



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISCELLANEOUS CASE NO. 382 OF 2018

PATRICK KIMATHI MUCHENA

T/A ARIMI KIMATHI & CO. ADVOCATESPLAINTIFF

-VERSUS-

EVANS ITHIRA DEFENDANT

R U L I N G

1. This Ruling is over the Chamber Summons dated 23rd May 2019 and a Preliminary Objection dated 3rd July 2019. From my consideration of both of those two leads me to find that if the Preliminary Objection succeeds the Chambers Summons will fail. See the case **N. W. AMOLO T/A AMOLO KIBANYA T/A AMOLO KIBANYA & CO. ADVOCATES V SAMSON KEENGU NYAMWEYA [2016] eKLR:**

“This Court is divested with jurisdiction to determine the merits of a reference that is filed outside the statutory stipulated period. And without jurisdiction, the Court can do no more than down its tools.”

2. The Chamber Summons is a reference of a taxation by the Taxing Master. The Taxing Master delivered her Ruling on 25th January 2019. The Chamber Summons as previously stated is dated 23rd May 2019 and was filed in Court on 24th May 2019.

3. The Preliminary Objection objects to that Chamber Summons on the following grounds:

a. That the Chamber Summons application dated 23rd May, 2019 contravenes Rule 11 (2) of the Advocates Remuneration Order as it is filed out of time without leave of Court hence it cannot be entertained.

b. That the Chamber Summons application dated 23rd May, 2019 contravenes Rule 11(1) of the Advocates Remuneration Order as no Notice of Objection to the decision of Taxing Master was issued and is therefore incompetent, misconceived and misplaced.

c. That the application is incurably defective and ought to be dismissed with costs.

4. Paragraph 11 (1) and 11(2) of the Advocates (Remuneration) Order is in the following terms:

“(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.”

5. As stated before the Taxing Master delivered her Ruling on 25 January 2019. The Applicant did not request the Taxing Master to proffer her reasons for her decision, as set out in paragraph 11(2) neither did he give notice of his objection as per paragraph 11(1). It is important to state that the Applicant’s Bill of Cost was dismissed by the Taxing Master and it follows that paragraph 11(1) is not applicable in this case.

6. The Applicant did not file an affidavit in response to the Preliminary Objection. The Applicant only stated in his written submissions that he submitted a letter on 31st January 2019 to the Taxing Master. That letter is not before Court and the Court has therefore no way of

confirming its existence. What however is on the Court record is a letter written by the Applicant addressed the Deputy Registrar of this Court and dated 19th April 2019 but filed in Court on 24th April 2019. It does not take much imagination for one to note that that letter was beyond the period provided in Paragraph 11(2). It is clear to me that the Applicant has failed to prove to this Court that he abided by the strict timelines provided in paragraph 11 (1) and (2). The holding in the case **GOVERNORS BALLOON SAFARIS LIMITED V SKYSHIP COMPANY LIMITED & ANOTHER [2015] eKLR** rings true as follows:

“The Applicant did not annex a certified copy of the said letter even after it had decided it was important to annex a copy. The Court is left with no choice than to say that none was given as required. Even if it had been filed, the Applicant did not file the Reference until 48 days after the delivery of the taxation Ruling. On that score, the Reference is fatally assailed.”

7. The Applicant failed to seek leave to file the reference out of time and the Court can only say to him this, his reference is incompetent for failing to abide by the timelines of the Advocates (Remuneration) Order paragraph 11(1) and (2). Being incompetent there can but only be on result. It fails.

CONCLUSION

8. The following are the orders of the Court:

a. The Chamber Summons dated 23rd May 2019 is struck out with costs.

b. The Preliminary Objection is successful and the costs thereof shall be paid by the Patrick Kimathi Muchena t/a Arimi Kimathi & Company Advocates.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of NOVEMBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT