



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC MISC. APP. NO. 3 OF 2020

HENRY SHIKUKU BARASA

JOASH CHIMUNGE WASWA

JOHN NYONGESA NGEYWA(Suing as the duly authorized representatives

of MATISI OUTREACH CHURCH.....APPLICANTS

VERSUS

REUBEN FWAMBA MBITA.....RESPONDENT

RULING

The Application

1. The plaintiffs brought an application dated 13/2/2020 under **Rule 11 of the Advocates Remuneration Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Order 42 of the Civil Procedure Rules**. They seek the following orders:-

1. ...spent

2. That the application herein be set down for hearing *inter partes* on priority basis.

3. That this court be pleased to enlarge the time within which to file a reference against the decision of the taxing officer delivered on 9/9/2019.

4. That the letter of objection to the reference attached herein be considered as proper and same be filed upon payment of requisite charges.

5. ...spent

6. That this court be pleased to stay the execution of the Deputy Registrar's ruling delivered on 9/9/2019 pending the hearing and determination of the reference.

7. That this court be pleased to issue directions on hearing of the reference filed subject to paragraph 4.

8. That costs of the application be borne by the respondent.

2. The application is supported by the affidavit of **Henry Shikuku Barasa** who has authority of other applicants to swear this affidavit sworn on **13/2/2020**. The application is grounded on the following grounds: that the taxation by the Taxing master allowing the bill of costs was unprocedural as he wholly ignored the critical guiding considerations during taxation, erred in failing to peg the instruction fees to the value of the subject matter, that the sum awarded as instruction fee was excessive exorbitant and off the scale; that he erred in failing to apply the ARO provisions in taxing the getting up fee at **Ksh 100,000/=**; that he failed to consider the value of the subject matter since no valuation had been brought to court and that the persons before court were men of straw and could not meet the alleged excessive costs taxed against them.

The Response

3. The respondent filed a replying affidavit sworn on **27/2/2020** by his advocate. His reply is that the application is fatally defective and incompetent; that it should have been raised in the suit; that the applicants are guilty of laches and that the taxing master exercised her discretion judiciously. He also avers that the applicants are able to pay from church collections raised.

4. A preliminary objection was lodged on **27/2/2020** and on same date the court ordered the same be canvassed alongside the merits of the applications. The preliminary objection states as follows:

1. That the application is fatally defective and offends the mandatory provisions of law particularly Section 19 of the Civil Procedure Act, Order 2 of the Civil Procedure Rules 2010.

2. That the application is a gross abuse of the due process of the law hence be struck out.

5. The court ordered the Preliminary objection to be canvassed as part of the whole application.

Submissions

6. The applicants filed their written submissions on **22/6/2020**. The respondent filed his submissions on **17/6/2020**.

DETERMINATION

7. I have considered the application and the response and the submissions. The issues that arises for determination in the instant application are as follows:

(1). Whether the application is fatally defective for failure to bring it in the main suit;

(2). Whether this court should enlarge the time within which to file a reference against the decision of the taxing officer delivered on 9/9/2019 and if so what directions should issue on the hearing of the reference?

(3) What orders should issue as to costs.

The issues are addressed as hereunder.

(1) Whether the application is fatally defective for failure to bring it in the main suit;

8. 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.

9. In this court's view nothing in that rule stipulates that such an application must be filed in the trial file record.

10. Besides **rule 11(4)** expressly provides for the filing of an application by way of chamber summons as follows:

“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.”

11. It does not also refer to the trial file record. The applicants herein are also seeking orders of extension of time within which to file a reference and **Order 42 of the Civil Procedure Rules** has been cited in aid of extension of time. There is therefore no merit in the respondent's objection to that effect, and I have found no other ground under **limb no 2** of the preliminary objection to warrant this court's belief that the application is a gross abuse of the process as alleged.

(2) Whether this court should enlarge the time within which to file an objection against the decision of the taxing officer delivered on 9/9/2019 and if so what directions should issue on the hearing of the reference?

12. The letter annexed to the application and dated **13/2/2020** is not a reference although the applicant seems to mistake it for one. That is a letter seeking reasons behind the taxing master's assessment and award of certain items in the bill of costs and it is provided for under **rule 11(2)**.

13. A reference is normally made to this court after the response by the taxing master fails to satisfy the applicant.

14. The reason given for the delay in filing the letter objecting to the taxation is that instead of raising the objection as provided for by the rules the applicant through his advocate made an application dated **13/9/2019** to this court seeking a stay of execution of the defendant's costs. The applicant also sought an order that the orders of the taxing master be set aside and the applicants' counsel be allowed to make submissions in opposition to the respondent's bill of costs. That application was dismissed on **21/11/2019**.

15. The applicant depones in the supporting affidavit that they have now been advised that their counsel approached the court in the wrong manner hence the dismissal of the application dated **13/9/2019**. Since it is the mistake of his advocate the applicants seek this court's indulgence and extension of time.

16. The letter seeking an explanation from the taxing master is exhibited to this court. Such extension of time as is sought by the applicant is provided for in **Rule 11(4)** of the **Advocates Remuneration Order** set out herein above, and the court may on its discretion allow it.

17. On many an instance courts have indulged litigants for the missteps of their counsel in the process of litigation. Examples of these cases are **Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [eKLR]**; **Philip Chemwolo and Mumias Sugar Co Ltd -vs- Augustine Kubende [1986] eKLR** and **Sheikh t/a Hasa Hauliers v Highway Carriers Ltd [1988] eKLR**.

18. In the circumstances of this case the applicants relied on the services of their advocate to represent their interests and he did what he thought best though mistaken. It is not that they never attempted to do anything. It is quite telling that the application dated **13/9/2019** was filed just **7 days** after the taxation, which was within the **14 day** window provided by **Rule 11(1)**. It is probable that were it not for the misstep of their counsel they would have had a proper reference on the record within the prescribed period. For the foregoing reasons and in the interests of justice I find that the application for extension of time has merit and should be granted.

19. Consequently I grant the application dated **13/2/2020** and make the following orders:

a. The time within which the objection to the taxation in the main suit is hereby extended by 14 days with effect from the date of this order.

b. Notwithstanding order no. 1 herein above, the letter of objection to the taxation dated 13/2/2020 shall be paid for forthwith.

c. The execution of the costs in the main suit is hereby stayed pending the hearing and determination of the reference.

d. The proposed reference shall be filed promptly and within the timelines stipulated in rule 11(2)

e. If no reference is filed within the time frame set out in these orders as above then these orders shall stand automatically vacated.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 5th day of November, 2020.

MWANGI NJOROGI

JUDGE, ELC, KITALE.