



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

MISC. CIVIL APPLICATION NO. 308 OF 2011

RANDOLPH M. TINDIKA t/a

TINDIKA & COMPANY ADVOCATES.....APPLICANT

VERSUS

JANE MARETE.....RESPONDENT

RULING

1. In a Chamber Summons dated 9th August, 2016 this court was moved through the provisions of Rule 11 of the Advocates (Remuneration) Order for the following orders:-

- i. That the time for objecting against the decision of the Taxing Officer dated 9th September, 2011 be enlarged;
- ii. That the respondent be given time to object to the decision of the Taxing Officer dated 9th September, 2011, and
- iii. That costs be provided for.

2. The application is supported by the affidavit of Jane Marete, the respondent (applicant) sworn on 9th August, 2016 and the grounds in support of her application. The applicant (respondent) did not file a replying affidavit or grounds of opposition. He sought time to file a replying affidavit but this court having noted that the respondent was served with a hearing notice on 16th February, 2017 ordered that the application proceeds to hearing. Mr. Tindika, Learned Counsel informed the court that he was entitled to respond to the application herein on points of law.

3. Mrs. Omondi, Learned Counsel for the applicant in reference to paragraph 4 of the affidavit submitted that the applicant had a good working relationship with the respondent. The relationship between the two fell apart leading to taxation of the matters in issue. Counsel stated that the applicant thought that she would get into an amicable settlement with the respondent but she was served with summons in December, 2015. That is when she realized that there was to be no consent. As at that time, 4 years had elapsed. The court was informed that the applicant took time to try and reach out to the respondent.

4. The court was referred to paragraphs 6, 7, 8 and 9 of the supporting affidavit that states that the applicant severally paid different amounts of money to the respondent.

5. Mr. Tindika, the respondent submitted that taxation does not lead to a certificate of costs and that provisions of Order 9 rule 9 of the Civil Procedure Rules requires that where there is a Judgment, a notice of change of Advocates cannot be filed without consent of the Advocate on record or leave of the court. He stated that none of the foregoing has been done in this matter.

6. Mr. Tindika then delved into issues of facts which this court will not consider as he failed to file a replying affidavit to respond to the issues raised by the applicant in her affidavit.

7. On the issue of Notice of change of Advocates, Mrs Omondi submitted that they filed a consent on 9th August, 2016 duly signed by M/s Kadima & Co. Advocates where the said law firm consented to the law firm of Omondi Kinyua & Co. Advocates to come on record for the applicant.

The issue for determination is if this court may extend the time for filing a reference under the Advocates remuneration order in the circumstances of this case.

8. Paragraph 11 of the Advocate's Remuneration Order 2009 gives the court discretion to extend time for lodging a reference notwithstanding the expiry of the 14 day period prescribed for filing of a reference from a Taxing Master's decision on costs. Paragraph 11 of the Advocates Remuneration Order provides as follows:-

(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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (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. (emphasis added).

9. A perusal of the Court file reveals that the law firm of M/s Kadima & Co. Advocates filed a Notice of appointment on 5th May, 2011 and represented the applicant even at the time when the Bill of costs was taxed on 1st July, 2011. A ruling on taxation was delivered on 9th September, 2011. A consent, duly signed by representatives of the law firm of M/s Omondi Kinyua & Co. Advocates and M/s Kadima & Co. Advocates was filed on 9th August, 2016. A notice of change of Advocates was filed on the same day by M/s Omondi Kinyua & Co. Advocates.

10. In a letter addressed to the Deputy Registrar filed on 10th October, 2012, M/s Kadima & Co. Advocates sought to be informed of the date when the ruling on the taxation would be delivered. The face of the said letter contains a notation to the effect that the ruling was delivered on 9th September, 2011 and the said law firm could peruse the file.

11. Although in paragraph 7 of her supporting affidavit the applicant states that she has paid the respondent Kshs. 1,079,000/=, it is clear from her deposition in paragraph 4 that the respondent was representing her in 4 cases. The applicant discloses in paragraph 7 that the said payment was in respect to the 4 cases. Out of the said cases Mombasa High Court Civil Suit No. 201 of 2008 was consolidated with High Court Civil Suit No. 142 of 2007.

12. The applicant attached to her affidavit an interim fee noted dated 19th August, 2010 for the sum of Kshs. 358,385 which she used as the basis for challenging the amount taxed at Kshs. 615,117.00. This court notes that it was not a final fee note. The applicant slept on her rights for almost 5 years from 9th September, 2011 when the Bill of costs was taxed until the 9th of August, 2016 when she filed the present application. In this Court's considered view, the applicant's submission that she was negotiating the issue with the respondent cannot hold. That was an overly long duration of time to try to negotiate this matter without taking any precaution to guard herself against the said negotiations falling through.

13. Due to inordinate delay on the part of the applicant to act in this matter, this court declines to exercise its discretion in her favour. The application dated 9th August, 2016 is hereby dismissed. Costs are awarded to the respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 11th day of May, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mrs. Nyange holding brief for Mrs. Omondi for the applicant

Mr. Tindika for the respondent

Mr. Oliver Musundi - Court Assistant