REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 1 OF 2011

IN THE MATTER OF: THE ADVOCATES ACT CAP 16 LAW OF KENYA

IN THE MATTER OF: HIGH COURT CIVIL SUIT NO. 184 OF 2011

BETWEEN

JANE MARETE VS SAVINGS AND LOAN KENY LIMITED

IN THE MATTER OF: TAXATION OF ADVOCATE/CLIENT BILL OF COSTS

BETWEEN

RADOLF M. TINDIKA t/a TINDIKA & COMPANY, ADVOCATES……APPLICANT

VERSUS

JANE MARETE……RESPONDENT

R U L I N G

1. On 27/5/2011 the taxing master made an order taxing the Advocate – clients bill of costs by consent in the sum of '*Kshs.592,096 subject to ½ increase V.A.T at 16% and disbursements of Kshs.11,800/='*. That consent resulted into a certificate of costs dated the same day being issue in the sum of Kshs.1,042,047.04.

2. On 9/8/2016, the client having changed advocates, filed the chamber summons of that date and sought among orders that time be enlarged and leave be granted for the client to object to the decision of the taxing master.

3. The reasons given for the application are that the client is aggrieved by the decision which she intends to challenge and for delay it is said that the application was never made in time because she had hoped to reach a settlement with her erstwhile advocates which came to pass. In the affidavit in support of that application the client makes the point that before the bill was filed and served in the sum of Kshs.1,719,256.78 she had been served with a final fee note in the sum of Kshs.418,000/= yet she had made payments to the advocate amounting to Kshs.1,079,000.00 which was never acknowledged in the bill of costs. The taxing officer is then faulted for having given no reasons for his decision despite the fact that counsel made submissions and that VAT was awarded without production of ETR compliant fee note.

4. The application was opposed by both grounds of opposition and Replying Affidavit of the Advocate filed in court on the 23/2/2017 and 21/4/2017 respectively. The opposition to the application raises the question of delay for some 5 years to bring the application as a design to defeat recovery proceedings in Mombasa RMCC No. 2494 of 2016 with an addition that the application is incompetent, lacks merit, an abuse of the court process and cannot be granted.

5. Those facts were reiterated in the affidavit which asserted that the bill was not contested but taxed by consent of the parties represented by advocates; a denial that the advocate had been paid Kshs.1,079,000 but admitted payment as disclosed in the demand letter dated 16/9/2011 and exhibited at annexure RMTZ. I t was then deponed that there had been a recovery suit in SPMCC No. 2494 of 2011 in which judgment had been entered and it was that judgment the client/applicant was keen to circumvent delay and frustrate.

6. Pursuant to the directions by the court of 23/2/2017 and reiterated on 24/4/2017 the parties filed respective submissions on 13/6/2017 and 15/11/2018. On the date fixed for highlighting of submission, however, only counsel for the Advocate attended court and did his side of Highlights. Owing to the fact that parties had filed written submissions and what remained were the highlights, I took the highlights from the Advocate Respondent even in the absence of the applicant because the court could not just ignore the submissions on record.

Submissions by parties

7. Even though the court record does agree with the respondent/advocate's position that the bill was taxed by consent, the client/applicant was obstinately stuck to her position that the taxing officer gave no reasons in arriving at the decision and erred in awarding V.A.T. without an ETR compliant fee-note. To that extent alone, I do not consider the application to have been conceived and pursued with the requisite candour and due diligence. In fact it gives the impression that counsel for the client did not even peruse the court file or if he did, he always haboured and entertained the hope that the court would shut its eyes to such records and go along with the false narrative.

8. All the same the applicant/client in submissions maintains and reiterates the facts in the application and the affidavit only adding that she was unaware that the bill was taxed by consent and that she only became aware of the certificate of costs when served with Summons To Enter Appearance in PMCC No. 2494 of 2014 in the December 2014. The applicant then cited to court the decision in **Labh Singh Harman Singh vs Attorney General & 2 Others [2016]eKLR** on the discretion of the court to enlarge time and the decision in **Abincha & Co. Advocates vs Trident Insurance Company Ltd [2013]eKLR** for the proposition of law that after an advocate renders a final fee-note he is estopped from presenting a bill of costs.

9. On delay it was submitted that there were attempts by the applicant in person and through counsel to negotiate with the respondent but no progress was made.

