



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CIVIL APPLICATION NO. 175 OF 2018.

ANDREW SHISALA ANGALUSHI.....APPLICANT

VERSUS

ZEPHENIA .K. YEGO & AGINGA ASILIGWA

CHANZU t/a Z. K.YEGO LAW OFFICES.....RESPONDENTS

RULING

1. The application herein is by way of Chamber Summons dated 20th November 2018, brought under Paragraph 11 (2) of the Advocates Remuneration Order and Article 50 and 159 of the Constitution of Kenya 2010 seeking for the following orders:-

I. Spent.

II. Spent.

III. That there be a stay of execution of the certificate of taxation arising out of the Advocates /Client bill of costs dated 9th March 2018 pending the hearing and determination of the reference .

IV. That this honourable court be pleased to enlarge the time within which to file a reference against the decision of the taxing officer delivered on 9th April 2018.

V. That the draft reference attached herewith be deemed as properly filed subject to payment of the requisite court fees.

2. The application is premised on the grounds on its face and supported by the affidavit of the applicant who seeks the orders on the basis that he never instructed the respondents to act for him, that the bill of costs was taxed in his absence and that he delayed filing the reference as he was acting in person and did not understand the process only for him to engage the services of an advocate at the lapse of the prescribed period.

3. The respondents on their part opposed the application vide the replying affidavit of Ayinga Asiligwa Chanzu. The applicants challenged the applicant's averment that he never engaged their services and that he was not aware of the taxation. They stated that the application participated in the same and that they obtained his consent to file the suit for him .They also challenged the prayers for stay of execution stating that the delay was not justified and that no security on the same has been offered.

4. The application is a result of a taxation of bill of costs emanating from a primary suit being Butali SRMCC No 163 of 2016 suit which was filed on the 13th October 2016. The aforesaid suit was filed by the respondent firm and subsequently thereto the firm of Onyinkwa & Co Advocates filed a defence on behalf of the defendant. According to the proceedings, the matter never proceeded to hearing as the respondents intimated to the trial court that they had tried to reach their client, the applicant, in vain. They then proceeded to file an application to cease acting for the applicant. The application was served on the applicant. It was allowed as prayed.

5. The respondents then proceeded to file an advocate-client bill of costs. The bill of costs was presented by the respondents and filed on the 12th March, 2018. A taxation notice was issued and served on the applicant. It was taxed on the 9th April 2018 after the court was satisfied that service had been done upon the applicant .A certificate of costs was drawn and dated the 16th April 2018.

6. On the 4th September 2018, the respondents applied for execution of costs by way of a notice to show cause. When the same came up for

hearing on the 11th October, 2018, the applicant who was present in court sought for more time to negotiate over the same. The notice was extended to 15th November 2018 when the applicant instructed the advocates on record which led to this application.

7. The application proceeded by way of written submissions. The applicant in his submissions challenged the fact that the bill was taxed yet there was an issue with regard to the retainer. He submitted that the taxing officer had no authority to tax the bill as there was a pending issue on the retainer and that the taxation was improper. He relied on the cases **Njogu & Company Advocates Vs National Bank of Kenya Limited (2016)eKLR** and **Mugambi & Company Advocates Vs John Okal Ogwayo & Another (2013) eKLR**.

8. He further submitted that he met the requirements as stipulated under Order 42 rule 6 of the Civil Procedure Rules 2010 and prayed that the same be granted. He relied on the cases of **Labh Singh Harman Singh Vs Attorney General 2016 eKLR**, **Mobil Oil Kenya Limited Vs Weldwell Limited (2008) eKLR** and **Kenya Medical Lab Technician & Technologists Boards Vs Prime Communication Ltd (2014) eKLR** and prayed that the application be allowed.

9. The respondents on their part opposed the application and submitted that the same had no merit. They submitted that there existed a retainer between them and the applicant and that they had instructions to act for him. They relied on **Makera & Company Advocates Vs Zakhem Construction Kenya (2014) eKLR**, **Machira & Company Advocates Vs Arthur Magugu Misc App, 358 of 2001** and **Gitonga Mureithi & Co Advocates Vs Centre for Multiparty Democracy (2018) eKLR**. They prayed that the application be dismissed with costs.

10. I have considered the application, the objection thereto and the submissions. The applicant seeks for stay of execution and leave to file a reference out of time. He contends that he was not aware of the existence of the primary suit filed by the respondents herein. He alleges that he learnt of the same when he was served with the notice to show cause and did not know what to do thus occasioning the delay in filing the reference. He prays that the application be allowed as his reference raises serious issues for determination. It should however be noted that the applicant did not at any time raise the issue of lack of instructions before the taxing master and thus the issue was never determined by the court.

