



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS APPLICATION NO. 14 OF 2020

SUNSAND DUNES LIMITED.....APPLICANT

VERSUS

RAIYA CONSTRUCTION LIMITED..... RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Nchogu, Omwanza & Nyasimi Advocates for the Applicant

A. B. Patel & Patel Advocates for the Respondent

RULING

The applicant filed a chamber summons dated 27.1.2020 in terms of paragraph 11 of the Advocates Remuneration Order for permission to appeal out of time stipulated in the statute. In support of the application are grounds embodied on the face of the motion as accompanied with an affidavit in support sworn by **Mr. Nyasimi Momanyi**.

The respondent in answer to the chamber summons did file grounds of opposition dated 30.4.2020.

The questions to which this Court will refer to shortly were canvassed explicitly by way of written submissions duly acknowledged as a basis of adjudication in determining the competing rights of the parties.

The applicant's submissions

The careful synthesis by counsel for the applicant to persuade this Court that such reliefs being sought are legitimate and reasonable relied on the principles in **Aly Figgis & Co. Advocates v Karuturu Networks & Another {2009} eKLR**, **Singh Harman Singh Ltd v Attorney General & 2 others {2016} eKLR**, **Republic v Kenyatta University & Another ex parte Wellington Wambure {2018} eKLR**. Learned counsel submitted that the legal merits of the reference is based on matters the Deputy Registrar failed to take into account in the determination of the Bill of Costs. The argument raised against the Ruling of the Deputy Registrar is that the error made if left unarticulated with potentiality prejudice the applicant. In respect of the error of principle counsel for the applicant submitted and cited the case of **Laximanbhal Const. Ltd v Joseph Gichunga Warutumoro {2019} eKLR**.

After advertng to aspects of the previous procedural history and the specific pointers that would render the present motion and equitable reliefs sought necessary counsel urged the Court to consider the application and proceed to allow it without any procedural bars.

The Respondents Submissions

In the written submissions in response, counsel for the respondents stated candidly that there was no merit to the applicants notice of motion. For the general legal position on exercise of discretion underpinning applications of this nature counsel urged this Court to be guided by the cited authorities of **Simon Njoroge Kirika v Michael Leshan Isaac & Another {2017} eKLR**.

Further, counsel argued and submitted that the central pillar which the Court is invited to embrace borders on the jurisdiction and defectiveness of the purported reference pursuant to paragraph 11 and (1) (2) of the Advocates Remuneration Order. Those Sections submits counsel establish a statutory structure to regulate objection proceedings against the bill of costs and subsequent certificate issued by Taxing Master.

Counsel then broadened his submissions by further submitting that the applicant has not demonstrated any sufficient grounds to impugn

exercise of judicial discretion by the Taxing Master to warrant this Court's interference. Counsel also referred to the dictum in the cases of **Maina Mburu & Co. Advocates v George Gitau Munene sued as Administrator of the Estate of Samuel Gitau Munene & 3 Others {2015} eKLR**, **First American Bank of Kenya v Shah & others {2002} EA 64**, **Joreth Limited v Kigano & Associates {2000} 1EA 92**. Counsel submitted that the applicants had not acted promptly, secondly, the legal and evidential burden was cast upon the applicant to prove that the costs of litigation sought was due and payable during the proceedings on the bill of costs.

Thirdly, the concerns raised by the applicants on the findings by the Taxing Master in both Rulings and in the circumstances of the motion none of the reliefs sought is tenable. Counsel continued with his submissions that the requisition to file an application for review is inexcusable given the clear provisions under Rule 11 of the Advocates Remuneration Order (**See also Machira & Co. Advocates v Arthur K. Magugu CA 199 {2012} eKLR**).

Accordingly, counsel contended that the applicants remain to be authors of their non-misfortune. Counsel cited in support the case of **Charles Omwato Omwoyo v African Highlands & Produce Co. Ltd {2002} 1 KLR 698** to buttress the position that no good reason for the delay has been manifested to invoke the Courts discretion. (**See also Gerald Mwithia v Meru College of Technology & Another {2018} eKLR**, **Josephat Nderitu Kariuki v Pine Breeze Hospital Ltd {2006} eKLR**. Counsel further submitted and cited the principles in **R v Kenyatta University {2018} Eklr**, **Union of India v Tata Yodogawa Ltd** to argue and canvass that the question of an extension of time in view of the delay is unjustified and would not be appropriate to the facts of this case and therefore ought not to be granted.

Finally, counsel argued that on the fact of it, the averments in the affidavit by the applicant counsel offends the principles in the cases of **Alice Mumbi Nyanga v Danson Chege Nyanga & Another Civil Case No. 394 of 2001 {2006} eKLR**, **Kisya Investment Limited & Others v Kenya Finance Corporation Ltd**, **Simon Isaac Ngui v Overseas Courier Services (K) Limited {1998} eKLR**.

