



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 209 OF 2015

CONSOLIDATED WITH MISC. APPLICATION NO. 210 OF 2015

ROBINSON ONYANGO MALOMBO t/a

O.M. ROBINSON & CO. ADVOCATES.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

R U L I N G

1. Before the court for consideration and determination is the Notice of motion dated 11/08/2016 and praying for orders that:-

(1) This Application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.

(2) Pending the hearing of this application inter partes, this Honourable Court be pleased to order a stay of execution of the Certificate of Taxation issued on 8th December 2015, the resultant Decree issued on 20th April 2016 and all consequential orders and actions arising therefrom.

(3) This Honourable Court be pleased to enlarge the time within which the Client/Respondent is required to file a Reference under Paragraph 11 of the Advocates (Remuneration) (Amendment) Order.

(4) Pending the hearing of the Respondent's intended Reference, this Honourable Court be pleased to order a stay of execution of the Certificate of Taxation issued on 8th December 2015, the resultant Decree issued on 20th April 2016 and all consequential orders and actions arising therefrom.

(5) This Honourable Court be pleased to make any other order as it may deem just, fit and/or expedient.

(6) The costs of this application be provided for.

2. By the time the application was argued inter-parties, prayers 1 & 2 became spent and what is pending

consideration is only prayers 3, 4, 5 & 6.

3. The Notice of motion was supported by the affidavit of JIMMY WALIAULA and grounded on the facts that:-

- a) **The court has discretion to grant the orders sought.**
- b) **Certificate of taxation was issued on 8/12/2015 and a judgement on it on 20/4/2016.**
- c) **The applicant is able to satisfy the judgement should the proposed reference fail and that it is prepared to abide by all conditions imposed by the court as a condition for extension of time to lodge the reference.**
- d) **That as a result of the judgement entered for the Advocate against the Client/Applicant, there were proceedings by judicial review seeking to enforce the judgement.**
- e) **That prior to taxation, the advocate had expressed desire to cease acting as a consequence of which discussions were held between the parties and an agreement reached that the fees due to him be discussed and payment made timeously. That was during the last quarter of the year 2015. As a consequence of the discussion no advocate was appointed to act for the Client/Applicant.**
- f) **That the sum taxed was exorbitant and not justifiable.**
- g) **That unless the orders sought are granted, the advocate will proceed to execute the decree and the client may not be able to recover the sums should the Reference later on succeed.**

4. To the application, the Advocate/Respondent filed of Notice of Preliminary Objection and a Replying Affidavit by one ROBINSON ONYANGO MALOMBO.

5. The Notice of Preliminary Objection challenges the application on two points;

- (i) **No stay of execution can issue in this file as no execution can issue against the client applicant the same being inconcurable on the provisions of section 21(4) 9(5) of the Government Proceedings Act.**
- (ii) **Prayer 3 cannot be granted as the Certificate of Costs has already been made a judgement under section 51(2) of the Advocates Act.**

6. The Replying Affidavit on its part challenged the depositions by MR JIMMY WALIAULA, reiterated that the Advocates was duly instructed; that the bills of costs as well as the application for judgement were duly served and affidavits of service filed and that there is no intent to execute against the judgement debtor as the law forbid execution against a County Government.

7. The Advocate specifically deny any agreement that he would continue to act without payment of fees and that his actions in filing the bills of costs having some taxed and seeking judgement on the certificate of taxation were unequivocal indications that he was insisting on payment of his fees but the client choose not to defend the processes. The parties equally filed lists of authorities and relied on them at the hearing.

Analysis and consideration

8. Having read the papers filed by both sides, I have come to the conclusion that the following issues present themselves for consideration and determination by the court:-

- a) **Whether or not time ought to be enlarged for the client/applicant to lodge a reference out of time.**

b) Whether or not there should be granted stay of execution of the Certificate of costs issued on 8/12/2015 and the decree issued on the 20/4/2016 together with all the consequential orders and actions arising therefore.

c) What other suitable orders ought to be made?

d) Who should pay the costs of the application?

Enlargement of time to file Reference:

9. Under the provisions of Rule 11 of the Advocate Remuneration Rules, any party objecting to a decision by the taxing officer is required to give notice of such objection to the taxing master within 14 days after the decision. The reference was never filed because the taxation proceeded *ex parte* albeit the client was duly served.

10. Although the client/applicant does not say when the fact of taxation was brought to its attention, there is an affidavit of service sworn by PAUL ODHIAMBO OUTAH on the 17/3/2016 which says that the client/Applicant was served with an application seeking the conversion of the Certificate of Costs into a decree. That service was effected upon one JIMMY WALIAULA, the deponent of the affidavit in support of the application under consideration and he accepted service by stamping on the face of it and signing thereon. That application and the affidavit in its support were explicit that the bill was taxed on 25/11/2015 and a certified of costs issued on 8/12/2015. Indeed the ruling of the taxing officer, the certificate of costs and a demand for payment were all annexed and exhibited in the application. With such evidence it is not difficult to conclude that the fact of taxation and the amount so taxed was brought to the attention of the Client/Applicant on the 14/3/2016.

11. There is equally another affidavit of service by the same Process Server sworn on the 10/5/2016 in which it is deponed that the client applicant was again served with the decree, certificates of order against the government and a notice calling for payment on the 21/4/2016. That service was effected upon one Ridhwan Muumin a legal clerk with the Client/Applicant who not only acknowledged the receipt but also signed on the copy filed in court to evidence service. The fact of service in those affidavits of service have not been controverted.

