



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
WINDING UP CAUSE NO. 2 OF 2010
IN THE MATTER OF SALAMA BEACH HOTEL LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT (CHAPTER 486 LAWS OF KENYA)
BETWEEN
ISAAC RODROT.....APPLICANT
AND
HANS JUERGEN LANGER.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mr. Munyithya for applicant

Mr. Ndegwa for respondent

RULING

This is an application filed under certificate of urgency dated 6th February, 2020 in terms of paragraph 11(1)(2) and (4) of the Advocates Remuneration Order and all other enabling provisions of the law seeking the following orders:

- 1. That the certificate of costs in this matter be discharged, varied and set aside.***
- 2. That the bill of costs be taxed afresh.***
- 3. The motion is based on the grounds that the applicant was never served with bill of costs.***
- 4. That the suit was a winding up cause against Salama Beach Hotel and neither counsel or the representative form the hotel in their individual capacity or that the orders sought for payment of Kshs.576,679 on a certificate of costs dated 3rd January, 3019 was not served to give rise to the taxation. In addition, the applicant Hans Juergen Langer also filed an affidavit basically on the same reasons as stated on the face of the chamber summons.***

The respondent filed grounds of opposition dated 17th February, 2020; **(i) That the period to appeal the taxing officers decision has lapsed. (ii) The applicant has not sought leave to extend time to appeal in a reference.**

Analysis

The gist of the applicant's chamber summons as the law stands is to be found under Rule (11)(1)(2), (4) of the Advocates Remuneration Order. In this appeal a certificate of costs by its nature being a judgement I am requested to invoke Order 10 rule 11 of the Civil Procedure Rules which provides that a judgement or order may be set aside if given ex-parte.

The focus of order 10 of the CPR is on the judgements or orders obtained either regularly or irregularly for non-attendance or appearance by the defendant so that the claim would be determined on the merits. The court has the jurisdiction in both cases to set aside or vary any order, or judgement for purposes of recalling or re-opening the trial against the impugned judgement or order obtained ex-parte.

To resort to rules of interpretation and construction of the words on Order 10 Rule 11 of the Civil procedure Rules the judgement of the court by reason of CJ in **Autodesk INCV Dyason (1993) 176 CLR 300 at 301-303** where he ruled on the rule similar to our Rule 11 by stating as follows:

- 1. The power is to be exercised with great caution in view of the public interest in the finality of legal proceedings.***
- 2. The power may be exercised when, though no fault on the applicants part the applicant has not been heard on a matter decided by the court.***
- 3. The jurisdiction also extends to cases where a court has good reason to consider It has proceeded on a misapprehension as to the fact or the law.***
- 4. The jurisdiction is not a back door for re-arguing the case. It is not to be used for the purpose of re-agitating arguments already considered by the court or because a party has failed to present the argument in all its aspects or as well as it might have been put.***

Finding on the same aspect of the case in **R v Statutory of State for Home Department Ex-parte Grazyna Beechan C 1995 ALL ER** the case textualized the decision in setting aside leave normally issued ex-parte in judicial review applications, the court held **“only rarely would the court set leave aside unless there is misrepresentation alleged at the stage when leave had been granted, it had been shown that the misrepresentation was material and had had an effect on the judge's decision. It was also necessary for the court to determine whether in the light of all material subsequently before it there was an arguable case, or there had been procedural impropriety.”**

To complete the picture the stretch of our jurisprudence on this provisions under Order 10 Rule 11 of the Civil Procedure Rules can even described as formidable when it comes to exercise of judicial discretion on ex-parte judgements. The guiding principles are as expressly stated in **James Kanyita Nderitu & another (2016) eKLR** the Court of Appeal stated that:

“From the outset, it cannot be gainsaid that on dissection the applicant raises significant issues regarding procedures whereby: First the claim arises out the reason of a taxing master pursuant to an adjudication order over a bill of costs presented by the respondent.

Secondly, on that application, in relation to the Advocates remuneration Order, the taxation proceeded albeit ex-parte against the applicant.

Thirdly Rule 11(1)(2) and (4) of the Advocates Remuneration Order provides for circumstances in which an aggrieved party has a right to file a reference within 14 days from the date thereof to the High Court.

Fourth, by a first application filed and issued for consideration the applicant prays for the setting aside of the certificate of costs which in the light of the ruling execution process has already been initiated.”

How far can a court exercise discretion on a cause of action which has abated and not permissible with regard to lapse of time? Is the jurisdiction expressed in terms of the chamber summons to set aside the certificate of costs for non-appearance and participation available to the applicant without leave to enlarge time to re-litigate the bill of costs.

In my view the applicants primary case was advanced vide taxation of the bill of costs. It is not permissible at any state to rely on Order 10 rule 11 of the Civil Procedure Rules without addressing the fact that time to file a reference has since expired.

The remedy which is available to the aggrieved party from a taxation is through a reference. If the statutory provisions are satisfied the requirements under Order 10 rule (11) of the Civil Procedure Rules may be satisfied read in conjunction with the specific statutory provisions provided for under the Advocates Remuneration Order. Why do I say, the Deputy Registrars power to perform the ministerial function on taxation of bills is appropriately provided for under Order 49 of the Civil Procedures rules. Therefore, ordinarily, the rule can be invoked by the party aggrieved with the ex-parte certificate of costs in addition with other enabling provisions of the law for the courts discretion to set aside the certificate of costs.

In my opinion the Advocates Remuneration Order, specifically rule (11) does not permit the court to set aside the taxation as indicated in the chamber summons without leave being made to enlarge time. Ultimately, for avoidance of doubt the issue in this application turns on the construction and interpretation on the provision of Rule 11 of the Advocates Remuneration Order, that is inherent in the procedure on taxation of bill of costs. For avoidance of doubt the avenue for redress I venture say it was set by the applicant himself for not seeking intervention earlier enough. In this regard outside the reference period, the additional jurisdiction to enlarge time still beckons so long as the purposes of the application meets the substratum in **Salat v IEBC {2014} eKLR**. A notable point is the provision under Article 50 (1) of the Constitution which provides interalia:

“That in determination of the peoples’ rights an independent tribunal must do so within a reasonable time.”

I therefore conclude this matter by noting three things: **(a) That the orders made herein by the Deputy Registrar against the applicant are not capable of being set aside at the instance of this application. (b) An applicant can only move such an application on the taxation within or immediately after 14 days from the certificate of costs being served upon him. (c) In the alternative to address precisely the subject matter on discretion whether or not to grant an extension of time as enumerated in Salat v Independent Electoral & Boundaries Commission & 7 others (2014) KLR SCK.** That is not the case being stated by the applicant.

In the result the application fails with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF APRIL, 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Otara holding brief for Munyithya for the applicant

2. Isaac Rodrot – The applicant

3. Mr. Komora holding brief for Ndegwa for the respondent