For the reasons given in his submissions counsel wants the Court to expunge the affidavit on the basis that incidents of evidence alluded to in support of the application are founded by an incompetent deponent on matters of fact outside his knowledge.

Determination

The main issue is whether the applicant has shown cause to justify the granting of the extension. It is a principle of Law that the applicant must demonstrate good and sufficient reasons why he or she was unable to bring the appeal within the set provisions of Section 79 (G) of thirty days since delivery of Judgment. When it comes to the proviso of the aforesaid provisions it is the duty of the Court to withhold discretion in the event there has been unreasonable delay in filing the application for enlargement of time without good cause requirements being met. There is no dispute that the power donated by the proviso of Section 79 (G) is purely discretionary and to exercise it, the Court shall not fetter itself except that it must be exercised judiciously and not whimsically.

The Supreme Court has had an opportunity to pronounce itself on this matter on a set of principles in permitting or withholding discretion on application of this nature. In the case of **Salat v Independent Electoral & Boundaries Commission & 7 others {2014} eKLR** therein the Court stated that:

“Discretion to extend time is indeed unfettered but its incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there were extenuating circumstances that could enable the Court to exercise discretion in favour of the applicant. In doing so the following principles are applicable thus:

(i). Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party.

(ii). A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.

(iii). Whether the Court ought to exercise discretion to extend time, is a consideration to be made on a case to case basis.

(iv). Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court.

(v). Whether there would be any prejudice suffered, the respondent if the extension was granted.

(vi). Whether, the application had been brought without undue delay and

(vii). Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”

The other case on all four corners to the present application is the Court of Appeal decision in **Paul Wanjohi Mathenge v Duncan Gichane Mathenge {2013} eKLR** where the Court stated as follows:

“The discretion under Rule 4 is unfettered but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in the previous decisions of this Court, including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.” (See **Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. 255 of 1997**).

A similar point arose in **Costellow v Somerset** and the principles expounded as follows:

“The first principle is that the rules of Court and the associated rules of practice denied in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribe time limits are not targets to be acried at it expressions of pious hope but requirements to be met. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because a procedural default, unless the default causes prejudice to his applicants for which an award of costs cannot compensate.”

It must be pointed out from the record that the Deputy Registrar did tax the defendant/applicant bill of costs but in exercise of her discretion did dismiss the claim for lack of merit on 29.5.2019. When an application for review of the decision was made through a notice of motion dated 3.6.2019, it was premised under Section 80 of the Civil Procedure Act that the Deputy Registrar had the jurisdiction to set aside or review the order on dismissal of the Bill of Costs and have it taxed afresh. In a rejoinder to the application the respondent filed a preliminary objection that the motion offends the strict rules of the Advocates Remuneration Order on taxation of costs.

With that in mind, in terms of the Ruling dated 24.12.2019, the Preliminary Objection by the defendant/respondent determined the claim on the bill of costs.

The filing of the application to enlarge time by the applicant was made to this Court on 6.2.2020. That application was served upon the defendant/respondent as explained in the affidavit of service dated 2.3.2020. In so far as the Advocates Remuneration Order is concerned in paragraph 11 an appeal against the decision of the Deputy Registrar shall be a matter to be lodged within 14 days from the date of the order or certificate of costs.

In this instance, that did not happen, in a manner prescribed under paragraph 11 of the Advocates Remuneration Order to bring the intended appeal/reference within the prescribed period by the rules. The filing of the chamber summons is intended to achieve enlargement of time to file a reference and for the applicant to exercise his right of appeal against the decision handed down by the Deputy Registrar on 24.12.2019.

On computation of time from the affidavits filed by the applicant there is obviously an overreach of twenty days from the date of the decision sought to be appealed. Therefore, the applicant was within the rules in seeking an extension of time to file a reference against the decision of the Deputy Registrar. There is no doubt that a consideration of this application would be guided by the principles in the cited cases of **Salat v IEBC & 7 Others (supra)** and **Paul Wanjohi Mathenge (supra)** which emphasized that to grant an extension of time is discretionary and that discretion remains unfettered but must in accordance to reason and justice.

Based on this understanding the applicant who has asked this Court to grant an extension has demonstrated evidentially how time was lost and the intention to come to Court within time was not negligence or indolent act. Further, the applicant has explained that one of the sole reason for the delay stemmed from the option of following for review of the decision that failed to justify the dismissal of the bill of costs. That instead of filing a reference he went for review as a step to have a stated consideration of the matter to pursue the issue of costs.