12. From the affidavit in support of the Application now under consideration the trigger is expressed at Paragraph 6, 7 and 20 of MR JIMMY WALIAULA's affidavit in which the deponent says that Judicial Review proceeding have been commenced to compel payment; unless the Orders sought are granted, the Respondent will proceed with execution and the applicant will suffer irreparable harm and injury considering the sum is colossal and a burden to the tax payers and it stand not be in a position to recover the sum from the Advocate/Respondent should the Reference succeeds.

13. Whether or not to extend time set by a statute is a judicial discretion which must be exercised on sound and established legal principles. In considering such an application the court take into account the reason for delay, the Length of delay and the special circumstances of each case. See *Teachers Service Commission vs Simon P Kamau (2011) eKLR*.

14. In this case, the only reason advanced for delay is that there was attempt at negotiations with a view to retain the services of the Advocate/Respondent so that he forebears the initiated process of taxation. That to this court could only have been a reason upto the 14/3/2016 when the Client/ Applicant was served with the application for judgement and a certificate of costs showing that taxation had been concluded.

15. From that day the client/Applicant was aware that there were no agreements not to tax and that if there had been any the Advocate had reneged on the same. The client having been so notified was expected to take remedial steps including seeking extension or enlargement of time to file a reference. It did not take any such steps. In fact, it equally failed to defend the application for judgement with the consequence that a judgement was entered and a decree issued. As far as this matter is concerned the entry of judgement and issuance of the decree was the last proceedings taken against the Applicant prior

to the current application being filed served.

16. However, from the Advocate's/Respondents replying affidavit it is demonstrated that this matter having come to its logical conclusion by entry of judgement, judicial proceedings were initiated seeking mandamus to compel settlement and the Applicant says, without more that those proceedings are at advance stage. To this court therefore, no execution proceedings can issue and none have been shown to have been initiated. If that be the position then the question that must be asked and answered is what would be the efficacy of granting the order sought even if the Applicant had discharged its obligations in law? I find no good reasons or purpose to be served.

17. On the length of delay, it has been demonstrated that the Applicant/client was served for taxation on 14/9/2015, was served with certificate of costs on 14/3/2016 as well as decree as well as Certificate of Order against the government on the 21/4/2016. In this file it is not disclosed when the Judicial Review proceedings were filed and served and the stage at which they are currently. However, I have at my own time perused that file and I have noted that the file among others were heard and a ruling reserved for the 16/9/2016 on whether or not the County Secretary and the Director of Finance should be committed to jail for being in contempt of the courts orders of mandamus which were issued by the court and duly served upon them. My further reading of that file reveal that even the judicial review application was indeed served and in time but the Applicant took no steps to participate at trial till the orders of mandamus were issued.

18. I have highlighted all the foregoing facts to interrogate whether the conduct of the applicant is that which deserve the judicial discretion in enlargement of time. Having done so I have come to the conclusion that the delay is not only unexplained but also inordinate. The conduct of the Applicant/Client is the kind that is out rightly indolent, lackluster and oblivious and indeterrent to the obligation that it has a duty to assist the court meets its objective to dispense justice timeously, proportionately and without delay. In this matter the court takes the view that to enlarge time and set aside the proceedings undertaken in the absence of the Client/Applicant as a result of its failure to honour service would be to aid a party who has by evasion or just indeterrence sought to derail and delay the course of justice. See *Mbogo vs Shah (1967) E.A 166*. That is not the purpose for which judicial discretion is meant to serve.

I may only add that even the mandate by Kenyans to court to administer justice is given with a caution that justice should never be delayed.

19. Premium has been paid to the fact that the sum awarded in this file and which the Applicant is expected to meet if reference is not allowed is colossal. The decree and the certificate of cost exhibited show that the sum is Kshs.1,614,229.26 with interests. That sum was brought to the attention of the Client/Applicant way back in March 2016. If indeed the applicant and its officer who received the service, and has sworn the affidavit, honestly appreciated the same to be colossal, they would taken the expedient steps commensurate with the magnitude of that sum.

20. It matters not to me that the applicant is a public entity. Parties who come to court must be seen as such parties and equal before the law. In fact, being a creature of the law the Applicant is even more bound to respect the law and its dictates. I believe that the manner the Applicant has behaved in this matter must be abhorred in the strongest terms and inquiries need be made whether there was some abdication of duty by a public officer to the detriment of the state organ and the public now exposed to pay for the inaction by such state officers.

21. I have come to the conclusion that the applicant is not deserving of the courts discretion to extend time within which to file a reference. Now that there would be no references, there is no question of stay of execution with regard to the Certificate of Costs issued on the 8/12/2015 which remains undisturbed with all the subsequent and consequent proceedings taken and pursued pursuant to it.

22. It follows that the application dated 11.08.2016 lacks merit and it is ordered dismissed with costs.

23. When the parties argued the application it was agreed that the decision in this file applies to and bind

the determination in Miscellaneous Application No. 210 of 2015.

24. It follows that the application in Misc. Application 210 of 2015 is equally dismissed with costs.

Dated and signed at **Mombasa** this day **8th** day of **September 2016**.

HON. P.J.O. OTIENO

JUDGE

Delivered this **9th** day of **September 2016**

HON. ANNE OMOLLO

JUDGE