



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL MISC. NO. 405 OF 2017

SHAH & PAREKH ADVOCATES.....APPLICANT

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED..... RESPONDENT

RULING

1. In the Notice of Motion dated 2nd July 2019, *Kenindia Assurance Company Limited* (hereinafter the applicant) sought the following orders:

i. That this application be certified as urgent and be heard ex parte in the first instance.

ii. That there be a temporary stay of execution of the certificate of taxation dated 24th June 2019 pending the hearing and determination of this application.

iii. That there be a stay of execution of the certificate of taxation dated 24th June 2019 pending the hearing and determination of this application.

iv. That there be a temporary stay of execution of the taxation dated 24th June 2019 pending the hearing and determination of this application .

v. That there be a stay of execution of the costs dated 24th June 2019 pending the hearing and determination of the intended reference.

vi. That this honourable court be pleased to enlarge the time within which to file a reference against the decision of the taxing master delivered on 31st May 2019.

vii. That this honourable court be pleased to grant leave to the applicant herein to file a notice of objection against the decision of the taxing master delivered on 31st May 2019 out of time.

viii. That the applicant herein do file and serve the reference within 14 days of this order or at any other time as the court may deem fit subject to the reasons and certified court proceedings in respect to the respondent's party and party bill of costs provided by the Hon Taxing Master.

ix. That the costs of this application be provided for in any event.

2. On the date fixed for hearing of the motion, learned counsel for the applicant *Mr. Wanjohi* withdrew prayers 2, 4 and 5 leaving only prayers 6, 7 and 8 for determination by this court as prayers 1 and 3 are already spent.

3. The motion is predicated on the grounds stated on its face and is supported by an affidavit sworn on 2nd July 2019 by *Ms. Winnie Awuor*, the applicant's Legal Officer. In a nutshell, the applicant contends that the respondent, *Shah & Parekh Advocates* filed a bill of costs dated 19th September 2017 which by consent of the parties was canvassed before the taxing master by way of written submissions; that after both parties filed their submissions, the taxing master reserved his ruling on 8th March 2019 but on that date, the court was not sitting and ruling was therefore not delivered; that the taxing master subsequently delivered his ruling on 31st May 2019 without giving notice to the parties.

4. The applicant further stated that though it was dissatisfied with the amount of costs awarded to the respondent which in its view were manifestly excessive, it was unable to lodge its notice of objection within the prescribed time as the time had already expired by the time it

became aware of the ruling on taxation; that the intended reference has overwhelming chances of success and that it was just and fair to grant it the orders sought.

5. The application is opposed through undated grounds of opposition filed in court on 22nd August 2019 and a replying affidavit sworn by *Hasmukhrai Manilal Parekh*, a partner in the respondent firm of advocates. The gravamen of the respondent's objection to the application is that the intended objection or reference was misconceived as the applicant had in its written submissions admitted that most of the items in the advocate/client bill of costs were drawn to scale and that for the few contested items namely items 322, 400, 415, 417-463, the learned taxing master gave reasons for her decision to tax the bill in the sum of KShs.1,721,992.

6. The respondent further denied the applicant's claim that the ruling on taxation was delivered without notice to the parties pointing out that notice of delivery of the ruling was published in the daily cause list of 31st May 2019 which in the respondent's view amounted to sufficient notice.

7. By consent of the parties, the application was canvassed by way of written submissions which both parties duly filed and which I have carefully considered together with the authorities cited. Having done so, I find that the only issue arising for my determination in this application is whether the applicant is deserving of an order enlarging the time within which it can file its intended notice of objection and reference against the taxing master's decision on taxation.

8. It is trite that this court has unfettered discretion to enlarge the time prescribed for filing of objections to the taxing master's decision on taxation. This discretion is donated by *paragraph 11 (4)* of the *Advocates Act* which states as follows:

“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 already expired.”

9. *Paragraph 11 sub paragraphs (1) and (2)* gives an aggrieved party 14 days of the taxing master's decision to give a notice in writing to the Deputy Registrar indicating the items of taxation he objects to and a further 14 days to file a reference to the High Court after receiving reasons for the taxing master's decision.

10. The discretion donated by *paragraph 11 (4)* above needless to say must be exercised judiciously taking into account the unique facts and circumstances of each case and the ends of justice.

11. In this case, the applicant claims that though it was dissatisfied with the taxing master's assessment of the respondent's costs, it was unable to file its objection within the time limited by the law since it was not aware of the decision on taxation given that the ruling was delivered without notice; that it only came to learn of the decision after it was brought to its attention by the respondent through letter dated 24th June 2019.

12. Though the respondent has disputed the applicant's claim that the ruling was delivered without notice to the parties, it has conceded that the ruling was delivered on a nonscheduled date, that is, on 31st May 2019 as opposed to 8th March 2019 which is the date that had been reserved in the presence of both parties.

13. The respondent has also admitted that notice of the delivery of the ruling was only published through the cause list of the same day the ruling was delivered. In my view, this was very short notice and may have amounted to no notice at all if for one reason or the other any of the parties was unable to access the court's cause list for the day.

14. Having failed to deliver the ruling on the scheduled date, the Deputy Registrar was duty bound to give the parties adequate notice to give them an opportunity to organize their respective diaries or activities to enable them to attend the court on the date next scheduled for delivery of the ruling.

15. The Deputy Registrar ought to have published or served notices on the parties at least three days before the date ruling was delivered. As this was not done, the applicant's claim that it only became aware of the ruling on 24th June 2019 after the days limited for filing of an objection had expired is plausible.

16. In view of the foregoing, I find that the applicant has established that its failure to file an objection or reference within the prescribed time was not deliberate and was not caused by lack of diligence on its part. I am thus satisfied that the applicant has demonstrated sufficient cause to justify the exercise of the court's discretion in its favour and is entitled to the orders sought.

17. Before concluding this ruling, I wish to note that though both parties extensively submitted on whether or not this court should grant stay of execution of the certificate of costs pending the intended reference, the prayer for stay pending the reference was one of the prayers that was withdrawn by counsel for the applicant on 17th October 2019 when the application was scheduled for hearing. It is therefore a prayer that was not subject to the court's determination in this ruling.

18. For all the reasons stated hereinabove, I find the Notice of Motion dated 2nd July 2019 merited and it is hereby allowed in terms of prayer (vi) and prayer (vii). The applicant will file and serve its intended reference within the next 21 days on the basis of the reasons given in the taxing master's ruling delivered on 31st May 2019.

19. Costs of the application will abide the outcome of the reference.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of May 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Nyamweya for the applicant

No appearance for the respondent

Ms Carol: Court Assistant