



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CENTRAL REGISTRY

MISC. CIVIL APPLICATION NO. 448 OF 2010

NJAGI WANJERU & COMPANY ADVOCATESPLAINTIFF/RESPONDENT

-VERSUS-

BEN MOMANYI T/A MOMANYI & ASSOCIATES.....APPLICANT/RESPONDENT

RULING

1. Before me is a notice of motion dated the 7/12/12 filed in court on the 14/12/12. The application is brought under section 3 & 3A of the Civil Procedure Act Cap 21 laws of Kenya Order 50 rule 6, order 49 7 (2 & 3) Article 159 (2d) Order 51 rule 1 and all the enabling provisions of the law.
2. The applicant seeks the following orders.
 - i. That there be a stay of execution of the registrar's certificate of taxation dated 23rd October 2012 till further orders of the court.
 - ii. That the court be pleased to extent time and allow the applicant to file a reference/objection out of time.
 - iii. That costs be provided for.
3. The application is supported by the affidavit of Ben Momanyi plus the following grounds that;
 - i. The Registrar taxed the bill and delivered his ruling *ex-parte*, on 23rd October 2012 without the knowledge of the applicant.
 - ii. The applicant wants to raise an objection against the decision of the Deputy Registrar to tax the bill because he did not have jurisdiction to tax between advocate and advocate.
 - iii. The period of time for filing a reference/objection, has lapsed since the bill was taxed, and hence the necessity of this application.
 - iv. The applicant realized that the bill was taxed when he went to peruse the Court file on the 5th day of November 2012.
 - v. The orders sought, if granted, would not prejudice the applicant herein.
 - vi. This honorable court has unfettered direction/jurisdiction to grant the orders sought.

The applicant deposes that the bill was taxed *ex-parte* as his advocate on record did not attend court during taxation and delivery of the ruling. That he got to know of the delivery of the ruling on the 5th November 2012 several days after the expiry of 14 days. That the law requires him to file an objection/reference to a judge and not on appeal. That he now seeks leave of court to file objection out of time. That on the 12th of November he filed an application to extend time of appeal but Justice Odunga refused to certify the matter as urgent.

The application was opposed.

4. Mr. Njagi Wanjeru the respondent swore a replying affidavit dated the 19/12/12. He deposes as follows; that the applicant was represented by M/s Achoki & Associates advocates who appeared for him all through. That on 2/7/12 the applicant application dated 16/6/11 was dismissed for not in attendance and the matter was remitted back to the Deputy Registrar to proceed with the same. They served a mention notice on the applicant to appear before the Deputy Registrar. On the 11/7/2012 the taxing master set down the bill of costs for ruling upon confirming that the respondents would not highlight their written submissions. On the 23/10/12 the Deputy Registrar ordered them to serve the ruling notice upon the applicants advocate and he did so on the 26/10/12 and the advocate acknowledged service. That it is therefore not true that the taxation of the subject bill was done *exparte*. That the applicant has not explained nor his counsel why they did not appear before Justice Odunga on the 2/7/12 nor attend the taxation on the 12/7/12 though served.
5. That the applicant's advocate wishes to procedurally and unprofessionally repudiate the legal representation by his former advocate M/s Achoki & Associates advocates as borne out by his previous notice of motion dated 11/4/2011. That the applicant advocates alleges he got to learn of the ruling on the 5/11/12 when he went to peruse the court file and not from his advocate who had been served with the notice and certificate of taxation on the 26/10/12 and therefore he is not entitled to a favorable exercise of the court's discretion. That he has even failed to annex a copy of the court receipt for the alleged perusal, that the aforesaid misrepresentations are attempts to scuttle the proceedings. That the applicants contention that he wants to raise an objection against the decision of the Deputy Registrar to tax the bill because he did not have jurisdiction to tax between advocate and advocate intrinsically bears out the incompetence and futility of the applicants of advocate bit which amounts to kicks of a dying horse.
6. The applicant and respondent filed written submissions dated 19th March, 2012 and 12th April 2013 respectively. The applicant's reiterated what is deposed in the applicant's affidavit and submitted further that failure to attend court on the stated date was an oversight and an excusable mistake and denying the applicant an opportunity to be heard will be denying him his constitutional right and rule of fair justice as he will be highly prejudicial if he is compelled to pay the same without being heard. That upon perusal of the file the applicant filed an application which was later withdrawn and the current one filed on 7/12/2012. That the application has merit and will shed some light into the issues raised in the taxation of bills which will go along way in guiding the court to make an informed decision.
7. Counsel for the respondent in his submissions reiterated the contents of his replying affidavit on the events leading to this application. He relied on the case of **TRANSNATIONAL BANK OF KENYA –VS- HASSAN SAID AMDUM** where the court of appeal held that ;

“Besides, from 21st march, 2005 when the applicant says it learnt of terms of the judgment , there was a lapse of a month before this application was filed the applicant contends that it took time before they got a second opinion on the need for appeal. The law does not give allowances to parties to obtain legal advice. It is upon the litigant to act within the time allowed by the law to take such essential steps in a matter. Additionally, that delay is not to blame on the applicant's former advocate.”
8. He submitted further that the applicant has employed delay ploys to delay the taxation of the said bill of costs as he has failed to take action on the matter since 19/1/2012 and as such it is quite obvious that the applicant never intended to prosecute the said application. He added that the 5th November, 2012 when the applicant claims to have perused the said file fell on the 13th day which was within the 14 days period within which the applicant was to raise his objection. That the applicant's intention to raise an objection against the decision of the Deputy registrar to tax the bill because he did not have jurisdiction to tax between advocate was misconceived as the Deputy Registrar only taxed between Advocate and client. He urged the court to consider the glaring unmeritoriousness and incompetence of such legal argument. He relied on **Civil appeal no 247 of**

2004 GEORGE GIKUBU MBUTHIA VS PETER NJERU MUGO & 3 OTHERS where it was held that;

“the applicant offered no convincing reasons for that delay either in her affidavit in support or in his submissions at the hearing of the application.....The applicant did not produce any evidence from the proceedings for the day of delivery of the ruling appealed against to support the suggestion that the ruling appealed against to support the suggestion that the ruling was not signed. Nor was it explained how this issue resulted in any delay and if so, how much delay.”

