the reason that subsequent action was time bound and could only be taken up if a party was aware of the said delivery/pronouncement.

47. It is not in dispute that the Applicant had been participating in the proceedings, but from the records no Ruling date or notice thereof was issued to parties and there is no evidence that they were aware of the same to enable either of them take appropriate action as required under **paragraph 11** of the **Advocates Remuneration Order**.

48. It is thus my view that it would be unfair not to extend time for the Applicant to put in a Reference and in the interest of Justice to allow him exercise his right of appeal against the decision that was handed down by the Deputy Registrar on **11th December, 2019**. I also find that the 1st Respondent has not shown what prejudice they stand to suffer if the application is allowed.

49. Accordingly and based on the above foregoing, this Court finds that it is more persuaded that the Applicant should be allowed to exercise his constitutional right.

50. In view of the above findings, Applicant's application dated **22nd March, 2021** is allowed and the time in which to file a Reference as against the Deputy Registrar's decision delivered on **11th December, 2019** is accordingly extended.

51. Costs to be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at MOMBASA this 6TH JULY 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Adhoch counsel for Applicant

Mr. Kirui counsel for 1st Respondent

Court Assistant - Winnie