



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 406 OF 2008

PURITY GATHONI GITHAE.....1ST PLAINTIFF

SAMUEL KAMAU MACHARIA.....2ND PLAINTIFF

VERSUS

EXCELO STRUCTURES LTD1ST DEFENDANT

OCEANFREIGHT TRANSPORT CO. LTD.2ND DEFENDANT

RULING

1. On 22/7/2014, the taxing officer of this Court, Mrs L M Wachira, rendered a ruling on the 2nd defendant's party and party bill of costs dated 12/2/2014. She taxed the bill of costs at Kshs 708,189 against the plaintiffs. The ruling was rendered in the presence of counsel for the parties. The plaintiffs did not give the taxing officer a written notice of objection within 14 days as required under Paragraph 11 of the Advocates Remuneration Order. The plaintiffs subsequently filed a notice of objection on 8/8/2014, three days outside the prescribed time line of 14 days. The filing was done without leave of the court.

2. Subsequently, on 2/12/2014, the plaintiffs (the **applicants**) filed a chamber summons dated 1/12/2014 seeking the following orders:

a. That this court be pleased to certify the application herein as urgent for hearing exparte in the first instance.

b. That pending further orders of the court, there be a stay of execution of the taxed costs in this matter.

c. That this court be pleased to enlarge the time for filing the objection and this reference and to deem the objection filed herein on 8/8/2014 and this reference as properly and duly filed.

d. That the court be pleased to deem the reasons of taxation of the taxing officer's ruling made on 22/7/2014 as contained in the typed ruling.

e. That this court be pleased to vary or set aside the decision of the Taxing Officer contained in her typed ruling made on 22/7/2014.

f. That cost of this application/reference be provided for.

3. The said application is supported by an affidavit sworn on 29/11/2014 by the plaintiffs' advocate, Mr Gacheru Ng'ang'a. The application is opposed by the 2nd defendant through a replying affidavit sworn by the 2nd defendant's advocate, Mr Maina Murage. That application is the subject of this ruling.

4. Whether or not the said application is the reference contemplated under Paragraph 11 of the Advocates Remuneration Order is debatable. I say so because, besides objecting to the taxing officer's award, the application seeks a number of other key prayers. Firstly, it seeks an unqualified order of stay of execution of the taxed costs. Secondly, it seeks enlargement of the time for filing the notice of objection. Thirdly, it seeks an order enlarging the time for filing the reference. Fourthly, it seeks an order deeming the application to be a properly filed reference and validating it. Fifthly, it seeks an order deeming the reasons set out in the decision of the taxing officer dated 22/7/2014 as the taxing officer's reasons of taxation under Paragraph 11 of the Advocates Remuneration Order. Lastly, it seeks an order varying or setting aside the decision of the taxing officer dated 22/7/2014.

5. The reason advanced by the applicants to explain the delay in filing the objection is that there was an oversight on part of a clerk in the office of the applicants' advocates. Secondly, the applicants contend that although they made several requests to be furnished with reasons for the taxation, none was forthcoming from the taxing officer. Thirdly, the applicants contend that the 2nd defendant has threatened to

execute for the costs through an unorthodox means of bankruptcy proceedings. Fourthly, the applicants argue that the taxing officer applied wrong principles when assessing instruction fees. Fifthly, they argue that the sum of Kshs 500,000 awarded as instruction fees is manifestly excessive. Lastly, they argue that the taxing officer erred in failing to tax the objected items under Schedule VI of the Advocates Remuneration Order 2006.

6. The case of the 2nd defendant is that counsel for the applicants was in court when the taxing officer delivered her decision and explained to the advocates that the reasons for the taxation were set out in the written decision which was available to the parties. The 2nd defendant adds that the decision was clearly captioned “**RULING ON TAXATION AND REASONS**”

7. The 2nd defendant further contends that the documents annexed to the application are backdated with a view to misleading the court. They contend that no reasonable explanation has been tendered to justify enlargement of time. It is further contended that the present application is not *bonafide* and was triggered by the 2nd defendant’s threat to initiate bankruptcy proceedings.

8. The 2nd defendant further contends that the excuse advanced by the applicant for failing to file the objection is lame and unsupported as there is neither a deposition from the alleged clerk nor his details. They add that apart from the unexplained delay in the filing of the objection, the delay in filing the reference is equally unaccounted for. They urge the court to disallow the plea to admit the reference.

9. The application was canvassed through written submissions dated 25/3/2015 and filed on even date. The 2nd defendant’s written submissions are dated 31/5/2017 and were filed on 2/6/2017.