He added that the grounds intended to be argued in support of the intended objection is wholly without merit both in law and in fact and the same would amount to an abuse of the court process if the same is allowed. He acknowledged that even though court has unfettered discretion to enlarge time the same should be exercised judiciously as the applicant has executed various ploys to delay speedy prosecution of these taxations including failing to pay court adjournment fee and the court should not consider the unmeritorious reasons for delay offered by the applicant. He relied on various case **H.C. MISC. CIVIL APPLICATION No. 10 OF 2001 AT NYERI MWICWIRI FARMERS CO. LTD. -VS- M'RUKARIA & 139 OTHERS** where it was held that, *“inordinate delay has to be sufficiently explained”*, **H.C. MISC. CIVIL APPLICATION NO 348 OF 2002 AT ELDORET –SUPER EXP. COMPANY LTD &Anor–vs- BONIFACE WANJALA KABAKHANA** where it was held that; *“the reasons for delay in filing are not convincing for the court to exercise its discretion in favor of the applicants”*, **CIVIL APPLICATION NO. NAI 2 OF 2006- KIPKORIR TITOO KIARA ADVOCATES –VS- POSTAL CORPORATION OF KENYA** where it was held that; *“the delay is without explanation, inexcusable. It can only be inferred that the applicant did not intend to appeal, CIVIL APPLICATION NO. NAI. 168 OF 2008 KTDA – VS- ROY TRANSMOTORS* where it was held that; *“the delay here is inordinate and the reason for delay completely lame and unacceptable.”*

9. On the applicant's claims that the ruling was awarded *ex-parte* he submitted that the applicant filed replying affidavits and written submissions which were considered by the DR. That the applicant failed to point out the items he is aggrieved by so that the court can evaluate the seriousness of his objection as provided for under paragraph 11 of the Advocate's Remuneration Order. That he should not use this as an opportunity to re-tax the bill of cost since the special jurisdiction to tax belongs to the taxing officer.
10. I have carefully read and considered the affidavits and written submissions filed by the counsels and concluded that the issues to be determined in this matter are;
 - i. Whether in the circumstances of this case the applicant/defendant would be entitled to the stay?
 - ii. Whether the applicant despite the inordinate delay qualifies for leave and extension of time to file a reference or objection against the taxation bills.
11. On the issue whether the applicant will be entitled to the stay. The amount in question is colossal and should the orders sought be denied without giving the applicant an opportunity of being heard this will be highly prejudicial to the applicant. In the case of **STEPHEN WANJOHI VS. CENTRAL GLASS INDUSTRIES LTD. NBI. HCC NO. 6726 OF 1991**, Hayanga J (as he then was) stated that for the court to order stay of execution the applicant must demonstrate; he will suffer substantial loss, there is sufficient cause, that there is no unreasonable delay and to provide security. I do recognize that granting a stay order is entirely upon the court it's a discretionary order. The applicant has explained the reasons he seeks to file reference in my view considering the circumstances as explained it would be in order to grant the applicant a stay. He has shown sufficient cause to warrant the stay, granting the said order will not prejudice the respondent.
12. On whether the applicant has satisfied this court that he should be given leave to file his reference from the taxation of the Deputy Registrar of this court out of time. Paragraph 11 (4) of the Advocates (Remuneration) Order provides as follows:

“The High court shall have power in its discretion by order to enlarge time fixed by

subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order maybe made by chamber summons upon giving to every other interested party not less than three days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought time to be enlarged may have already expired."

The above provision of the law is clear. This court has unfettered discretion to enlarge time for any party to do what is required under the provisions of paragraph 11 of the Advocates (Remuneration) Order. This discretion however has to be exercised judicially. It is not in dispute that the taxation ruling was not delivered on 12/9/2012 at 2.30 p.m. as scheduled but the same was delivered on 23/10/2012 and the applicant subsequently filed the his application on 14th December, 2012 seeking stay and leave to file a reference/objection challenging the decision of the Deputy Registrar. In my view there is no inordinate delay in filing the same. In the case of **LEO SILA MUTISO -VS- ROSE HELLEN WANGARI MWANGI - CIVIL APPLICATION NO. NAI. 255 OF 1997 (UNREPORTED)**, the Court expressed itself thus:-

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

13. With this decision in mind having accepted the applicant's explanation on the delay I will extent the time and allow the applicant to file a reference / objection out of time. The applicant is hereby given fourteen (14) days from the date of this ruling to file the said reference challenging the taxation by the Deputy Registrar of the respondent's bill of costs and which bill was taxed and ruling delivered on 23/10/2012. I grant a stay execution of the taxation by the Deputy Registrar pending the hearing and determination of the reference. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 5th day of February 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Applicant

.....For the Respondent

.....Court Clerk