



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 133 OF 2017

HON. NDERITU MURIITHI.....PETITIONER/APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

PETER NGUGI NDONYO.....INTERESTED PARTY/RESPONDENT

RULING

1. This ruling is in respect of the chamber summons application dated 14th February, 2018 through which the Applicant/Appellant, Hon. Nderitu Muriithi seeks orders as follows:-

- a. THAT a stay of execution be granted in respect to the taxed costs in Judicial Review Application No. 133 of 2017, pending the hearing and determination of this application.
- b. THAT the decision of the taxing officer delivered on 8th of January 2018 in respect to the Interested Party's bill of costs dated 2nd August 2017 be set aside.
- c. THAT this Honourable Court do vary the decision of the taxing officer and re-tax the said bill of costs.
- d. THAT this Honourable Court be pleased to remit the Interested Party's bill of costs dated 2nd August 2017 for fresh taxation before a different taxing master with further appropriate directions thereof.
- e. THAT the costs of this application be provided for."

2. The taxed bill of costs which is the subject of this application was taxed by the Interested Party/Respondent, Peter Ngugi Ndonyo. The Interested Party opposes the application through grounds of opposition dated 16th February, 2018 as follows:-

- a. The application is hopelessly time barred and ought to be struck out.
- b. The application is a gross abuse of the court process since the applicant had *inter alia* filed NRB HC MISC APP 25 of 2018 which was withdrawn on 14th February, 2018 after objections and opposition was filed against the same.
- c. The application is bad in law and incurably defective.
- d. The application is mischievous and frivolous and has no merits at all.

- e. **The application is made in bad faith and is only meant to delay the Interested Party from recovering the costs awarded in this case.**
- f. **The taxing master properly and diligently exercised her discretion in the taxation.**
- g. **The taxing master considered relevant matters and factors in assessing the instruction fees.**
- h. **The taxing master did not exercise her discretion capriciously and or inappropriately at all.**
- i. **There is no valid reason to justify the interference with the taxing master's discretion.**
- j. **The application is only fit for dismissal.”**

3. The Independent Electoral and Boundaries Commission (IEBC) and the Director of Public Prosecutions (DPP) who were the respective 1st and 2nd respondents in the substantive proceedings did not file any pleadings in regard to the application. Nevertheless, Mr. Muindo for IEBC made oral submissions during the hearing of the application on 27th January, 2020 in which he supported the Interested Party.

4. The pleadings disclose that the Interested Party has raised a jurisdictional question in regard to the time taken by the Appellant before the filing of the chamber summons. That question needs to be addressed without further ado because its determination will either give a red card to the court necessitating the downing of tools or a green card allowing the court to proceed with the determination of the substantive issues raised by the Appellant in his chamber summons. The advocates for the Appellant and the Interested Party filed and exchanged submissions on the chamber summons application.

5. On the question whether the Appellant's application was time barred, counsel for the Interested Party urged through the submissions dated 7th May, 2018 that the ruling and reasons for the taxation was delivered on 8th January, 2018 and the reference having been filed on 14th February, 2018 violated Paragraph 11(2) of the Advocates (Remuneration) Act, 2009 (“the Order”) which requires that a reference be filed within fourteen days from the date of the decision. Reliance is placed on the decision in **Nyakundi & Company Advocates v Kenyatta National Hospital Board [2005] eKLR** for the holding that Paragraph 11(1) of the Order requires that a reference should be filed within fourteen days from the date the reasons are given.

6. On the Appellant's claim that time was enlarged in Miscellaneous Application No. 25 of 2018, counsel for the Interested Party submits that there was no such enlargement. Counsel contends that the Appellant ought to have made a formal application for enlargement of time. The decision in **Mbugua & Mbugua Co. Advocates v Kenindia Assurance Company Ltd [2015] eKLR** is cited for the holding that the court cannot exercise its discretion to enlarge time where there is no formal application.

7. During the highlighting of the submissions, counsel for the Interested Party brushed off the claim by counsel for the Appellant that Odunga, J extended the time for filing the reference in Miscellaneous Application No. 25 of 2018. He referred the court to the order issued in that case and submitted that the miscellaneous application was withdrawn with no order as to costs.

8. Counsel for the Appellant filed submissions dated 20th March, 2020 in support of the reference. On the issue as to whether the reference is time barred, counsel stated that upon the delivery of the ruling by the taxing officer, the Appellant filed a notice to file an objection dated 15th January, 2018. The said notice is annexed to the submissions. According to counsel for the Appellant the notice was filed within the fourteen days period provided under Paragraph 11(1) of the Order. Further, that on 23rd January, 2018, the Appellant filed a reference dated the same date. It was counsel's submission that the said application was erroneously filed as a miscellaneous application which resulted in the issuance of a new file number being Miscellaneous Application No. 25 of 2018. The application is attached to the submissions.

9. It was the submission of the Appellant's counsel that the error was identified and brought to the attention of the Court during the hearing on 14th February, 2018 and counsel made an application to withdraw Miscellaneous Application No. 25 of 2018 and file a fresh application in this matter. Counsel further submitted that the withdrawal of the application was allowed and the Appellant was directed to file a fresh application within the course of the day which was indeed done.

