



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI LAW COURTS**

**ELC MISC 89 OF 2016**

**GATHENJI & COMPANY ADVOCATES.....ADVOCATE**

**=VERSUS=**

**DAVID N THUKU**

**SUSAN THUKU.....CLIENTS**

**RULING**

1. This is a Ruling in respect of two separate applications. The first application is dated 12<sup>th</sup> March 2018. It is brought by the Advocate/Applicant. It seeks the following orders:-

***1. That judgement be entered on the Certificate of Taxation dated 15<sup>th</sup> February, 2018 for the Applicant/Advocate as against the Respondent/ Client for the sum of Kenya Shillings Six Hundred Eighty Five Thousand, Four Hundred Sixty Two ,Cents Fifty Four (Kshs.685,462.54) only being the taxed costs.***

***2. That the Respondent /Client do pay the Applicant/Advocate the said sum of money plus interest at 14% per annum from date of the Certificate of Taxation.***

***3. That the costs of this application be provided for.***

2. The second application is dated 20<sup>th</sup> January 2019. It is brought by the Clients/Respondents. It seeks the following orders:-

***1. That this Honourable Court be pleased to stay further proceedings pending hearing and determination of this Application.***

***2. That this Honourable Court be pleased to enlarge time within which to lodge a reference.***

***3. That the decision of the taxing master delivered on 16<sup>th</sup> January 2018 on the bill of costs dated 4<sup>th</sup> May 2016 with respect to items 1,11,23 and 47 be set aside.***

***4. That costs of the Application be provided for***

**First Application.**

3. The Applicant in this case states that the firm rendered legal services for the Respondents in various matters which were in court. When the Respondents failed to pay legal fees, the Applicant taxed its bill of costs which was allowed in the sum of **Kshs.685, 462.54** and a certificate duly issued. The Respondents have however refused to settle the same necessitating filing of this application.

4. The Respondents opposed the Applicant's application based on a replying affidavit sworn on 17<sup>th</sup> April 2019. The Respondents contend that soon after the bill of costs was taxed, they asked for reasons from the Deputy Registrar who was the taxing officer. The reasons could not be given in time because the court file went missing. When the file was finally traced, the Respondents filed a reference but again the court file went missing. When the file was again found, the Respondents filed an application seeking stay of proceedings and for enlargement of time to lodge a reference. The Respondents therefore argue that Judgement cannot be entered when a reference is pending determination.

5. The parties were directed to file written submissions in respect of the two applications. The Applicant filed their submissions on 6<sup>th</sup>

August 2019. On 14<sup>th</sup> October 2019 when the date for ruling was reserved, the Respondents Advocate were given 7 days within which to file their submissions. As at the time of writing this ruling, no submissions had been filed and if any were filed, then they are not in the court file.

6. I have considered the Applicant's application as well as the opposition to the same by the Respondents. I have also considered the submissions by the Applicant. The only issue for determination is whether the Applicant has demonstrated that there are grounds for entry of judgement. The Applicant is only expected to demonstrate that there is a certificate of taxation issued and that there is no dispute on retainer. The fact that there is a reference pending is not a bar to entry of judgement as such reference does not act as stay. See **KTK Advocates Vs Baringo County Government (2017) eKLR and Njongoro & Co. Advocates Vs Dubai Bank Kenya Limited (2008) eKLR.**

7. In the instant case, there is no contention that a Certificate of Taxation has been issued. The dispute which arose as to retainer was settled vide this court's ruling delivered on 13<sup>th</sup> June 2017. There is no reference filed herein. What is pending determination is an application for enlargement of time to lodge a reference. The application cannot be taken as a reference because leave is yet to be granted.

8. The Applicant has sought interest at court rates of 14% percent. I do not see any basis upon which the Applicant can be denied interest. I therefore find that the Applicant's application is well founded. I allow it in its entirety.

It is so ordered.

#### **The Second Application.**

9. In this application, the Applicants state that the taxing officer was wrong in taxing the various items which have been specified in paragraphs 6,7,8,9 and 10 of the affidavit in support of the application. The Applicants therefore urge the court to set aside those specific items. The applicants contend that at the time the taxing officer delivered her ruling, the court file was missing.

10. The Applicants' application has been opposed by the Respondent through a replying affidavit sworn on 4<sup>th</sup> April 2019. The Respondent contends that the Applicants have never given notice of objection as required and that there is no prayer for enlargement of time to file objection and that therefore even if time was enlarged for lodging of the reference, that reference will be incompetent. The Respondent further argues that the Applicants have not explained the delay in filing the reference and that the Applicants have lied that the court file was missing as at the time ruling on taxation was delivered.

11. The Respondent further argues that the court file was readily available as can be seen from the various activities which were undertaken in the file after the ruling had been delivered. The Respondent further contends that the application is incompetent in that one cannot attack the decision of the taxing officer before leave is granted to enlarge time for filing a reference.

12. I have considered the Applicants' application as well as the opposition to the same by the Respondent. I have also considered the submissions by the Respondent. The issues which emerge for determination are firstly whether time to lodge reference should be enlarged. Secondly whether the reference which was lodged before leave to enlarge time is granted is proper and whether it should be entertained.

13. In the Applicants chamber summons, the Applicants claim that they were unable to file a reference because at the time the ruling on taxation was delivered, the court file was missing. I have looked at the court file. The ruling was delivered on 16<sup>th</sup> January 2018 and the taxing officer recorded in the court file that the ruling had been delivered. There is therefore no basis upon which one would claim that the court file was missing.

14. In a further affidavit filed on 30<sup>th</sup> April 2019, the Applicants have tried to change from the position in their supporting affidavit by trying to show that the court file was missing. The Applicants are not being candid as to why they could not file a reference in time. There was no objection filed within 14 days from the date of ruling indicating on which items the Applicants were objecting to. It is therefore clear that even if the court had found that there were grounds to allow enlargement of time, any such extension would amount to allowing an incompetent reference being filed and such reference would be open to striking out. See **Republic Vs City Council of Nairobi & another (2017) eKLR.**

15. The Applicants filed an application for enlargement of time and at the same time applied to have the reference heard and determined. This approach is inappropriate because one would not be expected to apply for the two in the same application. In **Purity Gathoni Githae & Another Vs Excelo Structures Ltd & another (2018) eKLR,** Justice Eboso observed that an application which seeks to enlarge time which at the same time challenges the decision of the taxing officer is inappropriate and against the law. I therefore find that the Applicants' application lacks merit. It is hereby dismissed with costs to the Respondent.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 19<sup>th</sup> day of December 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of:

Mr Muturi for Advocate /Applicant and

Mr Theuri for Mr Mshweshwe for Respondents

Court Assistant: Hilda

**E.O. OBAGA**

**JUDGE**