



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISCELLANEOUS APPLICATION NO. 664 OF 2013
MBUGUA & MBUGUA CO.ADVOCATES..... APPLICANT
VERSUS
KENINDIA ASSURANCE COMPANY LTD.....RESPONDENT
RULING

The chamber summons dated 30th May 2014 and filed in court on 5th June 2014 is brought under the provisions of paragraph (2) of the Advocates Remuneration Order, Cap 16 Laws of Kenya (Advocates Act). Taxation It is a special procedure provided by the law for challenging or objecting to taxed bills of costs by the taxing officer or Deputy Registrar under the special jurisdiction conferred by the Advocates Act, where in so taxing, the taxing officer sits as an officer of the superior court exercising delegated powers of a judge of the superior court.

The application seeks 3 main orders namely:-

- 1) That a declaration that the bill of costs dated 2nd July 2013 and taxed on 1st April 2014 is a nullity for the reason that the bill was statute barred.
- 2) That in the alternative, the court may be pleased to review and or set aside the Deputy Registrar's ruling delivered on 1st April 2014 on the advocate/client bill of costs dated 2nd July 2013.
- 3) That this court be pleased to make such other orders and or further orders as it may deem just and fit to make in the circumstances.
- 4) Costs of and accessioned by this application be provided for.

There are 2 main grounds upon which the application is premised:-

- i. That the Deputy Registrar misdirected himself in making the ruling on taxation in respect of a bill which emanated from PMCC No. 87 of 1996 which was in effect statute barred as the bill was filed after a period of more than 7 years.
- ii. That the Deputy Registrar failed to consider the objector's submission which were though filed late, raised the issue of limitation which ought to have informed her on the legal principle to be followed.

The said application is further supported by the affidavit of R.N. Kitheka and annexures thereto. The application is vehemently opposed by the respondent advocate who filed his replying affidavit on 21st November 2014 sworn by Joseph Njoroge Mbugua advocate on the same day.

The parties appeared before me on 25th November 2014 and argued their respective positions by way of oral submissions reiterating the content of the application supporting affidavit and the replying affidavit. The parties further agreed in principle that this ruling be adopted in HC MISC APPL 606 of 2013 with the necessary modification as the primary suit in that matter is different –SRM CC 2759/2000.

Before delving into the merits or demerits of the application herein, an important issue must first be resolved, and that is the issue of whether this application is competent, having been allegedly filed outside the stipulated period as provided for under paragraph 11 of the Advocates Remuneration Order. Once I determine that issue and if the answer is in the affirmation, then it will be pointless at this stage to go into the breadth and or width of the application only to waste precious judicial time and resources.

The respondent's advocate Mr Njoroge submitted that the reference was incompetent as the ruling on taxation was given on 1st April 2014 and by dint of provisions of paragraph 11 (1) of the Advocates Remuneration Order, the notification of objection on the items objected to ought to be filed within 14 days from the date of taxation/ruling. Seeking for reasons for taxation and that upon receipt of the reasons, the reference should be filed within 14 days from such date of receipt. In his view, therefore, the notice of objection ought to have been filed before expiry of 14 days from 1st April 2014. In addition, that having received the reasons on 9th May 2014 from taxing officer, the reference should have been lodged by 23rd May 2014 but instead it was lodged on 5th June 2014 which is also outside the period contemplated in paragraph 11(2) of the Advocates Remuneration Order. Further that they should have sought enlargement of such period where it was clear that the time for filing the said proceedings had expired, since an extension is not automatic as it involves the discretion of the court. In other words, that a formal application for extension of time must be made which has not been made or at all hence the reference is incompetent and should be struck out on that ground alone.

In response thereto, counsel for the applicant –client submitted that the notice of objection was filed in time and so was the reference –chamber summons but contending that the delay was not inordinate as it has been explained hence the court should ignore it and decide the application substantively.

I have carefully considered the submissions above and examined the record herein. Indeed, the taxation ruling was delivered on 1st April 2014 and the objection notice was filed on 16th April 2014, upon which the Deputy Registrar remarked that ***“reasons are in the ruling”*** Under the April 2014 calendar, 1st April 2014 was on a Tuesday. The 14th day fell on 15th April 2014 which was one day outside the period stipulated under paragraph 11 (1) of the Advocates Remuneration Order when the Notice of Objection dated 15th April 2014 was filed. The notice ought to have been filed by 15th April 2014 which was the last day, excluding the 1st day as stipulated in the provisions of Article 259(5) (a) of the Constitution that:

“(5) in calculating time between two events for any purpose under this constitution, if the time is expressed-

(a) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included.”

Under paragraph 11(4) of the Advocates Remuneration Order, the objection notice in writing must be filed within 14 days after the decision of the taxing officer, of the items of taxation to which the objector objects.

