



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA.

CIVIL APPEAL (APPLICATION) NO. 40 OF 2013

BETWEEN

ROZAAH AKINYI BUYU.....APPELLANT/APPLICANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

HANSON NJUKI MUGO.....2ND RESPONDENT

JOHN OLAGO ALUOCH.....3RD RESPONDENT

(In the Matter of the Reference on the Ruling of the Deputy Registrar of the Court of Appeal at Kisumu, Mr. Adika, dated 10th September, 2015 in Civil Appeal No. 40 of 2013 and in the Matter of a Reference dated 12th February, 2016 on the Single Judge's Ruling dated 12th February, 2016 (Lady Justice A.K. Murgor, JA.)

RULING OF THE COURT

[1] This is a Reference to full Court of the Ruling of **Murgor, JA.** dated 12th February, 2016 allowing an application by **Rozaah Akinyi Buyu** referred to hereinafter as **Judgment debtor** for extension of time in which to file a reference on taxation of bill of costs.

The Reference is made under **Rule 55 (1)** of the **Court of Appeal Rules (Rules)** which allows any person dissatisfied with the decision of a single judge to apply to have the application determined by the Court.

[2] By a Ruling dated 10th September, 2015, the Deputy Registrar of this Court (**Hon. H. Adika**), taxed and allowed the party and party bill of costs lodged by the **Independent Electoral and Boundaries Commission (IEBC)** and **Hanson Njuki Mugo**. The two will henceforth be referred as **Decree holders** against the judgment debtor at Shs. 2, 663, 115/= . A certificate of costs to that effect was subsequently issued on 30th October, 2015.

On 17th September, 2015, the decree holders filed a Reference under **Rule 112** in essence contending that the Deputy Registrar overlooked some matters and that the costs should be increased.

[3] By a notice of motion dated and filed on 3rd November, 2015, the judgment debtor applied for extension of time to apply to refer the taxation to a judge under Rule 112. That application was opposed by the decree holders. It was heard inter partes and allowed by Murgor, JA. on 12th February, 2016. Thereafter the decree holders filed the present Reference seeking the discharge of the decision.

[4] The grounds upon which the judgment debtor sought extension of time were that the judgment debtor was not aware of the delivery of the Ruling until 15th October, 2015; that a certified ruling and a certificate of costs had not been issued; that notice of date of delivery of the ruling was not issued; that the judgment debtor received a copy of the handwritten ruling from the decree holders advocates on 16th October, 2015 and that the ruling shows a bare and injudicious exercise of discretion in determining instructions fees.

The application was opposed on the grounds contained in the replying affidavit of **Jude Ragot**, the decree holders' advocate sworn on 24th November, 2015. In that affidavit the decree holders' advocate stated, *inter alia*: that the judgment debtor's advocates had been aware of the ruling since 18th September, 2015; that the application was lodged on 4th November, 2015; that the delay of 47 days in filing the application was unreasonably inordinate and had not been explained; that the application was filed almost 21 days after the threat of execution and that the application was meant to buy time.

The application was also opposed by **Hon. Olago Aluoch**, the 3rd respondent in the application who apparently has been awarded separate costs.

[5] Murgor, JA. considered the application and the respective grounds of objection. The learned judge made finding thus:

“There is no doubt that there has been delay in bringing this application, and the applicant has not provided any explanation, plausible, or otherwise as to the reasons for delay. But having said that, I am of the view that if the applicant had been notified of the date for delivery of the ruling ... the Reference might have been filed within the stipulated period. This omission is further compounded by the fact that, and it is not disputed, that the applicant is yet to be supplied with a certified copy of the ruling by the Deputy Registrar. Given these circumstances, the interest of justice militate against penalizing the applicant for the delay ...

This line of reasoning is further fortified by the fact that the record shows that, the 1st and 2nd respondents have also filed a Reference challenging the same decision. With this in mind, I do not envisage that any prejudice will accrue to them if time were to be extended to enable the applicant file her own Reference, as it is evident that the matter is yet to be finalized.”

