



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. NO. 241 OF 2013**

**ODERA OBAR & Co. ADVOCATES.....ADVOCATE/  
RESPONDENT**

**VERSUS**

**ALY ENTERPRISES LIMITED.....1<sup>ST</sup> CLIENT/  
APPLICANT**

**HALAL MEAT PRODUCTS LIMITED.....2<sup>ND</sup>  
CLIENT/APPLICANT**

**MOHAMED ALI MOTHAMBA.....3<sup>RD</sup>  
CLIENT/APPLICANT**

**MAFUTA PRODUCTS LIMITED.....4<sup>TH</sup>  
CLIENT/APPLICANT**

**RULING**

1. Before the court is a Chamber Summons dated 31<sup>st</sup> August, 2015 by the Applicants. The same seeks the orders to the effect that time for filing notice of objection to taxation be enlarged and in the alternative, the application be admitted as reference against the taxation dated 12<sup>th</sup> August, 2014, where the decree dated 6<sup>th</sup> November, 2014 issued therein be set aside. The Applicants also seek for an order of fresh re-taxation upon the setting aside of the decree, including the costs of the application. The application was based on the grounds contained in the application supported by the supporting and supplementary affidavit of Juma Mohammed Motha sworn on 31<sup>st</sup> August, 2015 and 14<sup>th</sup> September, 2015.
2. Before delving into the analysis of the affidavits before the court together with the merits or otherwise of the application, it is important to point out, that the Applicants have once again asked this court to set aside the certificate of taxation and decree that was resultant from the taxation proceedings as an alternative prayer. I am of the opinion that for the court to consider the averments and depositions presented by the Applicants and the Respondent with regard to setting aside the taxation proceedings and resultant decree, the procedure for institution of a Reference

- under Paragraph 11 of the Advocates (Remunerations) Order must be adhered to. In the instant matter, the applicants failed to give notice of objection to the taxing master within 14 days of the decision as provided for in subparagraph 11(1) of the Advocates (Remuneration) Order. In the circumstances, the jurisdiction of this court to revisit the taxing master's decision as invited to do by way of reference does not begin to accrue. Further, in the absence of the objection, the taxing master has not given his reasons for the taxation decision and thus the reference to the judge as envisioned under Paragraph 11 of the Advocates (Remuneration) Order has also not accrued. For these reasons, the court, refrains from delving into the issues pleaded in support of the reference of the taxation proceedings. The same should only be canvassed after due procedure has been followed and a proper reference filed before the court, after the determination of whether or not to grant extension of time to file an objection to the decision of the Taxing Master.
3. Having said so, the ruling herein should only be restricted to the determination of whether or not the court should grant the enlargement of time to file the reference.
  4. In this respect, it was contended that the Advocate herein unjustly and irregularly proceeded to tax an Advocate –Client Bill of Costs without any notice to the Client contrary to the legal requirements of the law. That consequently, the Advocate wholly engaged in ex-parte proceedings and obtained certificate of costs and a decree thereto which he has proceeded to initiate execution proceedings. The deponent further stated that the execution of the decree obtained from the taxation proceedings is irregular and prejudicial to the Applicants' right to natural justice. It was also averred that vide a ruling on 25<sup>th</sup> August, 2015, the court issued a stay of execution for seven days to allow for the filing of a reference which stay is yet to expire. According to the deponent, the Applicants were unaware of the taxation initiated by the Advocate since they were not served with the bill of costs dated 6<sup>th</sup> March, 2013 nor a taxation notice as required under the Advocates Act. That in the circumstances, the Applicants were not able to file a Notice of Objection together with the reference against the taxation within the time frame required by law.
  5. In response to the application, the Advocate filed the Replying Affidavit of Kennedy Obar Odera sworn on 4<sup>th</sup> September, 2015. It was contended that the Applicants herein had failed to demonstrate any sufficient cause to warrant the grant of orders sought for the enlargement of time to file a Notice of Objection and Reference. In conclusion, the Advocate claimed that the instant application is unmerited and an abuse of the process of the court because the Clients/ Applicants are truly indebted to the Advocate for the taxed amounts. He further averred that the application was also meant to delay the conclusion of the case and subvert the ends of justice.
  6. In a rejoinder to the Replying Affidavit by the Advocate, the Applicant's through the supplementary affidavit of the Juma Mohammed Motha sworn on 14<sup>th</sup> September, 2015 reiterated that the application before the court only seeks for enlargement of time to file a notice of objection and a Reference to the subject taxation proceedings. The Applicants further reiterated that the Court in its ruling dated 25<sup>th</sup> August, 2015 did not preclude the Applicants from filing an application for enlargement of time to file a reference.
  7. I have considered the application, affidavits, and submissions of the learned counsel to the respective parties. I have also considered the cases cited by the parties in support of their arguments. When challenging the decision of a Taxing Master, Rule 11 of the Advocates (Remuneration) Order comes to mind. The same 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 (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)