In my view, the applicant has advanced good cause and substantial reasons to warrant the grant of his application for an extension of time to file the response. The delay in filing the Appeal is not inordinate nor inexcusable as the facts raised show the applicant first made an application for review before the same Court before moving to this Court. It should also borne in mind that the right to a fair hearing under Article 50 is drawn in broad terms and as a remedial right both in Criminal and Civil Law. Therefore, the duty of the Court under Article 50 (1) of the Constitution in adjudication of disputes is to maintain a level playing ground for the litigants to have an equal opportunity to canvass their respective claims.

Thus on these points invariably the grounds of the objection fail to deny the applicant extension of time. Undoubtedly, the discretionary power accorded by the rules and precedent setting principles as cited above ought to come to the aid of the applicant to a bridge the time for doing the act to file a reference or take further proceedings in regard with the impugned Rulings on the defendant’s Bill of Costs.

With a legal eye on the merits of the purported reference it is clear from the affidavit in support as weighed with the grounds of opposition the intended reference raises serious issues on recondite points of Law bordering on the irregularity and illegality of the act giving rise to the dismissal of the bill of costs.

The answer to this again is in the comparative jurisprudence in: **Preller v Jordaan & Another, {1957} (3) SA 201 (O) at 203 C to E, General Leasing Corporation Ltd v Louw, {1974} (4) SA 455 (C) at 461 to 462, Noel Lancaster Sands (Pty) Ltd v Theron & Others, {1975} (2) SA 280 (T) at 282 F:**

“It should be borne in mind, however, that the review of the Taxing Master’s decision on taxation is one going beyond the rather narrow Common Law parameters of judicial review applicable to the acts or omissions of public bodies. It is by its nature a review denoting “a wider exercise of supervision and a greater scope of authority than those which the Court enjoyed” under either the review of the proceedings of lower courts or of public bodies acting irregularly, illegally or in disregard of important provisions of statute.”

The grounds prima facie discloses a serious and arguable case why the reference should be admitted and heard on the merits whether or not the bill of costs as framed by the defendant was indeed canvassed and determined by the Deputy Registrar by drawing an inference from the Judgment of the Court of Appeal is a substantive question that right facts for consideration on filing the reference. The grounds of opposition to restrain exercise of discretion for an enlargement of time to file a reference against the decision of the Deputy Registrar in the circumstances of this case is misconceived.

Addressing the application in light of the above principles, it is clear from the reasons explained in the supporting affidavit that the applicant was entitled to taxed costs in terms of the Judgment of the Court of Appeal dated 24.5.2018. As a result, there was a legitimate expectation that the bill of costs filed in Court on 24.9.2018 before the Deputy Registrar would approach the various items indicative of the professional legal services rendered to pursue the litigation both at the High Court and Court of Appeal.

The respondent was aware that the applicant had obtained the aforesaid Judgment which set aside the High Court decision dated 7.3.2017 in its entirety. Thus in a similar nature in allowing the Appeal in favour of the applicant costs of the Appeal and the suit in the High Court was to be met by the respondent.

Subsequent to this order the applicant moved this Court to also consider setting aside the orders by the Deputy Registrar on the initial dismissal of the bill of costs and the latter submitted on review dated 24.12.2019. As noted from the chamber summons, the applicant is aggrieved by the decision which locked him out of his due costs of the litigation with the respondent. Pursuant to Rule 11 of the Advocates Remuneration Order, it is mandatory that a reference could only be filed within 14 days of filing the notice to the High Court under the same rule, the Court has discretion to extend time. The case of **Vishisht Talwar v Antony Thuo Kanai T/a Thuo Kanai Advocates {2014} eKLR** the Court adopting a passage in the case of **Machira & Co. Advocates v Arthur K. Magugu (CA 199/2012) eKLR** put in perspective the certificate of costs by the Deputy Registrar and filing a reference in the following passage:-

Rule 11 therefore provides for ventilation of grievances from such decision through references to a Judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open Court. Reviews, however, would require provisions akin to those in Section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the fact of the record and so on. In our view of the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate's bill of costs through reference under Rule 11 to a Judge in chambers.

The application before the Deputy Registrar pursuant to the defendant's party and party bill of costs filed on 24.9.2018 was to determine the efficacy of each item taking into account the nature of legal services rendered and costs incurred arising out of the litigation both in the High Court and Court of Appeal in **HCC No. 179 of 2012**. For purposes of taxation paragraph 13A of the Advocates Remuneration Order provides as follows:

"The taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him."

Under this rule, the record of the Misc. Application for taxation should contain documents relating to the proceedings in the trial Court and corresponding record of appeal. In the Court of Appeal and the certified decree or orders relevant to the taxation as premised in the drawn bill of costs. On the contrary, a perusal of the taxation proceedings objected to by the applicant failed to contain the extract of the copy of Judgment of the Court of Appeal which substantively granted costs incurred in both Courts to be due and payable to the applicant. Therefore, I agree again with the applicant that an order for taxation ought to reflect the terms of the Judgment itself. Consequently, the main consideration for this Court should be whether the dismissal order and further upholding the Preliminary Objection by the respondent was consistent with the Court of Appeal Judgment of 24.5.2018.

