



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

MISC. CIVIL APPL. NO.7 OF 2018

PMM.....APPLICANT

- V E R S U S -

NWM.....RESPONDENT

R U L I N G

By the Chamber Summons dated 6/2/2018, the applicant prays that the Hon. Court be pleased to extend time within which the applicant can lodge notice to the taxing officer of his objection to the items of taxation in **Nyahururu C.M. Divorce Cause No.7/2017, PM v NW** as per the Certificate of Costs dated 31/8/2017. He also prays that the costs of this application be borne by the respondent.

The application was expressed to have been brought under Order 11 of the Advocates (Remuneration) Order, 1 1962.

The applicant was the petitioner in Divorce Cause No.7 of 2016 and upon its determination, the court awarded the costs to the respondent. By a letter dated 1/8/2017, the respondent applied for a Certificate of Costs and the taxing officer assessed the costs at Kshs.73,347/= and a certificate of costs was issued on 31/8/2017 (PMM2). The applicant did not become aware of the assessment till 1/2/2018, after a copy of the certificate was served on his advocate under a letter dated 10/1/2018; that the applicant was not able to comply with Order 11(2) of the Advocates (Remuneration) Order by issuing a Notice in writing to the taxing master that he was objecting to the taxation within 14 days; that the taxation having taken place on 31/8/2017, the 14 days within which notice should have been issued lapsed on 14/9/2017 as the applicant was not aware of the decision. That is why the applicant has moved this court under Order 11 paragraph 4, seeking extension of time: that once the applicant learnt of the certificate of costs, he filed the application on 7/2/2018, within 6 days of learning of the taxation.

Counsel relied on the decision of **Application No.4/2015 Benard Gichobi Njira v Kanini Njira & another; Misc.Appl.83/2015; Labh Singh Harman Singh Ltd v Denacy Investment Ltd and others** where the court considered assessment of costs in the magistrate's court and taxation of costs in the High Court.

The application was supported by the applicant's affidavit and his counsel also filed submissions in support of the application.

The application was opposed and the respondent filed a replying affidavit together with submissions of counsel. Mr. Kaburu, Counsel submitted that this application is incompetent because the applicant failed to comply with Order 51 Rule 10(1) Civil Procedure Rules by failing to indicate the specific Rule of Order 11 of Advocate's Remuneration Order he purports to invoke this court's jurisdiction; that the court cannot grant orders on such omnibus provisions; Secondly, that Order 1, 1962 as quoted by the applicant is none existent; counsel further submitted that in such an application, the applicant should have filed an objection to taxation or assessment of costs under Rule 11(2) of Advocate's Remuneration Order; that the said objection should have been filed within 14 days but none was filed as there is no evidence of filing; that under Rule 11(2), the applicant should have filed a reference to this court and he urged that this court finds that the applicant did not follow due process. Counsel admitted that indeed the court has discretion to extend time, but in this case, there had been inordinate delay of one year and that the applicant has not demonstrated that the costs are illegal or outrageous. For that submission, Counsel relied on the decision **Sound Entertainment Ltd v Antony Burungu & Co. Advocates Misc.21 of 2013 (NRB) (2014) KLR** which sets out the procedure for challenging a taxation.

I do agree with the respondent that the applicant did not properly invoke the jurisdiction of this court in that he did not specify under what Rule of Order 11 he was moving this court. Secondly, Order 1 1962 is a nonexistent provision. However in his submissions, Mr. Waichungo clearly stated that he relies on Order 11(1) – (4) Advocate's Remuneration Order which he referred to in his submissions. It is clear from the prayers sought what the applicant was seeking, that is, extension of time to challenge the taxation. As was observed in the case cited by the respondent, **Sound Entertainment Ltd (Supra)** the procedure for challenging the taxing master's decision is under Order 11 of the Advocates Remuneration Order. This court is mindful of Article 159 (2)(d) of the Constitution which enjoins this court to administer justice without undue regard to procedural technicalities. At least the applicant's counsel was aware of the Order under which to move the court, i.e. Order 11 of the Advocate's (Remuneration).

The Order 11 provides as follows:

- 1. Should any party object to the decision of the taxing officer, he may within 14 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 14 days from the receipt of the reasons apply to the judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.**
- 3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with leave of the judge but not otherwise, appeal to the Court of Appeal.**
- 4. The High Court shall have power and its discretion by order to enlarge the time fixed by subsection (1) or subsection (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.**

As rightly pointed out by Justice Limo in the case **Kanini Njiira (Supra)** the terms taxation and assessment are used interchangeably.

Ordinarily, the costs are assessed in the Lower Courts while in the High Court and above, costs are said to be taxed, which in each case is an estimate of the amount of litigation related expenses that a party may be awarded.

In the Lower Court, an application is made to the Executive Officer who assesses the costs based on the bill or schedule filed by the applicant as was the case herein. The other party is not invited or supposed to be party to the assessment. In the High Court however, all parties are supposed to be served to attend the taxation.

Upon assessment, it was the duty of the respondent to inform counsel for the applicant what the assessed costs were so that if the applicant wished to challenge the decision, he would have done so.

The respondent has not denied the fact that though the assessment was done and a certificate issued on 31/8/2017, the applicant was not aware of it till 1/2/2018 and upon hearing of it, the applicant's counsel moved with alacrity to file this application within 6 days.

I find that the applicant is not guilty of inordinate delay because he moved fast upon becoming aware of the assessment. By the time the applicant became aware of the certificate of costs, the 14 days within which he would have issued a notice of objection had long lapsed on 14/9/2017. I am satisfied that the only way to challenge the said certificate of costs was by first seeking leave of court to file the notice out of time. As clearly provided under Order 11 Rule 4, the court has a wide discretion whether to allow or disallow such application and that discretion must be exercised reasonably and fairly. As held by **Justice Onyancha** in the **Sound Entertainment Case Supra**, the applicant has to demonstrate that he has good and sufficient grounds to persuade the court to exercise its discretion. In this case, the applicant has pointed out the items that he intends to challenge. Several items where costs were awarded to the respondent e.g. item 1 where instruction fees was assessed at Kshs.50,000/= instead of Kshs.8,000/= as per the schedule; items 3, 7, 10, 13 as to why fees was awarded yet no affidavit was found on record supporting that claim.

I have earlier found that the applicant was not to blame for the failure to challenge the certificate of costs within time. The delay was occasioned by the respondent's failure to serve the applicant.

For all the above reasons, I am satisfied that the applicant has demonstrated that he is deserving of the prayer sought and I hereby allow the application and grant time of 14 days within which the applicant may lodge a notice to the taxing officer of his objection to the taxation/assessment. Costs to be to the cause.

Dated, Signed and Delivered at NYAHURURU this 8th day of October, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Kaburu for respondent

Ms. Wanjiru holding brief for Waichungo for applicant

Soi – C/A