



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISC. APPLICATION NO. 3 OF 2019**

**NAIROBI CITY COUNTY.....APPLICANT**

**VERSUS**

**OTIENO OGOLLA & ASSOCIATES.....RESPONDENT**

**RULING**

**Background**

1. The ruling herein is on an application made by Nairobi City County, (hereinafter referred to as “the Client”), by way of a Chamber Summons dated 27<sup>th</sup> May 2019. The Client has objected to a ruling delivered on 2<sup>nd</sup> May 2019 by the Deputy Registrar who was the Taxing Officer, upon taxation of an Advocate –Client Bill of Costs dated 5<sup>th</sup> February, 2019. The said Bill of Costs was filed by its Advocate, Otieno Ogolla & Associates, (hereinafter referred to as “the Advocate”) whom it has sued as the respondent herein . The outstanding prayers in the said application are as follows:

- a) **That this Court be pleased to extend the time for filing the instant application and that it be deemed to have been properly filed.**
- b) **That the decision of 2<sup>nd</sup> May, 2019 by the learned Deputy Registrar on the Bill of Costs dated 5<sup>th</sup> February, 2019 be set aside and the matter be remitted to a different Deputy Registrar for taxation.**
- c) **That in the alternative to (b) above, this Court be pleased to set aside the decision of 2<sup>nd</sup> May, 2019 by the learned Deputy Registrar on the Bill of Costs dated 5<sup>th</sup> February, 2019 and tax the said Bill of Costs.**
- d) **That the costs of the application be provided for.**

2. The application was supported by the grounds on its face and a supporting affidavit sworn on 27<sup>th</sup> May 2019 by Christine Ireri, the Ag. County Attorney of the Client. In the impugned ruling made on 2<sup>nd</sup> May 2019, the Deputy Registrar awarded the Advocate the amount of Kshs 10,815,067.50/= as costs. The Client contends that the learned Deputy Registrar applied the wrong principles when she held that the matter was complex and required a lot of input in terms of research work, that the responsibility entrusted in the counsel was high and needed to be extra diligent, and that elaborate submission backed by various judicial decisions were made in this regard.

3. Further, that the Deputy Registrar awarded the Advocate Kshs 4,500,000/= as instruction fee without justifying the increase, and erred in taxing the getting up fees at the amount of Kshs. 1,500.000/- on the basis of the said instruction fees. Lastly, that the Deputy Registrar failed to appreciate that even though the value of the subject matter was Kshs 630,000,000/=, the documents and research work involved were fairly moderate, hence did not involve complex issues to justify the amount awarded for instruction fee.

4. The Applicant therefore averred that it is in the interest of justice that the learned Deputy Registrar’s decision of 2<sup>nd</sup> May, 2019 be set aside, and the Bill of Costs dated 5<sup>th</sup> February, 2019 be taxed before another Deputy Registrar or by this Court.

5. The Client’s application was opposed by the Advocate who filed Grounds of Opposition dated 19<sup>th</sup> June, 2019. The Advocate contends that the application lacks merit, is frivolous, vexatious and an abuse of the due process of the law. Further, that the application does not meet the requirements for granting stay orders, is filed out of time, and therefore should not be entertained. Lastly, that the Deputy Registrar ruling was based on the law, precedents, right principles and was well reasoned.

**The Determination**

6. This Court directed the parties to canvass the application by way of written submissions. The Client's Advocates, Kwanga Mboya & Company Advocates, filed submissions dated 26<sup>th</sup> September 2019, while Otieno Ogola & Company Advocates (the Advocate) filed submissions dated 4<sup>th</sup> November 2019.

7. There are three issues for determination raised by the pleadings and submissions made by the Client and Advocate. The first is whether the Client has laid out sufficient basis to warrant the exercise of this Court's discretion to grant it leave for extension of time for filing of this application. If this discretion is exercised in favour of the Client, the second issue to be decided will be whether the taxation of item 1 of the Advocate's Bill of Costs and award of Kshs 4,500,000/= as instruction fees was made in error. The last issue is whether the Advocate is entitled to getting up fees of Kshs 1,500,000/=.

