



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
MISCELLANEOUS APPLICATION NO. 115 OF 2017
IN THE MATTER OF THE ADVOCATES ACT
(CAP 16 LAWS OF KENYA)
AND
THE ADVOCATES REMUNERATION ORDER 2009

BETWEEN
MUMIAS SUGAR COMPANY LIMITED.....APPLICANT

AND

PROFESSOR TOM OJIENDA & ASSOCIATES.....RESPONDENT

(Being a reference from Hon. Benson Khapoya (Taxing Master) Ruling

in Kakamega HC Misc. Cause No. 16 of 2017)

RULING

1. This application stems from Kakamega HCCC No. 122 of 2011 where the respondent represented the applicant but payment of legal fees as sought by the respondent from the applicant was not forthcoming prompting the respondent to file an Advocate/Client Bill of Cost on 14th March 2017 to enable them recover their fees. The respondent sought to be paid KShs. 29,374,650.00 through Kakamega HCMisc.Applic. No. 16 of 2017 where both parties filed the necessary pleadings in support or opposition of the bill of costs. The taxing master taxed the bill on the 17th October 2017 and delivered a ruling on 2nd November 2017 at KShs. 14,176,950.00.

2. The respondent filed this Chamber Summons application herein seeking the following orders:

a. THAT this Application be Certified as urgent and service hereof be dispensed with in the first instance

b. THAT this Honourable Court be pleased to issue an order granting leave to the Applicant to file Reference objecting to the taxed advocate Client bill of costs out of time in High Court Misc. 16 of 2017

c. THAT this Honourable Court be pleased to issue an order of stay of any and all orders emanating from the ruling of Hon. Benson Khapoya delivered and signed on 2nd November 2017

d. THAT findings and ruling of the Hon. Benson Khapoya in Misc Cause No. 16 of 2017, taxation, with regard to the Respondent's Bill of Costs, awarding a sum of Kshs. 17,444,509/- be varied and/or set aside in relation to items nos. 1,2,3,4,5,6,7,8,9,10,11,13,14,15,16,18,19,20,21,22,23,26,27,29,30,32,33,34,36,37,38,40,43,46,47,48,51,52,55,56,59,60,62,63,65,66,67,68,71,7,75,76,79,80,83,84,87,88,91,92,94,95,96,97 and 98.

e. THAT this court be pleased to order that the Bill of Cost be retaxed after considering the Applicant's submissions on the Bill by any other taxing officer

f. THAT this Honourable Court be pleased to interrogate the Respondent's Bill of Costs in light of actual work done and adopt the Applicant's proposal on taxation of the Costs.

g. THAT this Honourable Court be pleased to adjust the contested items as the justice of the case may require, in lieu of remitting the contested items to a taxing officer

h. THAT this honourable Court be pleased to order that costs of this Application as well as costs in the contested bill of costs be borne by the Respondent.

i. THAT this Honourable Court be pleased to make any such order and or orders as it deem just and appropriate in the circumstance.

3. It was the contention of the applicant that no ruling notice was ever issued to them and the realization that a ruling had already been delivered on 2nd November 2017 caught them by surprise. The applicant prepared a letter requesting for a copy of the ruling which was availed by the court registry on 27th November 2017. The applicant now seeks that the court deems the reference, filed out of time, as properly filed for reason that the ruling on the bill of costs was delivered in the absence of counsel for the applicant who had no knowledge that the ruling was being delivered on the said 2nd November 2018.

4. The respondent opposes the application through written submissions and a replying affidavit by Prof. Tom Ojienda, both filed on 30th January 2018. It was the respondent's submission that the applicant are victims of their own negligence and that the applicant's knew of the ruling on 10th November 2017 and did not act or write any letter asking to be supplied with the ruling on time. It is argued that the applicant's skipped a very important process of giving notice in writing to the taxing master on the items in the bill of costs they are objecting to, to enable the Deputy Registrar give the reasoning of the said ruling as per Rule 11 of the Advocates Remuneration Order. The respondent further submits that the applicant did not file an objection within 14 days to the taxing officer and that the taxing officer has not given any reasons for his original ruling on any items.

5. The issues for issues for determination in the application are -

a. Whether the Applicant should be granted leave to file the Reference out of time;

b. Whether the Taxing Officer had Jurisdiction to Tax the Bill of Costs;

c. Whether the taxing officer erred in principle in taxing the instruction fees at KShs. 10,000,000.00; and

d. Whether the Applicant should be granted leave to file the Reference out of time.

6. The applicant cites the decision in *Njagi Wanjeru & Company Advocates vs. Ben Momanyi t/a Momanyi & Associates* (2014) eKLR where it was said -

'Paragraph 11 (4) of the Advocates (Remuneration) Order provides as follows:

"The High court shall have power in its discretion by order to enlarge time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order maybe made by chamber summons upon giving to every other interested party not less than three days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought time to be enlarged may have already expired."

The above provision of the law is clear. This court has unfettered discretion to enlarge time for any party to do what is required under the provisions of paragraph 11 of the Advocates (Remuneration) Order. This discretion however has to be exercised judicially ...

.. In the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 Of 1997 (Unreported)*, the Court expressed itself thus:-

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

With this decision in mind having accepted the applicant's explanation on the delay I will extent the time and allow the applicant to file a reference/objection out of time.'

7. The applicants quote Section 59 of the Interpretation and General Provisions Act which provides that: -

'Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.'

8. The applicants submitted that no suit ought to be summarily dismissed and rely on the pronunciations of Madan JA in *D.T Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Another (1980)* eKLR.

9. I have considered the submissions on the issue of extension of time. I believe it would be in the interests of justice to extend the time for filing reference and to deem the reference filed herein as having been properly filed. I shall accordingly direct the Deputy Registrar to cause the file in Kakamega HCMisc.Applic. No. 16 of 2017 to put together with this file to facilitate consideration of the other prayers. Let the orders herein also apply to the other two files, that is to say Kakamega HCMisc Nos. 116 and 117 of 2017.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31st DAY OF January, 2019

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 7th DAY OF February, 2019

J. NJAGI

JUDGE