



**REPUBLIC OF KENYA**

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

**MISC APPLICATION 182 OF 2017**

**MOHAMED SALIM BALALA**

**ABED OMAR ABED P/a**

**BALALA & ABED ADVOCATES.....APPLICANTS**

**VERSUS**

**T.S.S. INVESTMENTS LIMITED.....RESPONDENTS**

**R U L I N G**

**INTRODUCTION**

1. The Chamber Summons application before the court is dated 2.7.2019 and filed by the Applicant herein and brought under Sections 1A, 1B & 3A of the Civil Procedure Act and Rule 11(2) of the Advocates Remuneration Order 2009.

2. The application seeks the following orders:-

- a) *That this Honourable Court be pleased to set aside the ruling of the Deputy Registrar (Honourable J. Nyariki) delivered on the 26.3.2019;*
- b) *That in the alternative to prayer 1, the Honourable Court be pleased to remitted the bill of cost amended on the 26<sup>th</sup> February 2018 back to the Taxing master for taxation;*
- c) *That this Court issues such further orders as it may deem fit and just in the interest of Justice;*
- d) *That the costs of this Application be provided for.*

3. The application is premised on grounds set out therein and is supported by Affidavit sworn on the 2.7.2019 by **ABED OMAR ABED** who is a partner to the Applicant's Firm. It is the Applicant's case that: a. when the matter proceeded before the taxing master, the Respondent herein made an oral Application objecting to Learned Principal Deputy Registrar's (hereinafter referred to as "**the Registrar**") jurisdiction to entertain and determine the challenge on retainer and that the same be placed before a Judge.

b. the Registrar proceeded to fix the same for a ruling on whether he could proceed with the taxation or have the same placed before the Judge for determination as regards to retainer. The file later on went missing only for the Applicant to discover that the Registrar had ruled that the file be placed before the Judge and fixed for hearing before the said Judge.

c. the Registrar erred in law in referring the matter to the Judge prior to taxation of the same and that the High Court can only have jurisdiction to interfere with a taxation upon filing of a reference as provided for under Rule 11 of the Advocates Remuneration Order.

4. The application is opposed by the Respondent vide Grounds of Opposition dated 22.10.2019. In brief response to the application, it is stated that: a. no Notice of Objection has been filed in accordance with paragraph 11(1) of the Advocate Remuneration Order or at all; b. the reference against the decision of the Registrar has been filed out of time and without leave contrary to paragraph 11(2) of the Advocate Remuneration Order; c. the high Court lacks jurisdiction to entertain any challenge to the decision of a taxing master in the absence of a duly filed reference and that the decision of the taxing master was right since he lacked jurisdiction to determine the existence of a retainer.

5. The Application was canvassed orally in court on 23.10.2019 by counsel for both parties. 6. I have considered the Application together

with the Affidavits, the oral submissions made and the authorities cited. In determining this Application, it is pertinent to seek to establish whether the Applicant complied with the provision of Rule 11 of the Advocates (Remuneration) Order before the issue of whether the Registrar had jurisdiction to determine the existence or lack of a retainer is dealt with.

7. Paragraph 11 of the Advocates Remuneration Order provides:

**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 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) 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 expired.**

8. From the above provisions, it is clear to me that any party wishing to object to a taxation decision, he/she must give notice of objection in writing within 14 days after such decision. The notice must also specify the items of taxation which are objected to. Upon receipt of such notice of objection, the taxing officer is expected to record and forward to the objector the reasons for his decision on those items. The objector is then expected to, within 14 days from the date of receipt of the reasons, file a reference by chamber summons, and serve all the parties.

9. The Applicant averred that the Registrar fixed a ruling on an objection on his jurisdiction to be delivered on the 26.3.2019. Thereafter, the file went missing from the registry and they even wrote a letter dated 20.5.2019 in a bid to trace the file, only for it to be traced on the 7.7.2019, and found that the Registrar had ruled that the file be placed before the Judge and fixed for hearing before the same Judge.

10. I have considered the Applicant's argument and looked at the Court's record. I note that on the 26.3.2019 when the matter was coming up for ruling, the Applicant herein was absent and the Registrar ruled that the file be placed before the trial Court for hearing and determination of the Grounds of Objection dated 12.4.18. Parties were required to fix a date at the registry. Consequently, the Applicant had 14 days from the date of the Registrar's ruling to file a Reference to this Court but the same was not done. The current reference was filed more than 90 days after the Registrar had rendered his ruling.

11. In my view, the Applicant had an opportunity under Paragraph 11(4) to apply for enlargement of time and give such reasons as

***“ failure to trace the court file within the stipulated time for filing of the Reference.”***

12. Instead, the Applicant simply filed the Reference out of time and did not even bother to seek leave of court to enlarge time within which the filed reference should have been filed. This Court therefore lacks jurisdiction to determine the merits of a reference that is filed outside the statutory stipulated period. Without jurisdiction, the court can do no more than down its tools. Consequently, the Reference herein dated 2.7.2019 was filed out of time and is therefore incurably defective and incompetent.

13. In the premises, the Chamber Summons dated 2.7.2019 is struck out with costs.

.It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 14TH MAY, 2020.**

**D.O CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes