



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. CAUSE NO. 108 OF 2012

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

BETWEEN

PARIN SHARRIF.....1ST APPLICANT

NAZLIN NIZAR JETHA.....2ND APPLICANT

YASMIN JANMOHAMMED.....3RD APPLICANT

ANAR HANALI.....4TH APPLICANT

-VERSUS-

CECIL MILLER

T/A MILLER & CO. ADVOCATES.....RESPONDENT

RULING

1. The background of this dispute is that the applicants Parin Shariff, Nazlin Nizar Jetha, Yasmin Janmohammed and Anar Hanali instructed the respondent Cecil G. Miller T/a Miller & Co. Advocates to act for them in two succession causes. One related to the estate of Zerakhanu Haiderali Sayani and the other was in respect of the estate of Haiderali Kanji Sayani. The instructions were withdrawn on 18th January 2012. The applicants did not settle the respondent's legal fees. In each matter the respondent filed a Bill of Costs. The costs were on 25th September 2014 taxed and allowed at Kshs.18,759,474/= and Kshs.18,760,692/=, respectively. The total was Kshs.37,520,166/=. In each taxation, a certificate of costs was issued on 31st March 2015. On 27th June 2019 judgment was entered in respect of each taxation.

2. The applicants filed the present application dated 17th July 2015 seeking extension of time to file a reference to challenge each of the taxation done on 25th September 2014. They were aggrieved by what they considered to be substantial costs awarded for unidentifiable legal services that the respondent had rendered. For instance, they contended that the respondent had not filed any succession cause by the time instructions were withdrawn. It is material that the Bills of Costs were defended during taxation, and oral evidence was taken by the Taxing Officer.

3. In the supporting affidavit sworn by Ahmed Yasin Dubow Jelle Advocate, who was then acting for the applicants, he stated that following the taxation on 25th September 2014, a stay of execution of 30 days was granted. On 15th October 2014 he filed a request for reasons, now that his clients were not satisfied with the taxation. The request was made under paragraph 11(1) of the **Advocates Remuneration Order**. They wanted to lodge a reference. By letter dated 23rd October 2015 the Taxing Officer responded by sending a copy of the ruling. It is notable that the ruling was typed and had 16 pages. Mr. Jelle swore as follows:-

“5. THAT the Respondents are intent on filing an application for Reference against the Ruling of the Deputy Registrar but have been frustrated in doing so as we are still awaiting certified copies of the proceedings before the Taxing Officer.

6. THAT the taxation was conducted by way of *viva voce* evidence with the applicants calling two witnesses, namely Mr. Peter Wena and Mr. Cecil Miller, both Advocates of this Honourable Court. The evidence by the two individuals was heavily relied on by the Taxing Officer in reaching her decision following the taxation, but as will be evident from the proceedings, were heavily controverted by the Respondents.

3. THAT as such, we are of the considered view that the typed proceedings will not only enable this court attain a fuller picture of the matter and also make its own independent decision on whether the taxing officer’s findings were well founded, but it will also ensure that justice is done to both parties.”

4. The applicants’ case was that it was this delay by the court in sending to them a certified copy of proceedings that placed them in the present circumstances where they did not file a reference. This is why they sought extension of time to file the reference to challenge the decision of the Taxing Officer.

5. The respondent asked that the application be dismissed with costs for being without merit, mischievous and an abuse of the process of the court. He stated that after the Taxing Officer provided a copy of the ruling which contained the reasons for the taxation, it was not necessary for the court to provide a copy of the proceedings before a reference was filed. The ruling, according to him, contained all the reasons required to enable the filing of a reference. Further, the respondent stated that, in any case, it had taken the applicants 11 months to bring the application; that the delay was unexplained and inordinate.

6. Mr. Mwangi for the applicants and Mr. Murgor (SC) for the respondent filed written submissions and made reference to decided cases on the application. I have considered them.

7. Under paragraph 11(2) of the **Advocates Remuneration Order**, any party who is aggrieved by the decision of the Taxing Officer has to come to the High Court by chamber summons. Under paragraph 11(4) the High Court has power to extend time for the lodgement of the reference. The period of lodgement of reference is 14 days from the date of the receipt of the reasons for taxation.

8. From the affidavit of the applicants’ advocate, the ruling was provided vide a letter dated 23rd October 2015. It was in response to a letter dated 15th October 2014 which was a -

“request for reasons.”

The advocate made no reference to any other letter, but stated that they were, on top of that, waiting for a copy of the proceedings. There is no indication as to when and how the proceedings were sought and when the Taxing Officer supplied them.

9. I agree with the respondent that it was not necessary to obtain a copy of proceedings to file a reference, in view of the fact that a lengthy ruling had been obtained that contained sufficient reasons. Secondly, the taxation had been on 25th September 2014. By all standards the amount taxed were substantial. If the respondents, who had participated in the taxation, were aggrieved, why did it take them up to 15th October 2014 to seek reasons? Was it not prudent to use the reasons in the ruling to file a reference, and subsequently, on receipt of the copy of proceedings, seek to amend the reference? Further, after the ruling was sent to the respondents’ advocates on 23rd October 2014 nothing happened until 17th July 2015 before this application was filed. That was about 9 months. Were the applicants being diligent? How many times did they communicate with the Taxing Officer, and where is the evidence?

10. In **Imperial Bank Limited (In Receivership) & Another –v- Alnashir Popat & 18 Others [2018]eKLR**, the Court of Appeal was dealing with the question of extension of time to file and serve a Record of Appeal out of time from the ruling and order of the High Court when it observed as follows:-

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal; and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity.....”

11. In **Leo Sila Mutiso –v- Rose, Civil Appeal No. NAI 255 of 1997**, and in many other decisions, it was reiterated that the decision whether or not to extend time is essentially discretionary. The court has to look at the facts of the case to be able to decide what the justice of the matter demands.

12. This court cannot at this stage discuss the merits of the intended reference. What is important is to consider the nature of the dispute; the fact that the respondent has long standing decrees of his legal costs which he wants settled; and that the applicants want an opportunity to challenge the taxation that led to the decrees.

13. The applicants came to court on 17th July 2015 under certificate of urgency. They had an obligation to proceed expeditiously with the application, and take all necessary steps to make sure that it was heard and determined. It is material to point out that the respondent was

equally aggrieved by the taxations. He diligently filed a reference which the applicants defended. He made sure that it was heard and determined. It was dismissed. He filed an application to have the consequent certificates of taxation to be entered as judgment of the court. That was again defended by the applicants. A decision was rendered in his favour. Nowhere did the respondent seek for a copy of the proceedings to be able to mount his reference. In short, the applicants have been indolent in so far as the prosecution of the application has been concerned. That is not a good example for a party who says that he was keen to challenge the taxation.

14. In conclusion, I determine that the applicants' delay in bringing the application to extend time to file a reference was, in the circumstances, inordinate, and the explanation for the delay was insufficient and not excusable. They did not take all reasonable steps within their power and control to approach the court by reference to have their grievance in relation to the taxations dealt with.

15. The result is that I dismiss the application by the applicants with costs.

16. The Kshs.58,553,158/=, if deposited into court, shall go to the respondent to settle the decrees that are so far outstanding.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF JULY, 2021.

A.O. MUCHELULE

JUDGE