



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 11 OF 2012

PATRICIA BINI.....PLAINTIFF

VERSUS

1. MELINA INVESTMENT LTD

2. GIUSEPPINO VALSESIA

3. PAULA SASSO

4. ROBERTO SASSO.....DEFENDANTS

RULING

1. By a Chamber Summons application dated 22nd October 2019, the Defendants herein pray for orders:-

- 1. That this Honourable Court be pleased to enlarge the time within which to file a reference against the decision of the Taxing Officer delivered on the 20th December 2018;***
- 2. That this Honourable Court be pleased to set aside the ruling made by the Taxing Officer herein on the 20th December 2018 striking out the entire Defendant's party and party Bill of Costs dated 9th April, 2018***
- 3. That this Honourable Court be pleased to remit the Defendant's Party and Party Bill of Costs dated 9th April 2018 to another taxing master to be taxed afresh;***
- 4. That the Reference filed herein be deemed as properly filed though filed out of time;***
- 5. That the costs of this application be provided for.***

2. The application which is supported by an affidavit sworn by the 2nd Defendant Giuseppino Valsesi on 22nd October 2019 and a Further Affidavit sworn on 14th January 2020 is premised on the grounds that:-

- i) The Learned Taxing Officer erred in law and principle by making a prejudicial and draconian finding of declaring the Bill of Costs to be defective and striking it out in its entirety without ascribing to it any justifiable and reasonable grounds;***
- ii) The Taxing Officer wrongly interpreted the orders issued by the Court of Appeal in Civil Appeal No. 54 of 2015; Patricia Bini –vs- Melina Investments & 3 Others where the Superior Court's Judgment was upheld except the award of Kshs 7000,000/- damages which was set aside;***
- iii) The delay in filing the Reference is not inordinate and inexcusable as it was occasioned by the fact that the Defendants reside and work for gain in Italy and had not been in communication with their Advocates for some time;***
- iv) The Defendants only became aware of the decision of the Taxing Master when they came to Kenya on 23rd September 2019.***

3. The Application is opposed. In a Replying Affidavit sworn on her behalf by her Advocate Nicholas Sumba and filed herein on 11th

December 2019, the Plaintiff avers that the Defendants' application is an abuse of the Court process brought about as an afterthought as the Deputy Registrar's decision being challenged was delivered way back on 20th December 2018.

4. The Plaintiff avers that no attempt has been made by the Defendants to satisfactorily explain the reasons for the inordinate delay in filing the Reference and that the fact that the Defendants reside in Italy cannot be a reason to justify the delay in a world that has since become a global, digital village where distance is no longer a challenge in communication.

5. I have perused and considered the application as well as the response thereto. The power to grant leave extending the period of filing a Reference out of the statutory period is discretionary and can only be granted on a case by case basis. While it is not a right, the discretion to grant it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on their behalf and in their favour.

6. In *Mwangi –vs- Kenya Airways Ltd (2003)* the Court of Appeal observed that some of the factors to be taken into consideration in such an application include the following:

a) The period of delay;

b) The reason for the delay;

c) The arguability of the appeal;

d) The degree of prejudice which could be suffered by the Respondent if the extension is granted;

e) The importance of compliance with time limits to the particular litigation or issue; and

f) The effect if any on the administration of justice or public interest if any is involved.

7. From the material placed before me, it is evident that the Ruling of the Taxing Master was given in the presence of Counsel for the Defendants on 20th December 2018. The two paragraph Ruling by the Honourable Wandia Deputy Registrar reads as follows:

“RULING

The Ruling arises from the Defendant's party and party bill of costs.

Having read the submissions of the respondent and those of the applicant, it is clear that the High Court Judgment was upheld except the award of 7000 000/- which was set aside. As such, the Defendants can only tax the Plaintiffs on the counterclaim. The bill is therefore defective and is struck off.”

8. Aggrieved by this Ruling, the Defendants' Counsel wrote to the Honourable Deputy Registrar a day later inquiring, as required by the Rules, the reasons for the decision for purposes of filing a reference to this Court. A response to that enquiry was given by a letter dated 15th January 2019 as follows:

“We acknowledge receipt of your letter dated 21st December 2018.

We hereby inform you that the Ruling bears the reasons for the taxation.”

9. No action was thereafter taken on the matter until some nine(9) months later when on the 22nd of October 2019, the application before me was filed. The Applicants have explained the delay on the basis that the Defendants reside and work abroad in Italy and that they were unable to communicate with their Advocates in good time.

10. The Respondent/Plaintiff has however dismissed the application as an afterthought given the period of time taken. While I agree with the Respondent that the world has since become a global village where communication is not hampered in any way by physical distance, I did not think in the circumstances herein that the delay was inordinate and/or inexcusable.

11. It was evident that Counsel for the Defendants did all they could do to obtain the reasons for the Ruling within time and that it was the absence of their client that militated against the timely filing. It was further apparent that within one month of the Defendants' arrival back in the Country, they filed the application before me.

12. At any rate, looking at some of the reasons given for the intended Reference vis-a-vis the decision of the Court of Appeal as attached to the Supporting Affidavit of Giuseppino Valesi, I am unable to say that the intended Reference is in-arguable. Of course, all the Applicants have to show at this stage is arguability-not a high probability of success. At this point in time, the Defendants are not required to persuade this Court that the intended Reference has a high probability of success. All they are required to demonstrate is the arguability of the Reference; a demonstration that they have a plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict.

13. The Respondent has not stated and I am unable to see any substantial adverse effects granting an extension of time will have on the

Respondent other than permitting the Applicants to exercise the preciously cherished right of Appeal.

14. In the circumstances, I will grant Prayer No. 1 of the Chamber Summons application with the addendum that the Intended Reference be filed within 14 days from today.

15. The Defendants/Applicants shall however bear the costs of this application.

Dated, signed and delivered at Malindi this 10th day of July, 2020.

J.O. OLOLA

JUDGE