REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC. CIVIL APPLICATION NO. 37 OF 2020

JIBRIL BROTHERS ENTERPRISES LIMITED

AWALE TRANSPORTERS LIMITED …..... APPLICANTS

VERSUS

ABDULAZIZ NASSOR ATHMAN ..... RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Khatib Advocates for the Applicants

Angeline Omollo Advocates for the Respondent

RULING

Before me is a notice of motion expressed to be brought under Section 3A of the Civil Procedure Act and paragraph 11(2) of the Advocates Remuneration Order 2014 and all enabling provisions seeking the following orders:

(1) That the applicant be granted leave to file an appeal out of time against the decision of the Honourable Magistrate made on 26th November 2018 wherein the Honourable Magistrate assessed the respondent's party and party cost at Kshs.173,126/=.

(2) That there be a temporary stay of execution of the Certificate of Costs dated 26th November 2018 and its consequential orders thereto pending the interparties hearing and determination of this application.

(3) That the Certificate of Costs dated 26th November 2018 be set aside and or vacate and the costs in this matter be reassessed by another Taxing Officer.

(4) That the costs of this application be provided for.

The core grounds in support of the motion are as expressed in the following language:

(1) The respondent sued the applicants for permanent injunction in respect of Plot No. Kilifi/Ngerenya/171 and on 6th April 2016 the Court delivered Judgment in favour of the Respondent in CMCC No. 38 of 2012.

(2) On 12th August 2016, the respondent filed Bill of Costs Misc. Application No. 9 of 2016 in the Senior Resident Magistrate Court Kilifi wherein the applicant filed a Preliminary Objection on jurisdiction.

(3) That during the pendency of that Bill of Costs, Misc. No. 9 of 2016, the respondent filed another Bill of Costs No. 18 of 2017 which has been pending determination todate.

(4) That on 23rd March 2019, the applicant was served with a decree and Certificate of Costs dated 26th November 2018.

(5) That the application was not served with any taxation notice and did not participate in the assessment of the costs.

(6) The applicant vehemently opposes the drawing and taxation on the costs as follows:

(i) The assessment was done ex-parte without notice.

(ii) The items 1, (party and party costs) was excessively charged/assessed at (Kshs.67,301/= instead of Kshs.45,000/=)

(iii) The Taxing Master erred in Law and principle by proceeding to assess the costs despite the pending Bill of Costs dated Misc. Application No. 9 of 2016.

(7) That on 14th August 2019, the applicant was served with a Notice to Show Cause in respect of the assessed costs whereupon the applicant filed an application or stay and setting aside the Certificate of Costs but the Court directed that the applicant should consider moving the High Court for further stay through Reference as it could not sit on appeal, hence the urgency.

Further, the applicant director **Hassan Jibril** swore an affidavit to buttress the notice of motion and as evidential persuasion to grant the orders in favour of the applicant.

The respondent filed a replying affidavit dated 30.6.2020 stating interlia:

(1) That contrary to the assertions by the applicant it is clear from the record several proper service of the Bill of Costs were made upon the applicant who failed to participate in the proceedings as supported by annexure ANA -2.

(2) That the applicant did not take any steps to contest or respond to the Certificate of Costs served to them on 22.3.2019.

(3) That the Bill of Costs was later to be considered by the Learned trial Magistrate as per the Court process and procedure. Thereafter, 30 days stay of execution granted in the event the applicant sought to file an appeal. That period also expired without any challenge to the decision by the Learned trial Magistrate.

This notice of motion by directions issued in the first instance on filing the Certificate of Urgency parties were required to file brief written submissions. In compliance with the order both counsels promptly filed that respective submissions which I have read and appraised as I determine the application.

Determination

The central issue disturbing the applicant prompting the filing of the instant motion hinges on the impugned Ruling by **Hon. Kituku** dated 6.5.2020 arising out of the taxed costs of Kshs.173,126/= on 26.11.2018 against the applicant.

The taxation of costs arose from an order of the Court in the Civil Suit No. 38 of 2012. Essentially, the applicant is of the view that the decision of the taxing officer on the assessment of costs ought to be set aside and an interpartes scheduling be made to have taxed afresh.