8. From the above provision the power to enlarge time is donated to this court. Further same is discretionary. It is now trite law that where the court has discretion to do something, the same should be exercised judiciously. Judicious exercise of discretion calls for fairness to both sides. The court has to therefore assess whether the Applicants have provided sufficient grounds to persuade this court to exercise its discretion in their favour. See the case of **Njeri Onyango & Co. Advocates –v-Ufundi Co-operative Society Limited (2014) eKLR.**
9. The Applicants herein have pleaded that the taxation proceedings were done exparte. That the reason they were unable to attend the taxation proceedings was due to the fact that they were not served with the Notice of taxation and Bill of Costs dated 6<sup>th</sup> March, 2013 as required under Section 48 of the Advocates Act. However, the Respondent Advocate refuted this claim and asserted that the proper procedure was followed with regard to the service of the Notice of taxation and the Bill of costs.
10. I note the averments of paragraph 6.8 of the Advocate's Replying Affidavit where he stated;

***"6.8 In the intervening period, the Advocate's concerted efforts to effect personal service of the Notice of Taxation upon the Respondents at their last known address were futile resulting in the filing of the Notice of Motion Application dated 8<sup>th</sup> day of July 2013 seeking inter alia Orders to dispense with personal service of the Notice of Taxation upon the Respondents ....***

***6.9 Upon considering the aforesaid Application, on the 9<sup>th</sup> day of July 2013, the Deputy Registrar Hon. Mr. Nyakundi exercised his discretion in favour of the Advocate and made an order in writing dispensing with personal service of the Notice of taxation upon the Respondents.....***

***6.10 Consequently, out of abundant pragmatism on the 9<sup>th</sup> day of July 2013, the Advocate wrote to the Respondent's Advocates and informed them that the Registrar had made an Order to dispense with personal service upon the Respondents. Of significance is that the Advocate drew the Respondents' Advocate's attention to the fact that in the circumstances the Bill of Costs shall proceed for taxation unopposed. "***

11. From the foregoing dispositions it is rather obvious that service of the Notice of Taxation and Bill of Costs proved difficult, since personal service was dispensed with. As such, it's clear that the Applicants' protestations on the ex parte nature of the taxation proceedings are well founded and the court cannot turn a blind eye to the same. In any case I have considered the pertinent objections that shall be raised in the Reference, including the issue of retainer, and in my opinion the Applicants should be given adequate opportunity to ventilate the same in court.
12. Additionally, I note the judgement entered by Ochieng J for the sum of Kshs. 17,716,484/= is quite substantial, thus the sum may have the net effect of crippling the Applicant's operations. It is therefore important to safeguard the interest of not just the Advocate but also the Applicants. Further to this, I do not consider that the Advocate stands to suffer any prejudice that cannot be compensated by an award of costs. In the foregoing the scales of justice demand that the Applicants/clients should be accorded an opportunity to challenge the taxation.
13. In the circumstances, having considered the power to extend time under sub-paragraph 11(4) of the Advocates remuneration Order and in exercise of the inherent powers of the court, the court allows prayer (c) of the chamber summons and allows the enlargement of time sought.
14. The Orders made are as follows;
  - a. ***The Applicants/Clients shall file and serve notice of objection to taxation within 14 days of the***

*delivery of this ruling. Subsequently the Applicant is also at liberty to make a reference to the court in accordance with the provisions of paragraph 11 of the Remuneration Order as maybe necessary.*

- b. There shall be a stay of execution in this suit until the lapsing of the 14 days prescribed in subparagraph 11(2) of the advocates (Remuneration) Order and as extended in order (a) above.*
- c. The Client is also to pay the costs of this application assessed at Kshs. 15,000/= within 14 days of the Ruling. In default of the payment of costs, the Advocate may execute the same.*

**Dated, Signed and Delivered in Court at Nairobi this 3<sup>rd</sup> day of December, 2015.**

.....

**C. KARIUKI**

**JUDGE**