REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

ENVIRONMENTAL & LAND DIVISION

ELC MISC. NO. 419 OF 2013

KAGWIMI KANG'ETHE & COMPANY ADVOCATES.....APPLICANT

-VERSUS-

A.A. KAWIR TRANSPORTERS LIMITED.....RESPONDENT

RULING

1. Two applications await determination in this cause. The first is dated 10th March, 2014 and the second is dated 26th August, 2014. The former application was brought under Paragraph 11 of the Advocates (Remuneration) Order by the Advocate/Applicant seeking a review of certain aspects of the Taxing master's decisions on the Applicants Bill of Costs which was filed on 16th March, 2013. The Taxing master's allocatur was made on 27th November, 2013. The second application was filed on 2nd September, 2014 by the Respondent/Client. The Respondent seeks an extension of time to enable the Respondent to also file an application for review challenging the Taxing master's decision.

2. On 22nd September, 2014, the court directed that the Respondent's application be determined first. Consequently, it is the subject of this ruling.

3. The Respondent, who was once the Applicant's client, seeks in its chamber summons of 26th August, 2014 that the court do enlarge and extend the time within which the Respondent may give notice to the Taxing master of the items of taxation to which the Respondent objects. The Respondent also seeks orders that the Notice of Objection dated 26th August, 2014 be deemed as properly filed and on record. The grounds advanced in support of the Chamber Summons are that the ruling was read without the knowledge of the Respondent or its advocates and by the time the Respondent accessed the ruling the time within which it ought to have filed or prompted a challenge before the High Court against the ruling had lapsed. The chamber summons is also supported by a 29- paragraphed affidavit of Mutiso Steve Kimathi sworn on 26th August, 2014.

4. The Supporting Affidavit gives the litigation history of this matter. In the affidavit, the respondent recalls the consolidation of two Miscellaneous applications namely HCC Misc. Application No. 420 of 2013 and No. 419 of 2013 brought by the Applicant. The two Bills were to be disposed of by way of the parties' written submissions as they were contested. The submissions from the record, were all filed by 10th October, 2013 after a series of adjournments from 18th July, 2013. A ruling was delivered on 27th November, 2013 in the absence of both parties. The Respondent only became aware of the ruling on

taxation on 9th December, 2013 when the Applicant served the Respondents with a letter seeking reasons for the decision of the Taxing master in respect of certain items. Attempts to peruse the court file from the registry proved fruitless as the file had already been dispatched to the court's typing pool for the typing of the reasons as requested by the Applicant. Attempts to track the file in the typing pool allegedly also proved fruitless until around 25th February, 2014 when through the intervention of the court's Executive Officer, the court file herein was availed. The time for filing the Notice of Objection under paragraph 11 (1) of he Advocates (Remuneration) Order had by then long lapsed and the Respondent had to file an application for extension of time. The search for the court file begun again and continued until 7th May, 2014 when the Respondent's counsel was served with Applicant's application of 10th March, 2014. The matter it turned out was slated for 24th June, 2014. On this day though the application by the Advocate was not listed and a few days later on 1st July, 2014, the Advocate relisted his application dated 10th May, 2014 for hearing on 22nd September, 2014.

5. The Respondent says the court should exercise discretion in this favour as the failure to file the notice of objection on time is excusable if one considers the history of the matter and the post ruling happenings as outlined in the Supporting Affidavit. The delay, according to the applicant was not inordinate and is excusable. The delay if at all was not the client's. The Respondent also says the Applicant will suffer no prejudice if the Respondent's application is allowed.

6. The Applicant's reaction is that the application lacks any merit and is incompetent for having been supported by an affidavit sworn by counsel rather than by the aggrieved applicant. The Respondent also submitted that there has been gross delay and that counsel did not appear in court on both 10th October, 2013 and 21st November, 2013 yet the matter was listed. Like himself, the Respondent too did not attend court in time on 27th November, 2013 even though according to the Applicant both parties "were called". The Applicant further submits that the Respondent was simply indolent in pursing the matter and that the court file contrary to the Respondent's assertions was always available. The lethargic approach by the Respondent continued even after they had accessed the file and after service of the Applicant's application on 9th May, 2014.

7. It is beyond controversy that this court has discretionary powers to extend the time for the filing of a Notice of Objection under paragraph 11(1) of the Advocates (Remuneration) Order. Paragraph 11(4) of the Advocates (Remuneration) Order is quite clear in these respects. The sole issue therefore in the current application is whether or not the court should exercise this jurisdiction and discretion in favour of the Respondent.

8. Exercise of judicial discretion properly so-called implies, in my view, a judicial choice between two or more equally proper courses. It is about the judge's objective 'feel' of the case to decide between a veto of the discretion in favour of the party or a permission of the discretion in favour of a party. It is a balancing exercise and is only fettered to the extent that the court is expected to act on the correct principles by identifying and considering relevant material factors or matters as well as case law, ignoring irrelevances and explaining the weight given to the factors considered. It involves the judges' objective "feel" of the case and is not about a quirky and fanciful determination of choice.

9. I have considered the submissions by counsel. I have also carefully read and considered the file record as well as the affidavits filed. In my view, even though I am not limited to any number of factors to be considered prior to exercising my discretion, the factors of particular importance to be considered in this case is the period of delay, reasons for delay and degree of prejudice to the Respondent. These are the main factors ordinarily considered by the court when faced with an application for extension of time and the two Court of Appeal cases of **Pan African Insurance Co. Ltd –vs- Inkson Industrial Co. Ltd C.A.C. Application No. Nai 52 of 2005 and Kagai –vs- Ngatia C.A.C Application No. Nai 77 of 2005 (both unreported)** are exactly to that point. I would perhaps add that it is also always relevant for the court to consider and perhaps conduct an assessment as to the seriousness and significance of the failure

to comply with any rule, practice direction or court order when called upon to exercise discretionary jurisdiction. If the breach is neither serious nor significant then it would serve little purpose considering why the default occurred and evaluating the circumstances of the cases.

10. In this case, I do not for one moment hold the view that the failure to file a notice of objection in time was trivial. It was significant as it did affect the running of the litigation as is now apparent. Conduct of litigation ought to be promoted by parties expeditiously and at fair and proportionate costs: see **Sections 1A and 1B of the Civil Procedure Act**. It should not be stagnated. The delay in filing the notice simply meant that if the Applicant was still minded then the court would be prompted one time in future and any ongoing proceedings would be stalled. Litigation has been disrupted in this cause. So, was the delay justified?

11. The delay in question ran some nine (9) calendar months. The Notice of Objection should have been filed by the latest the 10th day of December, 2013. Intention to file the same was not expressed until the current application was filed on 2nd September, 2014. I must first point out that from the record no notice of objection has ever been filed even out of time. The Applicant has submitted that the delay herein was (or is) inordinate. That it was also two fold in the sense that no notice of objection was filed within the prescribed time and even if the excuse is that the Respondent was not aware of the court' ruling, from the time the Respondent became aware of the ruling till the time if motioned or prompted the court there was still inordinate delay. The Respondent holds the view that the delay was not inordinate: See paragraph 23 of the Supporting affidavit filed on 2nd September, 2013. Neither the Applicant nor the Respondent however addressed me on what really is inordinate delay.

12. To ascertain what constitutes inordinate delay, I would gleefully adopt the words of Hon. Mr. Justice F. Gikonyo in the case of **Mwangi S. Kimenyi –vs- Attorney General and another [2014]eKLR.** The learned judge whilst determining an application for reinstatement of a suit dismissed for want of prosecution stated as follows: -

> *"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay and so on and so forth. Nevertheless inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however advised (sic) for the courts not to take the word "inordinate" in its ordinary dictionary meaning but to apply it in the sense of excessive as compared to normality.....see case of **Allen –vs- Alfred McAlphine & Sons [1968]1 All ER 543** where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases **of Agip (Kenya) Limited –vs- Highlands Tyres Limited [2001] KLR 630 and Sagoo –vs- Bahari [1990] KLR 456** where delays of eight months and five months respectively was not considered to be inordinate and also ELC Case No. 2058 of 2007 where delay of about 1½ was considered not to be inordinate"*

I agree, the learned judge was spot on. It all depends on the circumstances of each case, the period of delay notwithstanding.

13. In the instant cause the aggregate period of delay raced some nine months. On the face of it and coupled with the fact that the notice of objection under Paragraph 11(1) of the Advocates (Remuneration) Order ought to be filed within fourteen days, it would appear the delay was excessive. If however there was good reason for non-action, then as per Justice Gikonyo in the case of **Mwangi S. Kimenyi –vs- Attorney General (supra)** it would no longer be inordinate in the sense of excessive or unwarranted.

14. The reasons advanced for the delay are simple. The Respondent was not aware of the ruling and when it became aware the court file apparently took a walk. The court file was neither available in the court registry where ordinarily it was domiciled nor in the typing pool where it was taken. The record is clear that the ruling was delivered in the absence of the parties, both parties. The Respondent only became

aware of the ruling on taxation on 9th December, 2013. There is nothing on record to indicate that the Respondent was aware that the ruling had been rescheduled for 27th November, 2013. The Applicant stated in his submission that both parties were called and he attended court only to find that the ruling had been delivered. The court record reveals otherwise. The Applicant was present alone before the Taxing master on 21st November, 2013 when the ruling date of 27th November, 2013 was reserved. I believe the Respondent. The Respondent was not aware of the date of 27th November, 2013. The Advocate with the Bill should have notified the Respondent of the date of the ruling.