No doubt the notice was filed outside the stipulated 14 days. Nonetheless the provisions of paragraph 11(4) gives the application objector an opportunity to seek the court's discretionary powers to be

exercised by filing a chamber summons seeking for enlargement of time fixed by sub paragraph (1) stated above. In this case, no such time was sought by the applicant objector, and neither has the said objector sought, in the course of their counsels submissions, even by way of oral application for enlargement of time. Instead, the advocate contended that they filed the notice of objection in time and that the short delay has been explained. With utmost respect to the learned advocate for the objector, he was in essence trivializing that special procedure and the limitation of time provided for under the law.

Time once stipulated by law must be adhered to for doing any act or taking any step of a judicial nature. And where the law has gone further to provide that if such time has elapsed then a party may seek enlargement of time, and a party who is caught up by such limitation deliberately refuses or fails to seek for such enlargement of time, the court, regrettably cannot exercise any discretion in their favour as the discretion to enlarge time can only be invoked where there is an application as stipulated under the Act and paragraph and not on the court's own motion. The applicant simply stated that the delay had been explained. Such explanation could only be entertained in an application under sub paragraph 11(4) seeking for enlargement of time and not a by the way after a serious objection had been raised by the respondent, based on the established provisions of the law.

Consequently, I find the notice of objection filed on 16th April 2014 and dated 15th April 2014 incompetent and proceed to strike it out.

The other issue similar to the one above, is, therefore, whether the reference herein as filed on 5th June 2014 and dated 30th May 2014 is competent before the court. The applicant in paragraph 5 of their supporting affidavit contend that they received the reasons for taxation (as contained in the ruling) on 9th May 2014 when they went to peruse the court file after filing their notice of objection on 16th April 2014 asking for reasons for the taxation. Under paragraph 11(2) of the Advocates Remuneration Order, the objector "may within 14 days of receipt of the reasons apply to a judge by chamber summonssetting out the grounds of his objection."

In this case, again examining the calendar for the month of May 2014, 9th May fell on a Wednesday. The fourteenth day from then, excluding 9th was 23rd May 2014 which was another Wednesday. The chamber summons was filed on 5th June 2014, 13 days later. The applicant did not seek for enlargement of time as provided for under paragraph 11(4) of the Advocates Remuneration Order to validate that period.

Instead, when challenged by the respondent, they allege the application was filed in time and that the delay if any has been explained. Limitation period does not fly in the face of the court as it confers or ousts the jurisdiction of the court to hear or from hearing matters before it. It cannot be ignored, and particularly when there is an available window of opportunity in law for a party to utilize to ventilate their grievance.

Regrettably, the applicant has not sought to exploit that window. The law does not contemplate that the court should suo moto grant leave or extension of time which has elapsed without a party asking for such orders. The so called explanation could only be plausible if it was made on the right proceedings, not when it is being challenged as an issue of jurisdiction.

Jurisdiction, it is trite, is everything, without which no court should decide any dispute on merit. Consequently, I find the objection by the respondent merited and I proceed to strike of the chamber summons dated 30th May 2014 and filed in court on 5th June 2014 as being incompetently filed.

Having struck out the Notice of Objection of taxation and the reference as filed, there is nothing left for this court to decide on merit.

I hasten to add that the matter of limitation is not matters of procedural technicalities. They go to the root of the cause and therefore Article 159 (2) (d) of the Constitution cannot aid parties who flout the provisions of the law and seek to circumvent the same to achieve their own ends. Procedures are a means

to an end not an end in them. Without adhering to them, the law would become an unruly horse. Procedures are handmaidens to the rule of law. This court, being the temple of justice enjoys inherent unlimited jurisdiction in matter of criminal and civil nature, save as excluded by Article 165(5) of the Constitution with regard to jurisdiction relating to disputes referred to in Article 162 (2) a and b of the Constitution, and those reserved for exclusive jurisdiction of the Supreme Court.

However, in the interest of justice, and bearing in mind that the matter explained of in the now defunct reference raise very serious issues of law, I exercise my discretion and grant the applicant leave to file an application under the provisions of paragraph 11(4) of the Advocates Remuneration Order.

Such application seeking for enlargement of time shall be filed within 14 days from the date of this ruling failure to which the leave herein lapses.

The respondent shall have costs of this application which is struck out. In addition, and as agreed between the parties at the commencement of the hearing of this application and as ordered by this court, this ruling is adopted as affecting HC MISC APPL. NO. 665 /2013.

Dated, signed and delivered at Nairobi this 8th day of May 2015.

R.E. ABURILI

JUDGE

8.5.2015

Coram Aburili J

C.C. Kavata

Mr Ndungu holding brief for Njoroge for respondent

Mr Wahome for applicant.

Court - Ruling read and pronounced in open court as scheduled after it was not cause listed for 26th February 2015.

R.E. ABURILI

JUDGE

8.5.2015