In my view and supported with the record, in the particular circumstances of the taxation, it is clear that the Deputy Registrar failed to take into account the primary Judgment of the Court of Appeal for purposes of anchoring her decision on the lodged Bill of Costs. There are various aspects of the taxation by the Deputy Registrar which in a way require the intervention by an appellate Court. The Court in **Mwangi & Another v Wambugu {1982} LLR – 76 CAK Marube v Nyamuro {1983} CAK**, the Court held as follows in this realm that:

"A Court of Appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

In line with these principles, the Court in **Kipkorir & Kiara Advocates v Deposit Protection Fund Board {2005} IKLR 528** stated that:

"And if a Judge on reference from a taxing officer finds that the taxing officer has committed an error of principle. The general practice is to remit the question of quantum for the decision of taxing officer. The Judge has however a discretion to deal with the matter himself or herself if the justice of the case requires."

The foregoing principles are to be applied to the applicant's complaints as explained in the notice of motion, corresponding affidavits and the respondent's responses to the motion. I have taken the liberty to peruse the record and the two Rulings by the Deputy Registrar, when dealing with the initial taxation of the bill of costs, dated 24.9.2018. It is abundantly clear the Court did not factor in the final order of the Judgment of the Court of Appeal on costs. In fact, the proceedings which followed for review under Section 80 of the Civil Procedure Act did not legally recognize what constitutes an error on the face of the record as postulated in **Nyamogo & Nyamogo v Kogo {2001} EA 170**.

In the present application, I have a duty to reconsider the evidence before the Deputy Registrar, evaluate it and draw my own conclusions in regard to the taxation of the bill of costs (**Selle v Associates & Motor Boat Co. Ltd {1968} EA 123**). In the case of **Tokesi Mambili & Others v Simioni Litsanga {2004} Eklr**. The Court failed to take into account that in order to obtain a review the applicant had satisfied the criterion that there was discovery of new and important matter or evidence which was not within her knowledge or could not be produced at the time the dismissal order of the bill of costs was made on 29.5.2019. She failed to factor in the Judgment of the Court of Appeal to determine the ultimate rights of both parties to the litigation. Considering in the case of **Hefley v Boyer {1614} CRO Jac 336, Westminster Corporation v L.N.W. Railway {1903} AC 426 at 430**, the Court held:

"It is well settled that the statutory power conferred upon a tribunal or inferior body must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it, and it must act reasonably and fairly."

An example of self-misdirection was exemplified in the case of **Lambeth LBC v Secretary of State for Social Services {1980} (79) LGR:**

“The rule of reason has thus become a generalized rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as irrelevant considerations, and mistakes and misunderstanding which can be classed as self-misdirection or addressing oneself to the wrong question.” (See **Niarchos v Secretary of State for the Environment {1977} 76 LGR 480**)

In view of the foregoing and the reasons given in this application, I am satisfied that there is merit in the chamber summons to grant both the leave to extend time and setting aside the Ruling of the Deputy Registrar dated 29.5.2019. For the Court when it comes to considerations on exercise of jurisdiction discretion justice and equity are taken into account to struck a balance between the rights of the applicant and the respondent. There can be only one answer to the question for determination on the issues fronted by the applicant, as firmly stated in the case of **Banco Arabe Espanol v Bank of Uganda {1999} 2 EA 22** the Court held:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuant of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.”

In sink with the provisions of Section 1A and 3A of the Civil Procedure Act, I am further fortified in this matter to invoke the inherent jurisdiction of the Court for the interest of justice thereby adopting a more flexible approach in resolving the issues raised by the applicant. As **Clarkes** stated in **Stephens v Paul Flynn Ltd AC 2005:**

“The balance of justice may be tilted in favour of imposing greater obligation of expedition.”

Therefore, the power to recast the form of proceedings behooves on this Court to correct the mistakes and errors in the Court orders of the Taxing Master without the necessity of an appeal process. **(See also McMullen v Clancy {2002} 31R 493).**

In the upshot and the foregoing reasons, I remit the entire initial bill of costs dated 10.8.2018 to the Taxing Master for a fresh adjudication. That the vital lifeline to extend time to enable the applicant to adjudicate effectively in relation to the new and evolving litigation pattern is hereby granted. Costs of this application to abide the outcome of the taxation.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF JULY 2020

R. NYAKUNDI

JUDGE

This ruling has been delivered in terms of Article 48 and 159 (D) of the Constitution and practice directions on the general risks associated with COVID – 19 pandemic and the specific consents signed by both counsels dated **8.7.2020 (See Gazette Notice No. 3137 of 17.4.2020)**