8. On the first issue, the Client submitted that that it was not mandatory for it to demand for the reasons of taxation from the Taxing Officer. Further, that the delay in filing the reference was occasioned by the fact that the Client was unable to trace the written ruling on time, and the time taken to obtain instructions to file a reference. Hence, that the delay is excusable, and It is only fair, just and equitable that leave be granted for the reference to be admitted out of time. In addition, that the Advocate will not be prejudiced in anyway whatsoever if leave is granted for the reference to be admitted out of time. Reliance was placed on the decisions in **Governors Balloon Safaris Limited vs Skyship Company Limited & Another (2015) e KLR** and **Evans Thiga Gaturu Advocate vs Kenya Commercial Bank, (2012) e KLR** for these submissions.

9. The Advocate did not address this issue in its submissions even though it was one of its grounds of opposition to the application.

10. The procedure for the challenge of a taxing master's decision is provided under Rule 11 of the Advocates Remuneration Order, which provides as follows:

***“(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the 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.”***

***(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

***(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

***(5) 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. The provisions of Rule 11 of the Advocates' Remuneration Order contemplate a notice in writing requesting for reasons of the Taxing Officer's decision on taxation of specified items of the Bill of Costs, and upon receipt thereof, an application commonly referred as a reference to a judge, setting out the grounds of objection to the taxation. The Client states that such a notice is not mandatory, and there is no such notice on record that was given to the Taxing Officer.

12. I am guided by the decision of the Supreme Court of Kenya in **Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others, [2016] e KLR**, wherein the Court had occasion to consider the importance of adherence to the laid down procedure in approaching a court of law, and held as follows:

***“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.***

***Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the constitution, which proclaims that, “...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”***

13. It is my view that even though the requirement of giving notice to the Taxing Officer of items objected to is not couched in mandatory terms, it is necessary in light of the ensuing consequences, especially that the necessary timelines are observed, and that such references are filed and heard timeously. To this extent, I find that the notice of objection required to be given to the Taxing Officer it is thus not a mere technicality, and the present application is thus defective for non-compliance with this requirement .

14. The provisions of Rule 11 of the Advocates Remuneration Order nevertheless grant this Court discretion to extend time for lodging a reference from the taxing master's decision, notwithstanding the expiry of the 14 days period prescribed. In exercising such discretion, the

court acts judiciously bearing mind the facts placed before it and to meet the ends of justice, and the factors to be taken into account were enumerated in *Njagi Wanjeru & Company Advocates v Ben Momanyi t/a Momanyi & Associates*, (2014) e KLR by Ougo J., who adopted the Court of Appeal's decision in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* CA Civil Application No. NAI 25 of 1997 (UR) that:

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether or not to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chance of the appeal succeeding if the application is not granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”***

15. In the present application, the Client has attempted to explain the events leading to the delay in filing the reference in its submissions, which is irregular, as these are matter of fact which are required to be attested to in an affidavit. In effect, the result is that the Client has not established any good reasons by way of reliable and credible evidence for extension of time in its favour.

16. This Court therefore finds that this application is incompetently filed, as there was non-compliance with the procedure set out in Rule 11 of the Advocates Remuneration Order. In addition, no ground has been demonstrated for this Court to extend time to comply with the provisions of the said Rule. I therefore decline to exercise discretion in the Client's favour. In the circumstances, the remaining issues are not capable of being resolved by way of the instant application, and must also fail.

17. The Client's Chamber Summons dated 27<sup>th</sup> May 2019 is therefore struck out for the foregoing reasons. The Client shall pay the Advocate the costs of this application of Kshs 30,000/=.

18. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY 2020**

**P. NYAMWEYA**

**JUDGE**