



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MERU

ELC APPEAL NO. 25 OF 2014

JOSPHAT KIRIGIA ABURI.....APPLICANT/DECREE HOLDER

VERSUS

COOPERATIVE BANK OF KENYA LTD.....RESPONDENT/JUDGEMENT DEBTOR

RULING

1. The applicant (who was the respondent in the appeal) filed the application dated 23rd January 2020 seeking orders for this court to enlarge time within which the applicant ought to file his objection and/or reference to the taxation of their Bill of costs which was taxed on 9th October 2019 By Hon. E. Tsimonjero, the Deputy Registrar.

2. The application is premised on the grounds set out in the body of the application and in the affidavit of **Patrick Kimathi Muchena**, advocate for the applicant. The applicant contends that he was aggrieved by the decision of the taxing master and in line with Paragraph 11 of the Advocates Remuneration Order, he notified the Registrar of the objection to the taxed items within 14 days. That the Ruling was ready for collection on 11th December 2019. The advocate for the applicant engaged a person to collect the Ruling on his behalf but the same was not received in their offices until 17th January 2020 as they had closed their offices on 15th December and reopened on 15th January 2020 within which time they deliberated on the same and have since resolved to appeal.

3. In his submissions, the applicant outlined the provisions of Order 11 of the Advocates (Remuneration) Order and the fact that he had already complied with the Provisions of Rule 11 (1) & (2). He urged this Court to consider the exclusion of computation of time since 21st December to 13th January 2020. He urged the court to find that he had an honest explanation for the delay and in this regard, he cited the following authorities i.e. **Leon Ojiambo Ojian & another v Lilian Mushele Wafula & another [2018] eklr**, **Philip Keipto Chemwolo & Another v Augustine Kibende [1986] eklr**.

4. The application was opposed by the Respondent through a Replying affidavit dated 10th February 2020 sworn by **Christine Mukami**, advocate for the respondent (appellant). She averred that no sufficient reasons have been offered to extend the time within which to file the objection out of time. That the person who was to collect the Ruling remained unnamed and fictitious. That the applicant had ample time to collect the Ruling, but he went in a slumber only to wake on 17th January 2020. What more, the court became *functus officio* upon the delivery of the judgement hence the court lacks jurisdiction of the same.

5. The Respondent submitted that the applicant ignored the timelines as set out in Order 11 of the Advocates (Remuneration) Order. The period of delay is inordinate and the applicant has not attached any draft to prove that his reference is meritorious. The Respondent relied on the case of **Sound Entertainment Limited vs Anthony Burungu & Co. advocates [2014] eklr**.

Analysis and Determination

6. The main issue for determination in this application is whether leave ought to be granted to the applicant to file his reference out of time.

7. **Rule 11 of the Advocates (Remuneration) Order** provides as follows:

11. Objection to decision on taxation and appeal to Court of Appeal

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 objection referred to such judge under subsection (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 (1) or 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.

8. In **Parmuati Oloishuru Kore v Eric Ntabo and Co. Advocates [2019] eKLR** the court stated that in matters exercise of discretion the court has to consider the length of the delay and the reasons for such a delay, whether the applicant could suffer substantial loss and the the degree of prejudice that may occur, also see **Leon Ojiambo Ojian & another v Lilian Mushele Wafula & another (supra)**.

9. The Ruling to which the reference ought to have been filed was ready on 11th December 2019. The Reference therefore ought to have been filed by 25th December 2019. The Court was asked to consider the computation of time as set out in **Order 50 Rule 4 of the Civil Procedure Rules** which provides as follows;

“...except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: provided that this rule shall not apply to any application in respect of a temporary injunction.”

10. In **George Miyare t/a Atonga Miyare & Associates Advocates v Evans Gor Semelang’o [2018] eKLR** the court while determining whether the provisions of Order 50 Rule 4 of the Civil Procedure Act applies to the Remuneration Order opined as follows;

“.....It follows that the question of whether Order 50 Rule 4 of the Civil Procedure Rules is applicable to these proceedings is a foregone conclusion. It does not apply. Paragraph 11 of the Advocate Remuneration Order is so elaborate on the time frames for filing of objection to taxation, the Reference and even provides for enlargement of time that there is no gap capable of being filed by Order 50 Rule 4 of the Civil Procedure Rules.

Furthermore, the import of Section 3 of the Civil Procedure Rules is to acknowledge laws like the Advocates Act and Remuneration Order in matters of taxation of costs such that parties would be bound by the applicable law to the circumstances of their case and not to import Order 50 Rule 4 which is not a rule of general application to all matters before the court, irrespective of whether such matters were of civil nature or not....”

11. I fully agree with the determination in **George Miyale (supra)**. The provisions of **Order 50 Rule 4** of the CPR do not apply to this case hence the computation of time does not arise.

12. I have considered the time which the applicant took to file the application. There had been a delay of about one month from the date he ought to have filed the reference. The reasons afforded by the applicant are not sufficient. The applicant admits that he collected the tax masters decision on 11th December 2019. During this time he was well aware of the provisions of Rule 11. He never sought to commence the process set out in Rule 11 (4). One might ponder as to how the Ruling was received in their offices on 17th December 2019 if at all their offices were closed? This is a clear case of a party who slept on their rights. The delay was inordinate.

13. Despite the inordinate delay by the applicant, I do not foresee any substantial loss towards the Respondent. He has not alluded to, and or alleged the same. I also find that the applicant avers that the award issued as costs is minimal and this can be considered as an arguable ground to raise a reference.

14. This court is mandated to treat each case on its own merits, factor the interest of both parties and arrive at a decision that would best befit the course of justice. The applicant is entitled to a right to reference in the same manner as a right to appeal. The applicant will however meet the costs of the present application.

15. This court therefore makes the following Orders;

(i) Leave is hereby granted to the applicant to file a Reference within 14 days of this Ruling.

(ii) Costs of the application to be borne by the Applicant in favour of the Respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF OCTOBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 22.9.2020. In

light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE