



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Miscellaneous Case 580 of 2005

REPUBLIC..... APPLICANT

V

THE CITY COUNCIL OF NAIROBI.....1ST RESPONDENT

NATIONAL HOUSING CORPORATION.....2ND RESPONDENT

RULING

1. By a Chamber Summons dated 16th March, 2011, the applicant herein seeks the following orders:

1 That time within which to give Notice of Objection to the taxing Officer's decision dated 16th February 2011 be and is hereby enlarged.

2 That the Notice of Objection to the taxing Officer's decision dated 16th February 2011 herein appended be deemed as duly filed and served upon the *ex parte* Applicants' payment of the required Court fees.

3 That costs of this application be in the cause.

2. The application supported by an affidavit sworn by **Paul Wachira**, the 1st applicant herein on 16th March 2011.

3. According to him, on 22nd February 2011, his advocates on record applied to be supplied with a copy of the Ruling dated 16th February 2011 and the same was not delivered and he is informed by the same advocate that to date a copy of the said Ruling has not been delivered and that the said advocates have read the court file to draw the Notice of Objection herein. The deponent further deposes that he and the other Applicants need to object to the bill taxed on 16th February 2011 as the said bill is too high and this information is supported by the applicants' advocates.

4. The application was opposed by a replying affidavit sworn by **William K B Keitany**, the 2nd Respondent's Senior Legal Officer on 17th May 2011. According to the deponent, the 2nd Respondent's Bill of Costs dated 20th January 2010 was lodged by their advocates on 16th February 2011 taxed as between party and party and allowed as against the *ex parte* applicants in the sum of Kshs 5,132,364.00. Upon the delivery of the ruling on the Bill of Costs on the 16th of February 2011, it is deposed that the applicant had 14 days within which to lodge a Notice of objection and that time, according to him, was to lapse by the 2nd March 2011. According to information gathered from the deponent's advocates, by the

said date of 2nd March 2011 the Applicants had not filed any papers in objection to the taxed Bill of Costs and that the Applicants only applied for a copy of the ruling on the 10th of March 2011 being 8 clear days after the time had lapsed to lodge the Notice of Objection. It is therefore contended that the Applicants herein are time barred from raising the Notice of Objection and that the said application is therefore brought to delay the 2nd respondents from being able to recover the costs herein hence it is only in the interest of justice that the said application should be dismissed with costs to the 2nd Respondent herein. Further, the deponent avers that in the interest of justice the Applicants herein have not indicated and/or provided any security of costs in regards to the costs awarded herein to the 2nd Respondent should the Notice of objection be allowed.

5. In their submissions the *ex parte* applicants reiterate the contents of the supporting affidavit and submit that since the delay in giving the notice was only 16 days which in the applicants' view is not inordinate. The court is therefore urged to consider the application bearing in mind the provisions of the new Constitution that in dispensing justice courts shall not be tied down by technicalities in procedure but shall be guided by substantive justice and it is in the interest of justice that the applicant be accorded an opportunity to get a second opinion on the bill as taxed. In the applicants' view, the failure to meet a time frame should not be a bar to substantive justice since the Respondent shall suffer no prejudice if the items the applicants are objecting to are revisited.

6. On the part of the respondents, after narrating the history of these proceedings, it is submitted that though the Court has discretion to extend time under the Civil Procedure Act that discretion must be exercised judiciously and hence the Court must not only look at the applicant's request but also look at the effect of granting the request against the respondent as well as the effect of granting that request will have on the interests of justice hence the conduct of the party requesting the exercise of the court's discretion become pertinent. It is therefore submitted that the lengthy period that it has taken the applicant to set down their notice of motion and the fact that they did so only in reaction to the move by the 2nd respondent to have the error on the notice of taxation corrected, betrays the motives of the applicant, to further delay recovery of costs and that the true nature of the application before the court is a request by the applicants to aid them in their delay tactics and the court should not assist them to do so. It is submitted that counsel did not bother to attend the taxing master for rendering of the decision on the bill and there is no indication that the file was not available within a short time to enable the applicants see what amounts had been taxed of. Further litigation must come to an end and the delay is prejudicial to the respondent.

7. I have considered the foregoing.

8. In Evans Thiga Gaturu, Advocate vs. Kenya Commercial Bank Limited Nairobi High Court (Commercial Division) Miscellaneous Application No. 343 of 2011 I expressed myself as follows:

“In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles. However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent. In the present case, the ruling on taxation was made on 6th July 2011. If the client considered the said decision to contain the reasons, he could file the reference within 14 days from the date thereof. If, on the other hand, he was of the view that there were no reasons contained in the decision, he could request for the same in writing, in which case, he would be bound to wait for the same. If, however, at a later stage he decided to prefer the reference notwithstanding the failure by the

Taxing Master, after the lapse of the 14 day period, it is my view that he would be bound to apply for extension of time under paragraph 11(4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure by the Taxing Master to furnish him with the reasons which, according to the decision in Kipkorir, Titoo & Kiara Advocates (ibid), is a ground for allowing a reference. However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given if even by the time of making the same reference, the said reasons have not been furnished. I, accordingly, find that as the client filed the reference outside the 14 days of the delivery of the decision and before being furnished with the reasons, the reference is incompetent for being out of time and/or being prematurely instituted. I accordingly strike out the Chamber Summons dated 18th January, 2012.”

9. In this case the applicants did not file their Notice of objection within time and according to them they were not furnished with the reasons. They have, however, now perused the Court file and filed a Notice of Objection. On 2nd February 2011 the applicants’ advocates were aware of the decision delivered on 16th February 2011. Instead of perusing the court file they decided to seek for a copy of the ruling instead. Had they exercised diligence and perused the file they would have been able to decide whether or not to object to the taxation and this application would have been rendered unnecessary. The applicants have not even shown when their advocates eventually read the court file. The law as I understand it is that a delay must be explained. It is now well settled that wherever there is a delay, even for one day, there must be some explanation for it otherwise extension may not be granted. See Kenya Ports Authority vs. Silas Obengele Civil Application No. 297 of 2004; John Francis Muyodi vs. Busia County Council & 3 Others Civil Application No. 345 of 2005; Reliance Bank Limited (In Liquidation) vs. Grandways Ventures Limited & 2 Others and Southern Credit Bank Corporation Civil Application No. Nai. 118 of 2007.

10. Discretion must be exercised judicially and a party who seeks favourable exercise of judicial discretion must show diligence. It is clear from the record of these proceedings that the applicants have not shown any diligence in instituting and prosecution their objections to the taxation. That ruling on the said taxation was delivered on 16th February 2011 which is more than two years ago. The decision from which the same decision arose was itself delivered on 4th December 2009 which is more than three years ago.

11. In my view no satisfactory explanation has been proffered to enable me exercise my discretion in favour of the applicants.

12. In the premises I decline to exercise my discretion in favour of the applicants with the result that the Chamber Summons dated 16th March 2011 is dismissed with costs to the 2nd respondent.

Dated at Nairobi this 3rd day of June 2013

**G V ODUNGA
JUDGE**

Delivered in the absence of the parties.