The Law

The question of costs is provided under Section 27 of the Civil Procedure Act which has a bearing on the subject at hand. It suffices to say that the overall objective worthy of taking into account reiterated in the provision is that of costs follow the event of a litigation. The general principle being emphasized. Costs are claimable and payable as a compensation on incidentals at the time of filing the suit and over its final determination.

On feature of this application is that the costs as seen from the record was submitted on 26.11.2018 before the Learned Magistrate who on consideration approved the Certificate of Costs at Kshs.173,126/=. The matter stayed in limbo until a Ruling on notice to show cause was delivered on 6.5.2020 confirming that the costs as assessed was due and payable by the applicant.

The legal position on assessment of costs in the matter litigated before the Magistrate Court is provided for under schedule VII of the Advocates Remuneration Order. In weighing the respective submissions adherence must be given to the principles in **R v Minister of Agriculture & 2 others ex-parte Samwel Muchiri W. Njuguna & 6 others {2006} eKLR** and in **R v Commissioner of Domestic Taxes ex-parte Ukwala Supermarket Ltd & 2 others Nairobi Misc. Application No. 319 of 2015 {2018} eKLR** where as per **Odunga J** held as follows:

"The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well settled. These principles are:

(i) That the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decisions was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on error of principle.

(ii) It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge.

(iii) If the Court considers that the decision of the taxing officer discloses errors of principle, the normal product is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the

assessment and the Court is not entitled to upset a taxation because in its opinion the amount awarded was high.

(iv) It is within the discretion of the taxing officer to increase or reduce the instructions fees and the amount of the increase or reduction is discretionary.

(v) The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it.

(vi) The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees.

(vii) The mere fact that the defendant does research before filing a defence informed of such research is not necessary indicative of the complexity of the matter as it may not well be indicative of the advocate's unfamiliarity with basic principle of Law and such unfamiliarity should not be turned into an advantage against the adversary.

These principles were also stated in the case of First American Bank of Kenya v Shah & others {2002} 1EA64."

In the instant case, counsel submitted that the entire process of assessment with the Advocates Remuneration Order to the extent that the jurisdiction exercised by the Learned trial Magistrate was in Law irregular. On the other hand, counsel for the respondent submitted that the Bill of Costs was properly served within time to challenge any of the items as drawn but chose not to file any rejoinder or objection to the party and party Bill of Costs. It was also counsel's contention that the system for enforcement by way of notice to show cause is unjust because they did not participate in the process of assessment of costs.

On those submissions, the first inquiry is whether the applicant has satisfied the criteria to set aside the assessment of costs commonly referred to as 'taxation'. Before Taxing Master or a Magistrate delves into the Bill of Costs, the nature of the subject matter and services rendered to warrant payable costs to the satisfaction of the Court ought to be ascertained.

In our context therefore what is reasonable and justifiable on instruction fees has been enumerated in **Joreth v Kigano & Associates {2002} eKLR, First American Bank of Kenya v Shah & others {2002} 1 EA 64.** As the Court considers the application its not lost that the foundation of the Taxing Master or a Magistrate exercising taxation jurisdiction is in respect of these matters discretionary. Whether by assessment or taxation of the plaintiffs' Bill of Costs. It amounts to a misdirection of fact or Law against the defendant has to satisfy the threshold in **R v Commissioner of Domestic Taxes ex-parte Ukwala Supermarket (supra)** and **R v Minister for Agriculture & 2 others ex-parte Samwel Muchiri (supra).**

Having examined the record and the affidavit evidence presented by the applicant, annexures and averments amongst others, I am of the view the applicant has not shown prima facie evidence sufficient to prove that the Learned Magistrate fell in error of principle or took into account irrelevant factors under Schedule VII of the Advocates Remuneration Order.

The applicants countered submissions to the assessment of instructions fees at Kshs.75,000/= instead of Kshs.45,000/= as a ground to set aside this item did not exhibit any valuation to show that there was an error on the value of the subject matter. The assessment on instruction fees is therefore being faulted from bar without any cogent and credible evidence that all along the Learned Magistrate may have been misled on that fact hence among at a wrong assessment. It is important to note that the case in point was in respect of proceedings concluded against the defendant and costs given as one of the incidental reliefs. The basis of the assessment or 'taxation' is to enforce the decree of the Court.