11. It is the taxing officer that has jurisdiction to hear a dispute over costs between an advocate and a client. In **Wilfred N. Konosi T/A Konosi & Co. Advocates V Flamco Limited [2017] eKLR**, the Court of Appeal observed that:-

*“The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the Advocates Act and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in **Taparn vs Roitei [1968] EA 618** that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The Advocates Act and the Advocates Remuneration Order confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered. The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill.*

As a Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question.”

12. It is thus clear that the issue as to whether there was a client advocate relationship was an issue to be handled by the taxing officer. However in this case, the same was never raised during taxation. The issue can only be determined through a reference.

13. The main issues for determination now are whether the applicant has provided sufficient reason to warrant this court to stay the execution of the certificate of costs and to enlarge time to file a reference. The law on stay of execution pending appeal (and in this case pending filing of reference) is stated in Order 42 Rule (6) (2) of the Civil Procedure Rules 2010. An application of stay of execution according to the Civil Procedure Rules can only succeed if the applicant satisfies the following criteria:-

“(1) The applicant must show that he or she has filed the notice of appeal and that the stay of execution has been filed without undue delay.

(2) Secondly, from the facts of the case appealed from the applicant would suffer substantial loss unless stay of execution is granted.

(3) That the application has provided security for due performance of the decree or any such order which may be issued by the court at the end of the determination of the appeal.”

See the Court of Appeal decision in **Housing Finance Company of Kenya V Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR**.

14. In the instant application, the applicant stated that the delay to file the reference was due to his lack of knowledge. From the proceedings, it is clear that the applicant stayed seven months after the bill was taxed and was only jolted to action when the respondents filed a notice to show cause. The question is whether the delay was inordinate or unreasonable.

15. The question of unreasonable delay was dealt with in the case of **Jaber Mohsen Ali & Another V Priscillah Boit & Another E&L No. 200 Of 2012[2014] eKLR** where it was stated:-

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

16. Justice Mohammed in **George Kagima Kariuki & 2 Others V George M. Gichimu & 2 Others [2014] eKLR** clarified the issue of delay. It was his view that:-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”

17. In **Stanley Kahoro Mwangi & 2 Others V Kanyamwi Trading Company Limited [2015] eKLR** the court was of the view that:-

“A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised.”

18. In **Alice Wamaitha V Jane Wanjiru [2018] eKLR** the Court of Appeal was of the view that a period of one month was not inordinate.

19. A perusal through the court record shows that the applicant was served with the taxation notice and never attended court. Apart from stating that he did not know what to do, he did not explain why he stayed for a period of 7 months before seeking for legal advice on the matter. The delay was therefore inordinate and unreasonable.

20. Though the applicant states that he will suffer substantial loss if the application is not allowed he offers no security for the performance of the decree which is a condition precedent in granting the application. In the premises the applicant has not adduced sufficient grounds to warrant a stay of execution.

21. The other issue is on enlargement of time to file a reference. Taxation of bill of costs between an advocate and a client is governed by paragraph 11 of the Advocates’ Remuneration Order that states as follows:-

“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 to 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), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(5) 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.”

22. The provisions of this paragraph were expounded by the Supreme Court in the case of **County Executive of Kisumu V County Government of Kisumu & 8 Others [2017] eKLR** where the court held that:-

“23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:

“the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- 6. Whether the application has been brought without undue delay; and*
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

23. In the instant case there is no reasonable explanation for the delay in filing the reference. More so, the applicant has not attached a draft of the proposed reference for this court to consider whether he has good grounds. The applicant has failed to satisfy the threshold in granting orders for leave to extend time for filing a reference.

24. It should however be noted that the court has been called upon to exercise its discretion and consider the application in the interest of justice. This court is enjoined under Article 159 (2) (d) of the Constitution to dispense justice without undue regard to procedural technicalities.

25. The applicant is disputing that there existed an advocate-client relationship between him and the respondent. It will be in the interest of justice for the matter to proceed to reference so that the issue can be ventilated by the parties. I do not think that the respondents will suffer any prejudice if the application is allowed as long as they can be compensated in costs in respect to this application. I therefore allow the application and grant the applicant leave to file reference out of time. It is further ordered that there be a stay of execution of the certificate of costs pending hearing and determination of the reference.

26. The applicant is the one to blame for delay in filing the reference. He should therefore be penalised by being ordered to meet the respondent's costs of this application and it is so ordered.

Delivered, dated and signed at Kakamega this 5th day of June, 2020.

J. N. NJAGI

JUDGE

Representation:

No appearance for Applicant

No appearance for Respondent

Applicant - Absent

Respondent - Absent

Court Assistant - Polycap

30 days right of appeal.