



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 64 OF 2012

TKM MAESTRO LIMITED.....APPELLANT

VERSUS

EQUIPMENT MASTERS E.A. LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The Respondent's Chamber Summons application dated and filed on 22nd March 2019 was filed pursuant to the provisions of Rule 11 (2) of the Advocates (Remuneration) Order, 2009 and all other enabling provisions of the law. Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.
2. **THAT the Deputy Registrar's decision on item 1 of the bill of costs be set aside.**
3. **The Honourable court allows the application to be filed out of time.**
4. **Any other consequential order**
5. **The costs of this application.**

2. Its Written Submissions were dated 16th July 2019 and filed on 17th July 2019 while those of the Appellant were dated 14th August 2019 and filed on 15th August 2019. The Appellant's List of Authorities were dated 8th May 2019 and filed on 10th May 2019.

3. The Parties requested the court to deliver its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE RESPONDENT'S CASE

4. The Respondent's present application was supported by the Affidavit of its advocate, John Chigiti, that was sworn on 22nd March 2019.
5. Through its advocate, it stated that on 9th September 2018, the Deputy Registrar delivered a decision on the Appellant's party and party Bill of Costs dated 19th September 2017.
6. It pointed out that it filed a Notice under Paragraph 11 of the Advocates (Remuneration) Order on 15th August 2018 giving notice of the item it objected to. It was emphatic that the Bill of Costs was not drawn to scale.
7. It therefore urged this court to allow its application as had been sought therein.

THE APPLICANT'S CASE

8. In response to the said application, the Appellant's advocate, Josephine Achieng Muyai, swore a Replying Affidavit on 8th May 2019.

9. It was the Appellant's contention that the Respondent's present application was misconceived, incurably defective, had no merit and was an abuse of the court process. It stated that the Respondent did not contest item number 1 on instruction fees despite having been given several chances to do so and therefore it ought not be allowed to raise an issue that was not contested before the Taxing Officer at this stage.

10. It added that the current application had been filed eight (8) months after delivery of the Ruling and that the Respondent had not given a good reason or excuse to explain the delay in obtaining the reasons for taxation warranting the filing of the reference out of time. It was its averment that the letter dated 15th August 2018 offended the provisions of Paragraph 11 (1) of the Advocates (Remuneration) Order 2009 as it was delivered to court after the lapse of fourteen (14) days from the date of delivery of the Ruling.

11. It pointed out that the Respondent had not demonstrated that the calculation of the instruction fees as was explained in the Ruling of the Taxing Master and the reasons for taxation was erroneous.

12. It therefore urged this court to dismiss the Respondent's application with costs to it.

LEGAL ANALYSIS

13. The Respondent submitted that the Advocates (Remuneration) Order Remuneration Order that was applicable in the circumstances of the case was 2009 whereas the taxing master was guided by the 2006 Advocates (Remuneration) Order.

14. On its part, the Appellant stated that from the Ruling of the Taxing Master, the Respondent was given several chances to file the submissions but it failed to do so within time that it filed its submissions on 30th of July 2018 long after the Ruling of the Bill of Costs on 23rd July 2018. It pointed out that the said submissions were struck out and expunged from the court record and the Bill of Costs considered as opposed.

15. It placed reliance on the case of **Mureithi Wanjau & Caesar Ngige Wanjau vs Telkom Kenya Limited [2011] eKLR** where it was held that if an issue was not contested before the Taxing Officer, then it ought not be raised for the first time before a Judge because the Judge was not fit and suitable to decide the question of quantum on taxation of costs.

16. It also referred to the case of **Republic vs Kenyatta University & Another Ex parte Wellington Kihato Wamburu [2018] eKLR** where it was held that the court would be perfectly entitled to its discretion to refuse to grant an extension if the delay in filing the reference was excessive or inordinate or if it had not been explained or there was evidence of failure to act. It added that if sufficient cause had not been proven, the application for excusing delay had to be dismissed on that ground alone.

17. It further stated that the Respondent had not demonstrated that the calculation of the instruction fees was erroneous. It was its contention that the instruction fees for the 2006 and 2009 Advocates (Remuneration) Orders were the same. It was therefore its submission that this was not a case that warranted the interference by the High Court.

18. The court carefully considered the Respondent's application and noted that save for stating that the Bill of Costs was not drawn to scale. It did not demonstrate what the instruction fees would have been if the same were computed under the 2009 Advocates (Remuneration) Order compared to when it was calculated under 2006 Advocates (Remuneration) Order. The Applicant had argued that the instruction fees under both orders was the same. The Respondent had the liberty to respond to the Applicant's Written Submissions on this issue but to rebut that fact that it did not do so.

19. The court also noted that it did not rebut the Applicant's case that it not file Written Submissions in respect of item No 1. It did not also explain the reason why it took about eight (8) months before it could file the present reference. Notably, every party has a right to be heard by the court and to have his or her dispute determined. Having said so it is important to note that litigation must come to an end and should only be reopened when a party demonstrates sufficient reason that it was prevented by a reasonable cause from not taking action within any time that has been prescribed by the law.

20. In this case, the Respondent was late in filing the reference. It did not file the application within the fourteen (14) days that have been prescribed under Paragraph 11 of the Advocates (Remuneration) Order. It did not offer any explanation why it did not file within the said prescribed time. It merely filed the application as a matter of course seeking leave to be granted time to file the reference out of time without explaining what caused it not to file the same within time. This was unacceptable.

21. Balancing the Respondent's right to have a fair hearing and to access court and have its dispute heard and determined as contemplated under Article 50 (1) of the Constitution of Kenya and the Appellant's right to have its dispute resolved expeditiously as provided for in article 159 (2) (b) of the Constitution of Kenya, this court came to the firm conclusion that this was not a suitable case for it to exercise its discretion and allow the Respondent to file a reference out of time.

DISPOSITION

22. Accordingly, the upshot of this court's ruling was that the Respondent's Chamber Summons application dated and filed on 22nd March 2019 was not merited and the same is hereby dismissed with costs to the Appellant.

23. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2020

J. KAMAU

JUDGE