10. Counsel for the Appellant insisted that by directing the Appellant to file a fresh application, Odunga, J exercised his discretion to enlarge time under Paragraph 11(4) of the Order. According to counsel, the issue is now *res judicata* and counsel for the Interested Party should not raise it again. The case of **Labh Singh Harman Singh Ltd v Attorney General & 2 others [2016] eKLR** was cited in support of the proposition that the court can enlarge time.

11. In the alternative counsel for the Appellant submitted that the error of filing the reference as a miscellaneous application was an honest mistake by his counsel and he should not be prejudiced for this mistake. Counsel cited the case of **Republic v University of Nairobi Ex parte Lazarus Wakoli Kunani & 2 others [2017] eKLR** and stated that in that case the applicants sought leave to file a judicial review application out of time after the advocate failed to file the application within the time granted by the law. Counsel submitted that Odunga, J allowed the application stating that it is important to balance the interests of both parties especially given the fact that the respondents had not shown that they would suffer any prejudice if the application was allowed.

12. According to counsel for the Appellant, by filing the notice of objection and the miscellaneous application within the prescribed time frame, the Appellant clearly showed that he had every intention to appeal the decision of the taxing officer and took the necessary steps to do so. Counsel therefore submitted that the Appellant should therefore not be prejudiced by a technicality that was occasioned by the filing of the initial application under the wrong case number.

13. At the time of highlighting submissions, counsel for the Appellant urged the court to enlarge time for the reference and proceed to determine it on its merit.

14. The undisputed fact is that the taxing officer delivered her ruling which contained the reasons for the taxation on 8th January, 2018. The reference dated 14th February, 2018, which was supported by an affidavit sworn on the same date by Stephen Karanja Kabucho, the advocate for the Appellant, was filed on 14th February, 2018.

15. There is also no dispute that the Appellant had filed Miscellaneous Application No. 25 of 2018 on 23rd January, 2018 and this application was withdrawn on 14th February, 2018. The circumstances surrounding the withdrawal of the miscellaneous application are disputed. Unfortunately none of the advocates saw it fit to file affidavits in regard to the miscellaneous application.

16. It is therefore clear that the reference was filed outside the fourteen days allowed for filing a reference from the date the reasons are given. Since the reference was filed out of time it was incumbent upon the Appellant to seek leave for enlargement of time under Paragraph 11(4) of the Order.

17. Even if the Appellant had obtained an order enlarging time in the miscellaneous application, he ought to have exhibited that order through the affidavit sworn in support of the reference. He did not do so meaning that there was no enlargement of time. The failure to exhibit the proceedings of the miscellaneous application also renders untenable the Appellant's assertion that the issue is *res judicata* as time was enlarged in that matter.

18. The Appellant urged that the mistake of his advocate should not be visited on him. He also asked this court to enlarge time and proceed to determine the matter on merit. Paragraph 11(4) of the Order requires that the application for enlargement of time should be made by chamber summons and served on the opposing party. There is no such application before this court. The Appellant's request for enlargement of time cannot therefore succeed.

19. In **Nyakundi & Company Advocates v Kenyatta National Hospital Board [2005] eKLR** the Court held that:-

“Under Rule 11(2) of the Advocates (Remuneration) Order quoted above, a definite time frame for filing a reference is given. It is fourteen (14) days from the receipt of the reasons. If an Objector is delayed in making his/her reference he/she may apply for enlargement of time to make the reference under Rule 11(1) of the same Order. There is no evidence that the Respondent sought and obtained enlargement of time to file this reference.”

20. That it was necessary for the Appellant to apply for enlargement of time was stated in **Mbugua & Mbugua Co. Advocates v Kenindia Assurance Company Ltd [2015] eKLR** as follows:-

“Time once stipulated by law must be adhered to for doing any act or taking any step of a judicial nature. And where the law has gone further to provide that if such time has elapsed then a party may seek enlargement of time, and a party who is caught up by such limitation deliberately refuses or fails to seek for such enlargement of time, the court, regrettably cannot exercise any discretion in their favour as the discretion to enlarge time can only be invoked where there is an application as stipulated under the Act and paragraph and not on the court's own motion. The applicant simply stated that the delay had been explained. Such explanation could only be entertained in an application under sub paragraph 11(4) seeking for enlargement of time and not a by the way after a serious objection had been raised by the respondent, based on the established provisions of the law.

21. Even if the reference was indeed erroneously filed as a miscellaneous application instead of being filed herein, did it still exist after it was withdrawn? It did not. It cannot therefore form the foundation of the present reference. It was not transferred to this case. It therefore ceased to exist the moment it was withdrawn. What is therefore on record is the reference dated 14th February, 2018 which was filed way out of time.

22. The end result is that the Interested Party's objection to the reference succeeds. The reference before this court having been filed out of the stipulated time is incompetent. The chamber summons application dated 14th February, 2018 is struck out with costs to the Interested Party who is the Respondent in the reference.

Dated, signed and delivered virtually at Nairobi this 7th day of May, 2020.

W. Korir,

Judge of the High Court