15. What of the delay between December, 2013 through and August, 2014 when the current application was filed? The Respondent has attempted to explain that delay by stating that the file could simply not be traced. The Applicant contested this. I would put more weight on the Respondent's version. The chronological yet graphic description of how attempts were made to trace the file by the Respondent's counsel are more telling. It is not disputed that the Applicant had sought a typed copy of the ruling. The court records reveal that even though the Applicant's letter of 4th December, 2013 was received by the court registry on 5th December, 2013 it was not until 25th February, 2014 that the Deputy Registrar directed that the Applicant be supplied with a typed and signed copy of the ruling. That must explain why the notice of motion for review of the Taxing masters ruling was only filed on 10th March, 2014.

16. As for the period between March, 2014 and August, 2014 there is on record evidence that the Respondent's counsel finally paid for perusal of the court file on 14th May, 2014 and perused the court file. The Respondent states that it thereafter commenced the process of preparing the current application as the Respondent was already hopelessly out of time. There is no doubt the Respondent's counsel should have acted much sooner and faster. The Respondent's counsel was here certainly apathetic and sluggish but not incompetent.

17. The circumstances leading to the point of filing of the current application, the history of the proceedings, the attempts to track the court file, the voluminous submissions filed in contest of the Bill of Costs leans me towards determining that delay could and can be excused. The latter delay of three and a half months from around 14th June, 2014 though 26th August, 2014 was not so inordinate as to warrant an automatic lock out.

18. I am left with the question of prejudice to the Applicant if the current application is allowed. There is no doubt that litigation ought to be conducted swiftly in the interest of justice. Such swift conclusion can always be achieved if there is compliance with the administrative and case management rules and directions of the court. Compliance with such rules should be the norm. With optimum compliance parties are unlikely to be prejudiced via delays. I have reviewed this matter in its entirety. The Applicant has himself filed an application seeking to challenge the decision of the Taxing master in certain respects. The decisions sought to be challenged are those on items 4 and 5 of the Bill of Costs. It is those same items 4 and 5 that the Respondent also hopes to challenge if allowed to by this court. Of course the grounds of challenge are bound to be different. What the Respondent's current application has done is therefore to imperil the Applicant's application dated 10th March, 2014 but only for a while. The Applicant will be inconvenienced but for just a short while. The Applicant can however be compensated in costs. It is certainly not relevant for me to assess the chances of either parties success on challenge of the decision on the two items of the Bill of Costs., in the circumstances, lest I pre-empt the reviewer. I am however convinced that any prejudice thus far can be compensated in costs.

19. I find there was reason for the delay in filing the notice of objection as well as the application for extension of time to file the notice of objection. The delay was not so inordinate as to wholly imperil the litigation herein for the reason that the Applicant himself has not resigned to the award of the Taxing master but seeks to challenge the same items as the Respondent too. As my reading of paragraph 11(1) of the Advocates (Remuneration) Order is not that promptness is a mandatory requirement and further as the general trend is to only lock out litigants in very obvious and contumacious cases of breach of rules which lead to unmitigated prejudice, I would exercise my discretion in favour of allowing the application for extension of time.

20. One final comment, by way of obiter, before I make the final orders. It is a common trend for judicial officers to read rulings and judgments in the absence of both parties. There is an almost absolute requirement to pronounce judgments and rulings in public whether they affect Civil or Private Rights. It is for that reason that the court is expected to pronounce its judgments in open court. Where a judgment or ruling is read in the privacy of the judicial officers chambers or to an empty courtroom with the judicial officer and a court orderly as the audience or the judicial officer alone, there is no pronounciation. To pronounce implies to speak or state publicity. Ordinarily, one should speak to someone and not to nobody. I have found no reason why a judgment or ruling should be pronounced or be broadcast in empty court rooms in the absence of both parties. It defeats the purpose of the pronounciation. It leads to unsavoury instances and may even take away ones right of appeal. Effort should be made as much as possible to contact the concerned parties rather than quickly read a judgment or a ruling to an empty court. Judicial officers ought to avoid this trend. It defeats all sense.

Conclusion

21. I allow prayer 1 of the application dated 26th August, 2014 and direct that the Respondent do file its Notice of Objection within the next three working days. As the reasons for the Taxing master's ruling are already available the Respondent is also to file and serve its application for review within the next twenty one (21) days. The cost of the application for extension of time is however awarded to the Applicant/Advocate.

22. Orders accordingly.

Dated, signed and delivered at Nairobi this 13th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Applicant

..... for the Respondent