



Jiangxi Transportation Engineering Group Ltd v Karweru & Co. Advocates (Miscellaneous Application E011 of 2022) [2024] KEELRC 1873 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1873 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS APPLICATION E011 OF 2022**

**ON MAKAU, J
JULY 19, 2024**

**BETWEEN
JIANGXI TRANSPORTATION ENGINEERING GROUP LTD APPLICANT
AND
KARWERU & CO. ADVOCATES RESPONDENT**

(Before Hon. Justice Onesmus Makau on 19th July, 2024)

RULING

1. This ruling relates to the Chamber Summons by the Applicant (client) dated 23rd January 2024 seeking the following orders: -
 - a. That this Application be certified as urgent *ex-parte* and service thereof be dispensed with in the first instance.
 - b. That this Honourable court be pleased to enlarge the time fixed for raising a notice of objection to the decision of the taxing master as provided by Rule 11(1) of the *Advocates (Remuneration) Order*.
 - c. That pending the hearing and determination of this Application, a temporary order of injunction do issue restraining the Respondent whether by themselves, their agents, employees, assigns, servants or representatives from howsoever repossessing, attaching, advertising for sale or offering for sale by public auction or private treaty, and/or in any other manner whatsoever, interfering with the plaintiff's assets.
 - d. That pending the hearing and determination of objection proceedings, a temporary order of Injunction do issue restraining the Respondent whether by themselves, their agents, employees, assigns, servants or representatives



from howsoever repossessing, attaching, advertising for sale or offering for sale by public auction or private treaty, and/or in any other manner whatsoever, interfering with the plaintiff's assets.

- e. That the costs of this Application be provided for.
2. The summons is brought under Rule 11 (1) & (4) of the [Advocates Remuneration Order](#) and it is premised on the grounds set out on its body and the Supporting Affidavit sworn by the applicant's HR Manager Mr. Elphas Kangu. In brief, the applicant contends that a certificate of costs dated 6th September 2023 was not made known to it until 6th October 2023 when it was served with Warrants of Attachment by Auctioneers; that it filed a Notice of Motion dated 11th October 2023 objecting to the certificate of costs; and that the motion was struck out on 20th December 2023 for being alien to the procedure contemplated by Rule 11 of the [Advocates Remuneration Act](#).
3. It is further applicant's case that it has now brought the instant summons as guided by the court; that the application has been made without undue delay; that the Bill of costs is tainted with fraud aimed at unfair enrichment; that the instructions fees ought to be assessed at 50% because another Advocate represented it in the primary suit; that the Taxing Master misdirected herself and erred by awarding Kshs 15,000/- for court attendances and Kshs 20,500/- for services yet service was by email and the proceedings proceeded virtually.
4. The respondent (Advocate) has opposed the application vide Replying Affidavit sworn by Mr. Karweru Muchemi Charles Advocate on 13th February 2024. In brief, respondent's case is that the court lacks jurisdiction to determine the application; that under Rule 11 of the [Advocates Remuneration Order](#), the court's jurisdiction is limited to a reference only while the rest of the matters fall under the Taxing officer of the court; that applicant was present in court when the impugned ruling was delivered by the Taxing Master on 16th August 2023 and as such failure to file reference within the timelines set by Rule 11 has not been explained; and that the application is incompetent and a kneejerk reaction to a lawful demand.
5. The application was canvassed by written submissions which basically reiterates the averments summarized above.

Analysis

6. Having considered the chamber summons, Affidavits and submissions, the following issues fall for determination: -
 - a. Whether the court has jurisdiction to determine the application.
 - b. Whether the applicant has demonstrated sufficient cause to warrant extension of time for filing a reference.

Jurisdiction

7. Paragraph 11 (1) of the [Advocates Remuneration Order](#) provides that:
 - “(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.
 - (3) The High Court shall have power in its discretion by order to enlarge the time fixed by sub paragraph (1) or sub paragraph (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. The above rule was made before the 2010 Constitution when this court was non-existent. By dint of section 7 of the Sixth Schedule to the Constitution 2010, all the law in force before the effective are to be construed with alterations, and adaptations necessary to bring it into conformity with Constitution 2010. Accordingly, the Advocates Remuneration Order ought to be construed to give effect to Article 162 (2) (a) of the Constitution which provides for establishment of this court with equal status as the High Court. Therefore, under paragraph 11 (4) of the Advocates Remuneration Order this court has jurisdiction to entertain an application for leave to extend the time fixed for filing a reference to challenge a decision by a Taxing officer on a Bill of Costs.

Leave to extend time

9. A reference under paragraph 11 of the Advocates Remuneration Order has the nature of an appeal from a decision by a taxing officer. It follows that the principles for granting leave to file appeal out of time should apply to a request to file a reference out of time.
10. In the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (2014) eKLR, the Supreme Court set out the principles to be considered when exercising discretion to grant leave to appeal out of time including: -
 1. “Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without unduedelay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
11. In the instant application, the applicant contends that it was not aware of the certificate of costs dated 6th September 2023 until 6th October 2023 when it was served with warrants of execution by an auctioneer. The respondent on the other hand contends that the applicant was present in court when the Taxing officer rendered her decision on the bill of costs on 16th August 2023 and no explanation has been given for the failure to object to the decision within the 14 days provided by paragraph 11 of the Advocates Remuneration Order.
12. I have perused the record by the Taxing officer and confirmed that the applicant(client) was not present in court when the decision on the costs was rendered on 16th August 2023. There is no proof that the applicant was made aware of the said decision before the execution was commenced by the Messers Hippo Auctioneers on 6th October 2023.



13. The applicant has explained that the application has been made without undue delay considering that it had filed Notice of motion dated 11th October 2023 which was struck out on 20th December 2023. The said motion sought for the order that:

“The ex-parte orders entered against the respondents in the main application and the proceedings thereto be set aside and the application be set down for hearing on its merits.”
14. The “main application” referred to above is the Bill of Costs filed by the Advocate. To begin with the impugned orders were not granted ex-parte as alleged. The record bears witness that the Bill of costs was served on the applicant who attended the court for ruling on the taxation on 26th April 2023 before the Deputy Registrar of the court but the same was deferred. It is therefore incorrect for the applicant to purport that it was not accorded hearing before the impugned decision was made.
15. The question that arises is whether the explanation given for the delay is sufficient. My view is that it is not. The applicant was represented by counsel who is presumed to be conversant with law but he/she filed defective motion dated 11th October 2023 seeking setting aside of the decision of the taxing master. When the application was challenged by notice of preliminary objection, the applicant did not withdraw it but it strongly opposed the objection until the objection was allowed and the motion was struck out with costs.
16. As indicated in the current application, it would appear that the applicant has come back to court because it was given guidance by the court in the ruling rendered on 20th December 2023 when it held that the motion dated 11th October 2023 was alien and not contemplated under paragraph 11 of the *Advocates Remuneration Order*.
17. Having considered the material before, I am persuaded that the applicant had its day in court challenging the decision of the taxing master. The attempt was unsuccessful and all it is trying to do by the current summons is to have a second bite on the cherry. The delay is unreasonable and deliberate considering the refusal to withdraw the earlier motion when a preliminary objection was raised on 24th October 2023.
18. In view of the foregoing matters, I have arrived at the conclusion that the chamber summons dated 23rd January 2024 lacks merits and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2024.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