The basis for the applicants' dispute that the assessment was punitive and not embodying the value of the subject matter is purely a matter of conjecture. It did not directly and substantially bring the assessed instructions fees in question for being excessive or out of tune with the Judgment. As can be deduced from the trial Court record the costs chargeable and disbursements incurred are classified under Schedule VII of the Advocate Remuneration Order. In my view, I find no legitimate grievance that would bring the crux of the application within the dictum of **R v The Minister of Agriculture ex-parte W. Njuguna (supra).**

The second averments relevant to this application touched on the setting aside of the assessment of costs on grounds that the applicant was not notified of the appointed date and time of the event by the Court.

From the record Judgment in the primary suit was delivered on 6.4.2016 against the defendant/applicant, whereby orders were made to the effect that he was restrained from interfering with **parcel LR/Kilifi/Ngenya/46/171** and costs of the suit thereon. After delivery of Judgment, an application to assess costs was filed on 28.9.2016.

Consequently, a Certificate of Costs dated 26.11.2018 to entitle the respondent quantum of Kshs.173,126.00 was extracted for purpose of execution against the defendant/applicant there is no notice of appeal filed to challenge the decree or the Certificate of Costs. In effect a notice to show to cause why the applicant should not satisfy the costs as a consequential order of the Judgment was served upon by the plaintiff/respondent.

It is against this background that the applicant moved the Court vide the notice of motion filed in Court on 22.6.2020. The question is whether he has satisfied the criterion for grant of extension of time to file an appeal in respect of the taxation to enable him challenge the certificate of costs.

The principles for the jurisdiction of the Court to grant an extension of time for an intended appellant remain undisputed turning to case Law reliance has been placed on the cases of **Salat v Independent Electoral & Boundaries Commission & 7 others {2014} eKLR, Gatiru Peter Munya v Dickson Mwenda Kithinji (Application No. 2 of 2014), Paul Wanjohi Mathenge v Duncan Gichane Mathenge {2013} eKLR, Leo Sila Mutiso v Rose Hellen Wangari Mwangi CA No. 255 of 1997.**

The thread of the principles which run through the spectrum of the above cases is the Courts wide unfettered discretion to extend time for complying with any statutory, timeline, procedure rule, order or direction of the Court. In light of these several key factors are imperative and relevant:

(a) The length of the delay.

(b) The reasons for the delay.

(c) The degree of prejudice to the respondent, if the application is granted.

(d) The time an extension for an intended appellant, the chances of the appeal succeeding.

Comparatively, in **Attorney General v Keron Mathews {2011} UKPC 38,** the Court laid down the following principles:

> ***"Timelines in conducting litigation must be observed by a litigant, but an attorney's error can be a good reason for missing a deadline and applying for an extension of time of appeal. However, the applicant must show that the delay was substantially due to the conduct of the attorney and litigants must show some degree of vigilance in protecting their own interest. Failing to make at least periodic inquiries with an attorney can result in the Court being of the view that the attorney's conduct may have contributed to the delay, but it was not the substantial reason. In this case, the applicant showed very little interest in defending himself against the respondent's claim. Accordingly, the reason for the delay in applying for an extension were not sufficient to justify the long delay."***

What is the position of the procedural history of this case. It is not disputed that Judgment of the Court which gave rise to the Bill of Costs was delivered on 6.4.2016. The plaintiff thereafter filed itemized Bill of Costs on instructions fees, incidentals and disbursements on 28.9.2016. subsequently, on 26.11.2018 a Certificate of Costs ascertained as due for payment by the defendant. The Certificate of Costs remained unpaid until a notice to show cause was filed to execute and enforce the assessed costs.

The resulting effect is that from 2016 when the Judgment was delivered on the claim followed with a Certificate of Costs on 26.11.2018 there has been no notice of appeal or appeal filed by the applicant. Although in the present case, Certificate of Costs was issued under Schedule VII of the Advocates Remuneration Order any appeal ought to comply with Rule (11)(i) of the order at the very least to file a reference within 14 days from the date of the taxation.

The applicant in his affidavit has explained that the delay was a result of not being served with the Bill of Costs or assessment notice. According, to the respondent several notices were sent to the applicant for the need to attend the proceedings on the filed Bill of Costs. Yet it was the very dilatory conduct of the applicant that led to the hearing of the taxation/assessment ex-parte. More importantly, in this case a part from the contentions held by the applicant its significant to confirm from the record that there is evidence of various hearing notices drawn and dispatched to the applicant. Therefore, the assertion by the applicant on how service of the hearing notice by the respondent is inconsistent and inaccurate with the account supported by the trial Court record.

I agree that it was within the applicant rights not to attend the proceedings but having chosen that route I am in greater difficulty to exercise discretion to countenance such conduct to set aside the Ruling of the trial Court. The Court of Appeal guidance in the case of **Shah v Mbogo EA 116** is appropriate to this application:

> ***"The Court discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."***

In my view the applicant is guilty of laches; since 2018 he has taken no steps calculated to challenge the Bill of Costs. The applicant only resurfaced when the respondent applied for execution proceedings through a notice to show cause why the decretal sum should not be settled.

The remarks of the Court in **Russell v Duke of Norfolk {1949} 1ALL ER 109** are consistent with the scheme of exercise of discretion by the trial Court thus:

> ***"The requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with and so forth."***

In particular, to this case the applicant was accorded an opportunity to be heard at the on-going proceedings with regard to the Bill of Costs. The many hearing notices issued by the Court illustrate the efforts made for purposes of compelling attendance. In his absence the trial Courts was required to enforce the Law with some probable effect to avoid prejudice or miscarriage of justice on the part of the respondent.

It does follow that the applicant cannot complain of a breach of natural justice of the Court suitably granted an opportunity in such one case. In the words of **Sedley J in R v Home Secretary Ex Mbon {1996} 8 Admin LR 477 at 480:**

> ***"The well attested flexibility of natural justice does not mean that the Court applies differential standards at will, but that the application of the principles (which, subject to known exceptions are constant) is necessarily as various as the situations in which they are invoked."***

Discretion in this matter has been properly exercised and it was the applicants' own default and by that marked the end of being indulged. Squarely within these principles it would not be appropriate to grant an application seeking leave to file a notice of appeal and a reference against the Certificate of Costs.

Finally, difficulties arise here in regard to the question whether there are chances of the appeal succeeding.

In view of the nature of the notice of motion and material reasonably entertained for and against, I reached out to the substance of the grounds raised to be canvassed on the intended appeal. The threshold for interference to borrow a leaf from the dicta in **KEMFRO Africa Ltd T/a Meru Express Services & Another v A. M. Lubia & Another {1982 – 88} KAR** is that:

> ***"It is trite Law that the assessment of general damages is at the discretion of the trial Court and an appellate Court is not justified in substituting a figure of its own for that awarded by the Court below, simply because it would have awarded a different figure if it had tried the case at first instance."***

Though this principle set out falls in the realm of assessment of damages, the discretionary power applies **Mutatis Mutandis** to the present case. This Court gave due regard to the claim on assessment of instruction fees. The application was of the view that an assessment of Kshs.45,000/= as instructions fees ought to be awarded rather than Kshs.75,000/= in the Certificate of Costs. There would be little merit in the applicants appeal against fees.

In the case of **Paul Ssemogerere & others v Attorney General Civil Application No. 5 of 2001** the Court held:

> ***"In our view, there is no formula by which to calculate the instruction fees. The exercise is an intricate balancing act whereby, the taxing officer has to mentally, weigh the diverse general principles applicable, which sometimes are against one another in order to arrive at the reasonable fee…"***

In the circumstances and reasons given the application lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY 2020

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R. NYAKUNDI

JUDGE

This ruling has been delivered in terms of Article 48 and 159 (2) of the Constitution and practice directions on the general risks associated with COVID – 19 pandemic and the specific consents signed by both counsels dated **6.7.2020** ***(See Gazette Notice No. 3137 of 17.4.2020)***