10. I have considered the said application together with the supporting affidavit, the replying affidavit and parties’ respective submissions. I have similarly considered the applicable law and the relevant jurisprudential principles.

11. Three substantive issues emerge for determination in this application. The first issue relates to the appropriateness of lodging an objection and initiating a reference outside the prescribed time, and seeking enlargement of time within the same reference. The second issue is whether the applicants have satisfied the criteria for enlargement of time in the circumstances of the present application. The third issue is whether the application satisfies the criteria for review of the taxing officer’s discretion in taxation of a bill of costs. I will deal with the three issues in the order in which they have been itemized.

12. The framework on lodging of notice of objection, filing of reference, and filing of application for enlargement of time are contained in Paragraph 11 of the Advocates Remuneration Order which provides as follows:

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 which he objects to.

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 will be served on all the parties concerned, setting out the grounds of his objection.

3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

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.

13. Both the notice of objection to taxation and the present reference were filed out of time and without prior leave of the court. The applicant has in the same reference sought an order enlarging the time for lodging the notice of objection and the filling of the reference. In my view, the approach adopted by the applicants is not only inappropriate but against the law. I say so because, a notice of objection filed outside the prescribed time and without leave of the court is a nullity in law and cannot form the basis of any subsequent reference. Secondly, a notice under Paragraph 11 of the Advocates Remuneration Order is akin to a notice of appeal. The subsequent reference is akin to a memorandum of appeal. When filed outside the time frame prescribed by the law, they are nullities in law. What the applicant was required to do upon realizing that they were late in lodging the notice of objection was to apply for extension of time, and upon obtention of an extension order, lodge the notice and the reference as directed by the court or in accordance with the law. In my view, a contrary interpretation of the law will defeat the purpose of the law of limitation in civil proceedings and will ultimately create chaos in the administration of civil justice.

14. In light of the foregoing, it follows that no valid reference can be filed outside the prescribed time without prior obtention of an order enlarging time. To this extent, the notice of objection and the limb of the application which deals with matters relating to a reference under Paragraph 11 (3) of the Advocates Remuneration Order are nullities and are struck out accordingly.

15. What remains is the limb of the application which deals with enlargement of time and stay of execution. I will deal with those limbs in the contest of the second issue which relates to the question as to whether or not the applicants have satisfied the criteria for enlargement of time. Paragraph 11 (4) gives this court discretionary power to enlarge time for lodging the notice and the reference. A litigant applying for enlargement of time under Paragraph 11 (4) is obligated to give a satisfactory account for the delay. Secondly, the delay should not be inordinate. Lastly, the applicant should demonstrate that the intended reference has merit.

16. In the present application, the notice of objection was filed three days outside the prescribed time. The applicants have explained that there was an oversight on the part of the clerk assigned the task of filing and serving the notice of objection. Similarly, the applicants have

explained that they delayed to file the reference because they were waiting for reasons under Paragraph 11 (2) of the Advocates Remuneration Rules.

17. I have considered the explanation tendered by the applicants. I have also considered the gist of the applicants' grievance against the decision of the taxing officer. Similarly, I have taken into account the fact that there was a three days delay in filing the ill-fated notice. I am persuaded that the ends of justice will be served if time for lodging and serving the notice of objection and the reference is enlarged and the 2nd defendant is indemnified through a modest award of costs of the present application.

18. Having found that there is no valid reference before the court, I will not make a determination on the third issue at this point.

19. As regards stay, stay automatically comes into force once an order enlarging time is granted and the terms thereof are complied with. The ruling of the taxing officer was clear that it contained reasons for the taxation. Prayer (d) is therefore superfluous.

20. In light of the above findings, I make the following orders in disposing the plaintiffs' Chamber Summons dated 1/12/2014.

a. The plaintiffs are granted an extension of Seven (7) days within which to lodge both the notice of objection to taxation and the reference. In default, the Chamber Summons dated 1/12/2014 shall stand dismissed.

b. The plaintiffs shall pay the 2nd defendant throw-away costs of this application assessed at Kshs 25,000 to be paid within 30 days from today. In default, the order enlarging time shall stand vacated and any reference filed pursuant to the order herein shall stand struck out.

c. Mention for directions on 30/8/2018.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF JULY 2018.

B M EBOSO

JUDGE

In the presence of:-

Ms Kinuthia holding brief for Nduta Kamau Advocate for the plaintiffs

Ms Halima Abdi - Court Clerk