



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. NO.268 OF 2017

THOMAS K'BAHATI

T/A K'BAHATI & CO. ADVOCATES...ADVOCATE/RESPONDENT

-VS-

JANENDRA RAICHAND SHAH.....CLIENT/APPLICANT

RULING

1. The Application under consideration is the Chamber Summons dated 19th July 2017 in which the Applicant is seeking the following orders:

- 1. That there be a stay of execution of The Certificate of Taxation dated 2nd May, 2017 pending hearing and determination of this Application.**
- 2. That this Honourable Court enlarges time within which to file a Reference against the decision of the Taxing Officer delivered on 28th April 2018.**
- 3. That the Reference filed by the Applicant herein be deemed as properly filed though filed out of time.**
- 4. That there be a stay of execution of the Certificate of Taxation dated 2nd May, 2017 pending hearing and determination of the reference filed by the Applicant herein.**

2. The Application is supported by the Affidavit of JANENDRA RAICHAND SHAH, the Applicant and is based on the following grounds:

- i. The Applicant herein filed an objection to taxation on 11th May, 2017 and is yet to receive a response to the objection from the Taxing Master.**
- ii. That the Applicant has always intended to Appeal the decision of the taxing master delivered on 28th April, 2017.**
- iii. That the Applicant is yet to receive a response from the taxing master in respect of the decision of the Notice of objection filed on 11th May 2017.**
- iv. That the Respondent has the intention of levying execution against the Applicant as indicated in his letter dated 10th May, 2017.**
- v. That the Applicant did not file the reference herein within time as he was awaiting the response of the Taxing Master to the notice of objection filed on 11th May, 2017.**
- vi. That the Applicant did not file the reference within the required time as he was awaiting the decision of the taxing master which is yet to be rendered up to date.**
- vii. The Applicant has done due diligence by seeking leave to file the Reference out of time.**

viii. That the Applicant has decided to just go ahead and pursue the Appeal pertaining to the decision of the Taxing Master rendered on 28th April, 2017 despite the lack of response to the Notice of Objection dated 11th May, 2017.

ix. It is in the interest of justice that the Application is allowed to grant the Applicant the chance to exercise his right of appeal.

3. The Respondent opposed the said application and filed grounds of opposition dated 13th January 2018 as follows:

a) The Application is incompetent and defective.

b) The Court lacks jurisdiction to entertain the application.

c) Clause 11 of the Advocates Remuneration Order 2009 invoked in the application does not grant the Court powers or jurisdiction to stay execution of an Advocate/Client certificate of costs.

d) There is no proper reference known in law before the Court.

e) The Application is frivolous, scandalous, and vexatious and abuse of Court process and is meant to delay.

f) The application has no merit or substance.

g) The Application is an afterthought; is made after undue delay.

h) The Application is incompetent, defective, unknown in law, vexatious, frivolous and scandalous.

i) The Application is an abuse of Court process as the same is simply purposed to delay, scuttle, prejudice and bring hardship to the Advocate/Respondent's entitlement

4. The parties filed and exchanged written submissions through their respective Advocates, M/s Muturi Gakuo & Kibara Advocates for the Applicant and M/s K'Bahati & Co Advocates for the Respondent. I have considered the Application and the submissions filed. The issues that arise for determination are:

i. Whether the Court may extend the time for filing of a reference under the Advocates Remuneration Order in the circumstances of this case: and

ii. Whether the Court may stay execution of certificate of costs pending the hearing of the reference.

5. Paragraph 11 of the Advocates Remuneration Order provides:

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 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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (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 expired.

6. Paragraph 11 of the Advocates Remuneration Order is clear that the Court has discretion to extend time for lodging a reference notwithstanding the expiry of the 14 days period prescribed for the reference from the Taxing Master's decision on costs. However, in exercising its discretion in this regard, the Court should consider whether there has been no inexcusable delay in presenting the application. The Respondent has submitted that there was inordinate delay of about 21/2 months and therefore the Court's discretion should not be exercised in the Applicant's favour. The Applicant did file a notice of objection to the decision on taxation on 11th May 2017. This was a delay of about 12 days after the decision was delivered. In the said notice of objection, the Applicant sought to be given the reasons for the decision by the Taxing Master. There is no evidence that there was a response to the said objection. In my view, the applicant has been diligent in seeking to have the dispute on taxation of the costs determined expeditiously. To my mind, the Applicant has given sufficient reason why this Court should exercise its discretion to grant the order sought for enlargement of time within which to file a reference against the decision of Taxing Officer made on 28th April 2017.

7. The Applicant has also sought for an order of stay of execution of the Certificate of Taxation dated 2nd May 2017 pending hearing and determination of the reference to be filed by the Applicant. Taxation of costs is part of the execution process. The Respondent has submitted that the Application has no merit and ought to be dismissed and allow the Respondent to enjoy the fruits of his labour. The Respondent, however further submitted that the Court may exercise its discretion in favour of the Applicant subject to the deposit of the taxed costs in a joint interest earning account in the names of the Advocates for the parties. I note that Applicant's main contention is that the amount of costs awarded were excessive.

8. In the interests of justice, to enable the filing of an appropriate Application for consideration by the Court, the Court will grant the applicant a limited period of time to comply with the provisions of paragraph 11 of the Advocates Remuneration Order, and in the meantime order a stay of execution of the certificate of taxations of costs upon terms.

Accordingly for the reasons set out above, the Court makes the following orders:

- a) The Applicant is granted leave to file a reference against the decision of the Taxing Officer delivered on 28th April 2017.**
- b) The Applicant shall within 14 days from the date hereof comply with subparagraph (2) of paragraph 11 of the Advocates Remuneration Order by filing a reference by Chamber Summons setting out his grounds of objection to the taxation of costs.**
- c) There shall be a stay of execution of the certificate of costs dated 28th April 2017 pending the hearing and determination of the reference to be filed, subject to the deposit half (1/2) of the taxed costs being Kshs. 4,079,433.48 in a joint interest earning account in the names of the Advocates for both parties within fourteen (14) days hereof.**

9. For his failure to comply with the provisions for reference of an objection on taxation under paragraph 11 of the Advocates Remuneration Order, the applicant will pay costs of this application to the Respondent.

Orders accordingly.

Delivered, signed and dated at Mombasa this 17th September, 2018.

C. YANO

JUDGE