



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC APPLI. 521 OF 2004

KENYA REVENUE AUTHORITY..... APPLICANT

VERSUS

1. KENYA SUGAR

BOARD

2. COMMODITY HOUSE LTD..... RESPONDENTS

RULING

I have before me an application by the objector purportedly brought under the provisions of Rule 11 (2) of the Advocates Remuneration order. The primary order sought is expressed as follows:-

“That the costs allowed by the Principal Registrar (Taxing Master) Miss Hannah W. Ndung’u on taxation of the Bill of Costs filed in this suit by the Ex-parte Applicant (Respondent) against the Objector dated 26th April 2005 in respect of All items be reviewed and reduced or remitted with appropriate directions to a Taxing Officer as the Court shall deem fit for reconsideration.”

The application is not supported by an affidavit. The primary reasons for the application are that the costs allowed of Kshs. 11,312,970.00 are excessive as the proceedings were commenced by way of Judicial Review; that in taxing the Bill of Costs the Taxing Master misdirected himself in basing it on the value of the subject matter which fact was not relevant in the proceedings; that the Taxing Master adopted the wrong principles in taxing the instruction fee and that the award to the ex-parte applicant would wrongfully enrich it and punish the objector.

The application was opposed and the ex-parte applicant’s Advocate (Maurice Kilonzo) filed an affidavit in opposition. It is deponed in the affidavit, *inter alia* that the objector by a letter dated 5th September 2006 applied for reasons for the taxation of 25th August 2006 but in the letter referred to proceedings of 21st June 2006 which were non existence. It is further deponed that the ruling on taxation was read in the presence of a representative of the objector who merely sought thirty (30) days grace period which was granted. It is also deponed that counsel for the ex-parte applicant wrote to the objector on 26th September 2006 and furnished the objector with certified copies of the proceedings and ruling of the Taxing Master of 25th August 2006. It is further deponed that, the objector by its letter dated 17th October 2006 acknowledged receipt of the applicant’s letter and its enclosure i.e. the ruling on taxation and ought to have filed its reference within fourteen (14) days of its receipt of the said ruling and having moved the court 1 ½ years out of time, the reference should be struck out. It is further deponed that the taxing master appreciated the matter involved and correctly applied the law.

The ex-parte applicant's affidavit in opposition raises what in my view should be considered first before considering the merits or demerits of the application. It raises the issue of the competence of the application. Rule 11 (1) and (2) of the Advocates (Remuneration) Order reads as follows:-

“11. (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.”

As to whether the objector's application was lodged out of time depends on the interpretation of the above provisions. A plain reading of sub-rule (1) shows that a party who desires to challenge a taxing master's ruling on taxation must give his notice of objection within fourteen days after the decision on taxation. That notice must be in writing. No period is prescribed within which the Taxing Officer should furnish his reasons for taxation. However, when the same are supplied, a reference should be lodged within fourteen days of receipt of the reasons for the decision.

The objector has attached the proceedings and the ruling of the Taxing Officer to its application. The ruling was delivered on 25th August 2006. The objector says that its notice of objection was given on 5th September 2006. The same was not however exhibited. However, as the ex-parte applicant does not really challenge that fact, I take it that indeed, the notice of objection was so given. The notice was clearly given within the prescribed period.

The objector's argument is that as no reasons were given and have not been given by the Taxing Officer to date, its reference cannot be invalidated. In its view, it had indefinite time to lodge its reference as long as reasons for taxation were not given. The objector does not however, explain the criteria it used to select the time to lodge this application. Should it be left to an objector to pick the date of moving the court? Suppose, he takes 1 ½ years as the objector herein has done? Or 3, 6 or 12 years?

I have looked at the ruling of the Taxing Officer delivered on 25th August 2006. It was delivered in the presence of a Mr. Kashindi who held brief for counsel for the objector. Mr. Kashindi sought a 30 days stay of execution after the ruling had been delivered. The typed ruling covers about three (3) pages and shows that the Taxing Officer considered the disputed items in some detail and was guided by no less than three reported decisions. The Taxing Officer did not perfunctorily give figures of sums awarded. It is unlikely therefore that she would give any other or further reasons for her decision. In any event the objector has challenged the decision on taxation using the very same ruling. It is obvious therefore that the objector required no other or further reasons than those in the ruling it has itself exhibited. Failure to furnish other or further reasons was not an impediment to the lodging of this application.

The objector has not explained when it obtained the exhibited proceedings and ruling. That must be because, it chose not to file an affidavit which would have been the admissible mode of introducing evidence on factual matters. Fortunately, the ex-parte applicant has filed the affidavit in opposition aforesaid. The objector raised no objection to its filing nor did it file any affidavit to controvert the averments in the affidavit in opposition. Counsel for the ex-parte applicant swore that he supplied the objector with the ruling on taxation under cover of his letter dated 26th September 2006. The objector in its counsel's letter dated 17th October 2006 acknowledged receipt of the said letter of 26th September 2006.

So the objector by 17th October 2006 was armed with the Taxing Officer's ruling on taxation which, as I have said, the objector has used to challenge the decision. The objector has not alleged that on receipt of the ruling, it sought other or further reasons for the said taxation from the Taxing Officer. Indeed there is

no evidence that it did anything until the filing of this application on 23rd May 2008.

In my view therefore, the objector should have demonstrated that it was waiting for other or further reasons from those contained in the ruling on taxation and that the same had been requested for after the 17th October 2006. And even if such other or further reasons for taxation were furnished, the objector would have to seek leave of the court for extension of time to lodge its reference. Further, when the objector received the ruling on taxation on 17th October 2006, fourteen days thereafter it was late and it should have sought extension of the time limited by Rule 11 (2) of the advocates Remuneration Order.

I am alive to the fact that failure to furnish reasons by the Taxing Officer is by itself a ground for challenging a taxation. But it should be demonstrated that indeed there has been such a failure. In the application at hand, the applicant has clearly failed to demonstrate such failure. Indeed its challenge is limited to the reasons given in the ruling. It required no other or further reasons.

In the result, I find and hold that this application is incompetent for having been lodged out of time without the leave of the court. As the objector may still seek leave to lodge a competent reference I decline to express any view on the merit or demerits of the rest of the arguments made before me lest I put the judge who may consider such application in a bind.

The objector's application dated 3rd July 2008 and filed on 4th July 2008 is struck out with costs to the ex-parte applicant.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF OCTOBER 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Lekerai holding brief for Ontweka for the Objector and Gikandi/Akanga for the ex-parte Applicant.

F. AZANGALALA

JUDGE

3RD OCTOBER 2008