[6] The respective counsel have filed lengthy written submissions and cited several authorities. The decree holders fault the decision of the learned judge in several respects; firstly, that the finding that the judgment debtor was not notified of the date of the ruling on taxation was a misdirection in view of the finding that there was unexplained inordinate delay; secondly, that the learned judge misdirected herself by failing to consider that the judgment debtor came to know of the date of the delivery of the ruling on 18th September, 2015 and thus the period for which the judgment debtor was not aware of the ruling was eight days; thirdly, that the learned judge relied on an irrelevant factor that the judgment debtor was not availed a copy of the ruling on taxation as there is no such requirement under the rules; fourthly, in taking into consideration that the decree holders had also filed a Reference; fifthly, in finding that the decree holders would not suffer prejudice; in failing to award costs to the decree holders to assuage them for unnecessarily dragging them through unnecessary application and, lastly, in failing to consider that the judgment debtor by conduct did not act equitably as the application was filed 21 days after threat of execution and served on a Friday when the hearing was scheduled for the next Monday.

[7] The Reference is opposed on the grounds, *inter alia*, that the jurisdiction of the court is not properly invoked as the application does not specifically show whether it seeks discharge, variation, reversal of the order or the nature of variation; that the jurisdiction and powers of a single judge are unfettered; that the single judge correctly found that the judgment debtor was not notified of the date of delivery of the ruling ; that it was necessary for the judgment debtor to get the text of the ruling to mount arguable reference; the single judge took into account the need to do justice and considered the issue of prejudice and lastly, that the Reference raises important questions of law.

[8] By Rule 112 (3), an application for Reference of a bill of costs as taxed by the Registrar may be made to the Registrar informally at the time of taxation or writing within seven days thereafter.

It is not disputed that the taxation of the bill of costs and the ruling thereof was done in the absence of both the decree holders' and judgment debtor's advocates.

It is also clear that the decree holders' advocates and the judgment debtor's advocates had no notice of the date of the ruling and that on 10th September, 2015, the Deputy Registrar only read a handwritten ruling.

It is in those circumstances that the application for extension of time to file a Reference pursuant to Rule 112 (2) was made.

[9] The time for filing a Reference is limited by Rule 112 (3) to 7 days.

The decree holders invoked the unfettered discretion of the single judge under Rule 4 to extend time and the learned judge duly extended time.

It is however contended, in essence, that the learned judge misdirected herself in granting the application for reasons stated by the decree holders to which we have referred.

[10] The principles which guide the Court in exercise of discretion in an application for extension of time are well settled and need no repetition. The discretion though unfettered should be exercised judicially. In considering whether or not the exercise of judicial discretion should be interfered with, the court to which the Reference is made does not substitute its discretion for that of the judge who exercised the discretion in a certain way.

[11] We have considered the grounds of Reference and the grounds of objection. It is evident from the impugned ruling that the learned judge correctly stated the guiding principles and referred to relevant authorities.

The learned judge thus considered the issues raised including the issue of delay. The learned judge made a finding that there was delay in

bringing the application which had not been explained. Nevertheless, the learned judge considered that the judgment debtor had not been notified of the date of delivery of the ruling nor provided with a certified copy of the ruling and reasoned that the judgment debtor should not in the interest of justice be penalized for the delay. Further, the learned judge took into account that the decree holder was also dissatisfied with the ruling and had filed a Reference. The learned judge was of the view that in the circumstances, delay was not prejudicial to the decree holders.

[12] The fact that there was unexplained delay in bringing the application did not disentitle or fetter discretion of the learned judge from extending time. We respectfully agree with the learned judge that the delay was not prejudicial to the decree holders because their Reference against the taxation of the same bill of costs was pending for hearing.

The taxed costs are relatively a large sum. The purpose of the decree holders pending Reference is to have the taxed costs increased. The purpose of the judgment debtor's application was to facilitate the filing of a Reference for reduction of the taxed costs.

It was proper for the learned Judge to consider the wider interest of justice.

In our view, it would not be in the interest of justice to deny the judgment debtor an opportunity to seek the reduction of the taxed costs while the decree holders are rightly to be heard on the Reference to increase the same taxed costs. Justice would be evenly done if the respective References are heard at the same time.

[13] For the foregoing reasons, we find that the learned judge exercised her discretion judicially and that there are no good reasons for interfering with the decision of the learned judge.

Accordingly, the Reference is dismissed. The costs of this Reference shall abide the decision on the respective References against the taxation of the bill of costs.

DATED and Delivered at Kisumu this 18th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR