



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION NUMBER 183 OF 2019

NATIONAL BANK OF KENYA LIMITED.....APPLICANT

VERSUS

SINGH GITAU ADVOCATES.....RESPONDENT

RULING

1. By an application dated 7th April 2021, the National Bank of Kenya Limited (the applicant) seeks a raft of prayers. However, prayers (1), (2) and (3) are now spent. The applicant now seeks an order that the time within which to file a Reference against the Taxation Ruling delivered on 10th March 2021 be enlarged. It also prays that its notice objecting to the Taxation vide the letter dated 24th March 2021 be deemed to have been properly filed. Also, it prays that the Reference filed herewith be deemed to have been properly filed. Lastly, the applicant prays for costs of the application to be provided for.

2. The application is founded on the grounds that the subject ruling was delivered on 10th March 2021 taxing the Respondent's Bill of costs at **Kshs. 1,582,425.15** as against the applicant. The applicant states that it requested for a typed copy of the ruling on 10th March 2021 and 23rd March 2021 respectively which was availed to its advocates on 24th March 2021 by which date the time within which to file a reference had already lapsed. Further, the applicant states that vide a letter dated 24th March 2021, it indicated the items objected to in the ruling. Lastly, leave of this court is required prior to filing the reference.

The Respondent's Replying affidavit

3. Sylvia Ogola, an Advocate of the High Court of Kenya practicing as such in the firm of LJA Associates LLP seized of the conduct of this matter on behalf of the Respondent swore the Replying Affidavit dated 21st April 2021 in opposition to the application. She deposed that both parties canvassed the Bill of Costs and a Ruling was delivered on 10th March 2021 in the presence of both parties allowing the Bill as against the applicant in the sum of **Kshs. 1,582,425/=**. She deposed that the applicant filed a Notice of Objection to taxation on 24th March, 2021 within the statutory period of 14 days from the date of the Ruling. He deposed that even though the applicant received a copy of the typed Ruling and the reasons of the Taxing Master's decision on 24th March, 2021, the applicant has not filed the Reference contrary to Rule 11 of the Advocates (Remuneration) Order, 2009.

4. She averred that the considerations for granting stay of execution are proof of sufficient cause, proof of substantial loss and provision of security for costs. She also deposed that the applicant has neither cited nor demonstrated an error on the part of the Taxing Master whether in principle, in law or fact nor has the applicant challenged the existence of the Advocate-Client relationship or service of the Bill of Costs hence it has failed to establish any sufficient cause to warrant the orders sought. Also, she deposed that the applicant has not demonstrated substantial loss incapable of being compensated by way of damages and that the applicant has by conduct shown reluctance to pay the Respondent's fees. Also, that the applicant ought to deposit in court the amount due or furnish security for the same. Lastly, that the delay in filing the reference is unjustifiable.

The applicant's further affidavit

5. Samuel W. Mundia swore the further affidavit dated 9th April 2021 in reply to the Respondent's Replying affidavit. He averred that the time within which to file a reference lapsed on 6th April 2021. Further, that out of abundance of caution, it filed the instant application on 7th April 2021, and, that the applicant is ready to deposit security for costs of the reference in a joint interest earning account in the names of both advocates.

The applicant's advocates submissions

6. The applicant's counsel cited *Laban Singh Harman Singh Ltd v Attorney General & 2 Others*[1] which held that section 89 of the Civil Procedure Act provides for the application of the Civil Procedure Rules in all cases of a civil nature including the present application. Counsel argued that if the stay is refused, the reference will be rendered nugatory.

7. Further, the applicant's counsel cited Rule 11 of the Advocates Remuneration Order and argued that the ruling was delivered on 10th March 2021, a letter requesting for a typed copy of the ruling was prepared and presented to court on the same day and that a copy of the ruling was availed to the applicant on 24th March 2021 on which day, time within which to file a notice of objection had lapsed. Counsel argued that upon receipt of the typed copy of the ruling, the applicant wrote to the taxing master on the same day giving notice of the items objected to in the ruling as provided for under Rule 11(1).

8. Counsel relied on *Governors Baloon Safari Limited v Skyship Company Limited & Another*[2] in which the court stated that a party who desires to object to a taxation decision must give notice in writing of such objection specifying, the items of taxation objected to, within 14 days after the decision and upon receipt of the notice in writing the Taxing Officer is required to record and forward to the objector, the reasons for his decision on those items after which the objector has 14 days upon receipt of the reasons, to file a Reference.

9. Counsel argued that the ruling was received on 24th March 2021, the day the 14 days were lapsing. Counsel urged the court to find that the taxing officer was required to forward the reasons for his decision on the objected items. Counsel relied on *Ahmed Nasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd* [3] which held that where the reasons for the taxation are contained in the ruling there is no need to seek further reasons simply because the wording of subrule (2) of Rule 11 demands so and that the said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the Ruling. However, counsel argued that the Taxing Master was required to give reasons for the specific items which were objected to. He argued that the applicant received reasons on 24th March 2021 and filed its notice of objection the same day. He argued that the time lapsed on 6th April 2021 and the applicant filed its reference on 7th April 2021, a delay of one day, hence the delay is not inordinate. He argued that the High Court has power to enlarge time and not to punish the applicant. (Citing *Kinyua Muyaa & Co. Advocates v Kenya Ports Authority Pension Scheme & 8 others*[4]).

10. Further, counsel submitted that the application has been filed without delay and cited *Utalii Transport Company Limited & 3 others v Nic Bank Limited & Another*[5] which held that there is no precise measure of what amounts to inordinate delay since it differs from case to case depending on the circumstances. He also cited *Mwangi S. Kimenyi v Attorney General & another*[6] which held that the litmus test for inordinate delay is the amount of delay which helps the court to conclude whether it is inordinate and inexcusable. Counsel argued that the applicant has brought the application without delay and that the applicant risks suffering substantial loss if the stay is refused. (*Shell Ltd v Kiburu and Another*.[7])

The Respondent's advocates submissions

11. The Respondent's counsel submitted that despite the Registrar availing a copy of the typed Ruling and the reasons on 24th March 2021, the applicant failed to file a Reference but instead it filed the instant application on 7th April 2021. He cited *Robert Musyoki v China Road & Bridge Corporation*[8] which held that Rule 11 (2) provides that a person who objects to a decision of the Taxing Officer may within 14 days from the receipt of the reasons of the Taxing Officer apply to the Judge in chambers setting out the grounds of his objection, by way of a Reference under Rule 11. Counsel relied on *Speaker of the National Assembly v James Njenga Karume* [9] which held that where there is a clear procedure for the redress of any particular grievance, that procedure should be strictly followed. He also cited *Machira & Company Advocates v Magugu*[10] which held that any complaint about any decision of the taxing officer whether it relates to a point of law or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a Reference to a Judge in accordance with paragraph 11. Also, counsel cited *Gacau Kariuki & Co. Advocates v Allan Mbugua Nganga* [11] which held that the only available recourse to a person aggrieved by a decision of a Taxing Officer is to lodge a reference.

Determination

12. The nub of the applicant's grounds is that the Taxing Master did not provide reasons for the decision. Despite citing *Ahmed Nasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd* [12] which held that where the reasons for the taxation are contained in the ruling there is no need to seek further reasons simply because the wording of subrule (2) of Rule 11 demands so and that the said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the Ruling, counsel maintained that the Taxing Master has to avail reasons for the objected items. To me the said argument goes against the clear intent and meaning of the said decision.

13. After the taxation of the bill of costs, the procedure for the challenge of the results therefrom is provided in Paragraph 11 which provides:

(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.*

14. The above provision has been the subject of judicial interpretation in many cases including the above case cited by the applicant's counsel. In *Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited*[13] the court discussing the question of providing reasons for taxation decision stated: -

“...where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The

sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise, mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent.”

15. The above reasoning leaves no doubt that the applicant’s argument is legally frail and it is not supported by the law or decided cases including the decision the applicant cited. It is admitted that the ruling was supplied to the parties. Paragraph 2 of the Ruling is clear. The Taxing Master stated: -

“On instruction fees, this being taxation of HCCC No 1514 of 2001, the 1997 Advocate’s Remuneration Order applies. The value of the subject matter is Kshs. 118,857,702/= which translates to Kshs. 1,822,665.50.”

16. Additionally, at paragraph 3, the Taxing Master stated that *“other items objected to are items 2,62,189-206. Item 2 is 1/3 of instruction fees which is Kshs. 607,621/=. Getting up fees under item 62 is taxed off. This is because getting up fees is a charge on the instructions fees which is a static one-off item. It cannot recur again in an application.”*

17. At paragraph 4 the Taxing Master observed as follows: - *“The Respondent has opposed items 189-206. Under paragraph 74, the vouchers shall be produced if the taxing officer requires them. In this case, I see no need for the same because the figures are reasonable. If the Respondent needed to inspect them in advance, he should have requested the taxing officer to order their production earlier before responding to the Bill of Costs.”* Lastly, at paragraph 5, the Taxing Master was clear that the rest of the items were unopposed and she allowed them as drawn.

