



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. APPLICATION NO. 370 OF 2019

(ARISING FROM MACHAKOS MISC APPL NO. 321 & 322 OF 2018)

JOSEPH KIOKO NTHIWA..... APPLICANT

VERSUS

B.M. MUNGATA & CO ADVOCATES..... RESPONDENT

RULING

1. This reference was made vide chamber summons dated 18.9.2019. The Applicant seeks orders as follows:-

- a. Staying execution of the decree in Machakos Misc Appl 321 & 322 of 2018.
- b. Setting aside the ruling and decree resulting from Machakos Misc Appl 321 & 322 of 2018.

2. The grounds for the application were stated as follows:-

- a. The applicant instructed the respondent to file Machakos **CMCC 102 of 2007** and that the advocate-client relationship turned sour resulting in the applicant filing a notice to act in person and in turn the respondent filed two bill of costs being **Machakos Misc Appl 321 & 322 of 2018**.
- b. The bills were taxed and the respondent who is now the applicant is dissatisfied with the taxation and hence filed a reference.
- c. The applicant requires stay of execution as the respondent has filed an application seeking for entry of judgement and decree in readiness for execution and that the applicant is ready to pay reasonable costs after the conclusion of Machakos CMCC 102 of 2007.

3. The application is supported by the affidavit Joseph Kioko Nthiwa who averred that the suit Machakos CMCC 102 of 2007 is pending hearing and determination and that the applicant filed notices of objection to the taxations in **Machakos Misc Appl 321 & 322 of 2018** that were filed by the respondent. It was averred that the registrar took long to give reasons for her decision but they were however obtained and so was certificate of taxation. A copy of a notice of objection, certificate of taxation and the application for judgement on the bill of costs **Machakos Misc Appl 321 & 322 of 2018** were annexed to the affidavit.

4. In reply to the application was an affidavit deponed by Benard Mungata, the advocate from the respondent and it was averred that the orders sought cannot be granted as there is no decree in **Machakos Misc Appl 321 & 322 of 2018**. It was averred that the respondent is not a party in **Machakos CMCC 102 of 2007** hence his costs ought not to be tied to the outcome of the same. It was averred that the ex-parte judgement that was entered in **CMCC 102 of 2007** was set aside and the monies advanced therein were released. It was averred that the application was filed outside the 14 days period and ought to be struck out. It was averred that the applicant rushed to file the application after being served with the application for judgement and hence no reference was filed.

5. The application was canvassed vide submissions. The applicant simply submitted that stay of execution be granted and that the costs of the respondent await **CMCC 102 of 2007**. It was submitted that the award of the taxing master was unreasonable and ought to be set aside. The applicant urged the court to allow the application dated 18.9.2019 as prayed.

6. In response, counsel for the Respondent in placing reliance on Paragraph 11 of the Advocates Remuneration Order submitted that the reference was filed out of time and no extension of time was sought. It was therefore counsel's argument that the application/ reference was incompetent and ought to be dismissed. The court was invited to consider the case of **Alfred Ochieng Opiyo T/a Ochieng Opiyo & Co Advocates v Export Hydro Pump & Services (Africa) Ltd (2018) eKLR**. It was counsel's submission that no reasons were given for the

objection and could not hide behind the delay to get reasons from the registrar as an excuse to file the reference outside time. Reliance was placed on the case of **Mumias Sugar Co Ltd v Tom Ojienda & Associates (2018) eKLR** in submitting that failure to get reasons for the decision was not fatal to the application. Counsel submitted that the court has no basis to relook at the taxation. Counsel submitted that the payment of taxed costs ought not to be tied to an outcome of another matter. Counsel urged the court to have the application dismissed.

7. The issues for determination are whether the reference is properly before the court and whether the court may allow the reference and set aside the decision of the taxing master.

8. With regards to the 1st issue, the respondent had challenged the applicant for failing to file a reference within 14 days. Paragraph 11 of the Advocates' Remuneration Order provides as follows:

"11. Objection to decision on taxation and appeal to

Court of Appeal.

(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.

(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.

9. From the record, the decision was made on 23.5.2019 and the objection filed on 4.6.2019 that was within 14 days from the date of the decision. The reasons for the decision of the taxing master were not sought. However vide letter dated 18.7.2019, the applicant claimed that he sought the same and there was delay in giving reasons. Be that as it may, the court responded on 8.8.2019 and intimated that the reasons were available in the ruling that was delivered on 23.05.2019 and that the same would be rendered upon payment of requisite fees. From the record, it is not clear when the applicant received the said reasons and the court cannot make any assumptions. However there is indication that the applicant was present in court on 23.5.2019 when the ruling was delivered hence he was aware of the reasons. The application being filed on 18.9.2019 was well outside 14 days of the receipt of the decision hence the reference is not properly within the court and the challenge raised by the respondent has merit.

10. Under Paragraph (4) of the Advocates Remuneration Order, the court has powers to enlarge time and the applicant ought to have included it as one of the prayers in the instant application so that the application that is evidently out of time may be allowed. See **Njagi Wanjeru & Co Advocates v Ben Momanyi t/a Momanyi & Co Associates (2014) eKLR**. The applicant in his affidavit in support of the application seemed to have made an attempt to explain away the delay. However in the absence of a specific prayer to enlarge the time to file the application, I am commended to dismiss the same for being incompetently before court.

11. In light of my above analysis, it is needless to address the second issue. Consequently the applicant's application dated 18.9.2019 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 4th day of February, 2020.

D. K. Kemei

Judge