10. For the respondent elaborate submissions were made to underscore the fact that no explanation had been offered for the inordinate delay of about some 5 years and the decisions in sound ***Entertainment Ltd vs Antony Burungu & Co. Advocates [2014] eKLR***, ***Hari Kakuya & Co. Advocates vs Rift Valley Agricultural Contractor Act [2014] eKLR***, ***Republic vs Laikipia District Land Tribunal & 3 Others [2006] eKLR, Obaga & Co. Advocates vs Kipkebe Limited [200] eKLR*** and ***Shehla Gnafour vs Attorney General [2017] eKLR*** were cited for the proposition that the application was undeserving of being granted because the delay had not been explained to the satisfaction of the court and that in considering the application the court has to consider the reasons for such delay and length, the merits of the contemplated action, if argued, and whether or not the Respondent can be compensated by an award of costs for any prejudice occasioned by extension of time.

12. I have taken into account of all matters presented to court in the record of the application, the opposition thereto and the submissions filed and I do appreciate that the discretion upon the court to extend time must be seen through the prism of access to justice concomitantly with the very purpose of the court system to do justice by determining parties disputes justly, fairly and expeditious. That is what I have always understood by the expression wide and unfettered discretion of the court[1]. I stand to be guided by the words of the Court Of Appeal in ***Sila Mutiso v Rose Hellen Wangari Mwangi*** **– Civil Application No. Nai 255 of 1997** to the following effect:-

> **"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."**

13. But in doing justice between the parties, the court must take cognizance of the fact that every adult of sound mind is the best custodian of own rights including the right to enter into contracts hence there have been developed principles to safeguard parties negotiated bargains from interference by all including the courts.

13. In this matter even though the taxing master recorded the Order of 27/5/2011 that was not a court's made decision but a contract between the parties and merely presented to court for adoption as an order of the court.

14. Such is a contract between the parties which bind all and sundry such that not even the court retains the liberty or discretion to interfere with the same by way of re-writing it unless a vitiating factor be proved to the satisfaction of the court. This is the age old position of law seen to underline the principle of party autonomy and freedom to contract. The court of Appeal in **National Bank of Kenya vs Pipeplastic Sankolit (K) Ltd & Another [2001]** restated this established principle by underscoring the courts primary duty as that of interpreting contracts and not rewriting the same for the parties;

> "**A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of the contract unless coercion, fraud or undue influence are pleaded and proved**"

15. Those principles apply with equal force and measure as far as consents entered in court are concerned. In ***Flora N. Wasike vs Destimo Wamboko [1988] eKLR***, the Court of Appeal emphatically stated the nature of a consent order as a contract when it said:-

> **"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds on which would justify setting a contract aside or if certain conditions remain to be fulfilled, which are not carried out".**

16. Here I am being called upon to extend time for the client/applicant to challenge the contract it entered into with the advocates on the fees payable to that advocate on the false basis that the taxing officer did not give the reasons for the decision reached when in fact the taxing master never made any decision. Even if I were to extend time I do not see any arguable matter to be argued at the intended reference.

17. Additionally, in this matter even though the client/applicant contend that she did not learn of the consent order till December 2014 when served with summons to enter appearance in RMCC 2494/2014, the current application was never filed till the 9/8/2016 some twenty (20) months later. The reason for that delay is said to have been attempts at a settlement. No evidence has been exhibited at such negotiations and even the offers made. I do find that there is no satisfactory explanation for the delay which I find to be inordinate and unreasonable. If the delay is found to be inordinate and unreasonable then it can only be deemed a design to overreach and obstruct the expeditious disposal of the dispute. That runs counter the constitutional dictate that just shall not be delayed.

18. I am in no doubt that the consent order entered in court in the presence of counsel for both sides and duly signed by then on the 27/5/2011 binds the parties and the Applicant/client has no window of escape even if the same be disguised as extension of time to challenge the taxation. For that reason and being of the view that no vitiating factor has been alleged to have led to the consent, I find that it would be an act futility to extend time so as to give the applicant a chance to challenge a consent order.

19. I therefore find no merit in the application dated 9/8/2016 and order that it be dismissed with costs to the Respondent/Advocate. Noting that this is a proceeding initiated by a bill of costs to ascertain the costs due to an advocate in which no other bill may be lodge and while aware that the Respondent/Advocate acted in person, I limit the costs of the application to disbursements only which I have ascertained to have been the sum of **Kshs.265** being the costs for filing the Grounds of Opposition, the Replying Affidavit and written submissions.

20. It is so ordered.

Dated, signed and delivered this **8th** day of **March 2019**

P J O OTIENO

JUDGE