



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. 195 OF 2019

MURIU, MUNGAI & CO. ADVOCATES.....ADVOCATES/RESPONDENT
AND

UBA KENYA BANK LIMITED.....CLIENT/APPLICANT

RULING

1. Through the application dated 4th November 2020, the Client/Applicant seeks the following Orders: -

1. ***THAT the Honourable Court be pleased to enlarge the time within which to file a Reference against the decision of the Taxing Master delivered on the 13th day of May, 2020.***
2. ***THAT the decision of the Taxing Master delivered on the 13th day of May, 2020 in so far as the same relates to the reasoning and determination pertaining to the taxation of Items No. 1, 2, 3 and 4 of the Bill of Costs dated 22nd May, 2019 be and is hereby set aside.***
3. ***THAT the Honorable Court be pleased to refer the matter back for re-taxation of Items 1, 2, 3 and 4 of the Bill of Costs and with proper directions thereof.***
4. ***THAT in the alternative to prayer 2 the Honorable Court exercises its inherent jurisdiction and be pleased to re-assess the instruction fees due to the Respondent in respect of Items 1, 2, 3 and 4 of the said Bill of Costs and calculations flowing therefrom by reducing the amount payable by the Applicant under the Advocates (Remuneration) (Amendment) Order 2014 and/or make such other or further orders as regards the Bill of Costs in issue.***
5. ***THAT the costs of this application be borne by the Respondent.***

2. The application is brought under Rule 11 (2), and (5) of the Advocates (Remuneration) Order, is supported by the Affidavit of the Applicant's Head of Legal **Ms. Debra Ajwang-Ogada** and is premised on the grounds that the Applicant wishes to raise pertinent issues with the Taxing Master's Ruling that cannot be raised and properly ventilated within the context of a reply to the Advocate's reference.

3. The Applicant's case is that the Taxing Master erred in law and in fact in finding that there was no agreement on fees and that the Advocate's fees were due from the Applicant for an abandoned transaction.

4. The respondent/advocate opposed the application through the Grounds of Opposition dated 10th November 2020 wherein he listed the following grounds: -

- a) ***That the Client/Applicant has not explained the reason(s) for the delay in filing the Reference to warrant the exercise of court's discretion in granting enlargement of time.***
- b) ***The "reason" given for the delay that the Client was '[under the belief that leave to file the reference would be granted in open court]', whatever that means, is misconceived as no leave is required under Rule 11 of the Advocates (Remuneration) Order.***
- c) ***To the extent that the court has not allowed the Client's application to file the reference out of time as prayed in prayers 1, 2, 3 and 4 of the application, which would be in the merits of the intended reference, are premature. Put differently the Advocates can only be required to respond to prayers 2, 3 and 4 of the application, and the corresponding supporting affidavit, and the court can only consider the said prayers, after the court grants enlargement of time to file the reference.***
- d) ***The application is otherwise an abuse of the court process.***

5. Parties canvassed the application by way of written submissions which I have considered. The Applicant submitted that even though the impugned ruling on taxation was delivered virtually on 13th May 2020, a copy of the ruling containing the reasons for the decision was only availed to the parties via email on 10th July 2020 after which the respondent served its reference on 3rd August 2020. The applicant argued that it was under the impression that it could seek leave to file a cross reference when the matter came up for directions on 15th October 2020 on which date the court directed them to file a formal application for leave.

6. It was the applicant's case that the court should exercise its discretion and enlarge the time within which it can file its Reference as the delay is not unreasonable or inordinate and further, that Article 159 (2) (d) of the Constitution promotes the administration of justice without undue regard to procedural technicalities. It was further submitted that the Applicant's Reference raises triable issues that the parties should be allowed to ventilate at the hearing. For this argument the applicant relied on the decision in *Andral Shisala Angalushi v Zephania K. Yego & another* (2020) eKLR where the court stated that: -

"It should however be noted that the court has been called upon to exercise its discretion and consider the application in the interest of justice. This court is enjoined under Article 159 (2) (d) of the Constitution to dispense justice without undue regard to procedural technicalities."

7. The applicant also relied on the decision in *Andral Shisala Angalushi* (supra) for the argument that the respondent will not suffer any prejudice if the application is allowed as long as they can be compensated in costs in respect to the application.

8. The respondent/advocate, on the other hand, submitted that the Client did not explain the reason(s) for the delay in filing the Reference and was therefore not entitled to the exercise of court's discretion in granting enlargement of time. For this argument, the respondent relied on the decision by the Supreme Court in the case of *County Executive of Kisumu vs County Government of Kisumu & 8 Others [2017] eKLR* where the Supreme Court held that: -

"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. "***

9. I have carefully considered the pleadings filed herein, the submissions made by the parties' respective counsels together with the authorities that they cited. I find that the main issue for determination is whether the Court should exercise its discretion and enlarge time for the Client to file a Reference against the decision of the Taxing Master delivered on 13th May, 2020.

10. Paragraph 11 (1) and (4) of the Advocates Remuneration Order stipulates 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,

(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.

11. A simple reading of the above provision reveals that the power to enlarge time discretionary and like any other exercise of judicial discretion, must be exercised judiciously and based on sound principles and grounds.

12. In the instant case, it is not disputed that the impugned ruling on taxation was delivered on 13th May 2020 and the copies of the ruling containing the reasons for the taxation sent to the parties via email on 10th July 2020. The present application was filed on 4th November 2020 which is at almost 4 months after the ruling was sent to the parties. The applicant has explained that it was under the impression that it could seek the leave of the court to file a cross reference when the respondent's reference came up for mention for directions on 15th October 2020.

13. The respondent, on the other hand, argued that the applicant's explanation for the delay was not plausible as it did not require the leave of the court to file a reference.

14. Considering the totality of all the circumstances of this case and the fact that the respondent's reference is still pending determination by this court, I find that it will serve the interests of justice to allow the applicant an opportunity to pursue its reference court as any inconvenience caused to the respondent can be ameliorated by and award for costs.

15. Consequently, I allow the application dated 4th November 2020 in terms of prayer 1 only.

16. Having allowed the prayer for extension of time within which to file the reference, I wish to point out that prayers no. 2, 3 and 4 of the application ideally constitute the reference application and were therefore sought prematurely ahead of the prayer to enlarge time. I also note that the parties did not tender any submissions in respect to the said prayers. I therefore direct that the prayers be canvassed together with the respondent's reference application.

17. I award the costs of this application to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF JULY 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:

Ms Diru for Kenneth Wilson for Respondent.

No appearance for Applicant.

Court Assistant: Sylvia