18. Clearly, the basis upon which the particular items were taxed and allowed is glaringly clear in the ruling. The Taxing Master gave a reasoned ruling providing reasons for her decision. One wonders what other reasons the applicant needed if he/she read the ruling. It follows that the applicant ought to have filed the reference upon being supplied with the ruling. The applicant’s argument that it was waiting for the reasons is unsustainable, unconvincing and hard to sell. Entertaining such a reasoning on the face of such a clear ruling offends both reason and jurisprudence on the subject. The said reasoning is refused.

19. The applicant seeks extension of time to file the reference. I start from the premise that the High Court has power in its discretion to enlarge time for a party to file a reference out of time. This is the language of Paragraph **11(4)** of the Advocates’ Remuneration Order which provides that: -

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.

20. The decision whether or not to extend the time is essentially discretionary. In general, the matters which this court takes into account in deciding whether to grant an extension of time are: *first*, the length of the delay; *second*, the reason for the delay; *third*, the chances of the application succeeding if the application is granted; and, *fourth*, the degree of prejudice to the respondent if the application is granted. This list is not exhaustive. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*^[14] succinctly laid down the principles to guide courts in applications for extension of time as follows: -

i. 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;

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 should exercise the 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. The delay should be explained to the satisfaction of the Court;

v. Whether there will be any prejudice suffered by the respondents if the extension is granted;

vi. Whether the application has been brought without undue delay; and

vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

21. From the above jurisprudence, several principles are discernible. *One*, 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. A common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e., statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under the circumstances and the law.

22. In *Smith v Middleton*^[15] it was held that the discretion is to be exercised in a selective and discriminatory manner, not arbitrarily or idiosyncratically otherwise as Lord Diplock said in *Cookson v Knowles*^[16] the parties would become dependent on judicial whim. Discretion must be exercised in accordance with sound and reasonable judicial principles. Here the order is discretionary because it depends on the

application of a very general standard— what is ‘just and equitable.’ The exercise of the court’s discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit.

23. A reasonable explanation for the delay must be offered. The applicant must show that he/it did not willfully disregard the timeframes provided for in the Rules. He/she is obliged to satisfy the court that there is sufficient or good cause for excusing him/her from compliance. Leave may be refused where there has been a flagrant breach of the rules especially where no explanation is proffered or where the explanation is unsatisfactory. The applicant should convince the court to exercise its discretion in his favour.

24. In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor and the prospects of success of the application. Ordinarily, these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting leave. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts.

25. This discretionary power is judicial in nature and must be confined to the rules of reason and justice. The discretion must be judiciously exercised after taking into account the circumstances of the case, whether the applicant acted prudently and without delay. For this discretion to be exercised the applicant has to show good and substantial reasons for the failure.

26. In essence, an applicant is required to demonstrate a reasonable explanation for his default (it is sometimes described as an “acceptable” explanation). 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.^[17] As the Supreme Court stated in above decision, 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. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

27. The applicant laid more emphasis on grounds for stay of execution as if it was prosecuting an application under Order 42 Rule 6 of the Civil Procedure Rules. Nothing was said about the prospect of success of the intended reference or why the court should unlock its discretion in its favour. I have already reproduced parts of the ruling and questioned what other reasons the applicant wanted. Also, I find nothing to persuade me that the reference if filed stands a high chance of success. The decision to search for reasons was in my view unwarranted. I find and hold that the applicant was to blame for the delay and failure to file the reference. The court must take into account all the circumstances of the case. The proper approach is to make the order which best accords with the interest of justice.^[18] I am not persuaded that the applicant has established a basis to warrant any of the orders sought. Accordingly, the application dated 7th April 2021 is dismissed with costs to the Respondent.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 21ST DAY OF JULY 2021.

John M. Mativo

Judge

[1] {2016} e KLR.

[2] {2020} e KLR.

[3] {2006}1 E.A.

[4] {2017} e KLR.

[5] {2014} e KLR.

[6] {2014} e KLR.

[7] {1986} KLR 410

[8] {2018} e KLR.

[9] Court of Appeal at Nairobi Civil Application No. 92 of 1992.

[10] {2000} 2 EA 428.

[11] Misc. Appl. No. 2011.

[12] {2006}1 E.A.

[13] {2012} e KLR.

[14] {2014} eKLR.

[15] {1972} SC 30.

[16] {1979} AC 556.

[17] See *Monica Malel & Anor v R, Eldoret*, *Civil APP No. NAI 246 of 2008*.

[18] *Philips LJ in Linotype-Hell Finance Limited v Baker* [1992] 4 All ER 887, at page 3