



**IN THE COURT OF APPEAL
AT NAKURU
(CORAM: BOSIRE J.A. (IN CHAMBERS))
CIVIL APPEAL (APPLICATION) NO. 300 OF 2008**

BETWEEN

TEACHERS SERVICE COMMISSION..... APPELLANT/APPLICANT

AND

SIMON P. KAMAU & 19 OTHERSRESPONDENTS

(Application for extension of time to file a reference on taxation to single judge against the taxation of the party and party costs (Njoroge, Deputy Registrar) delivered on 4th April 2011

in

H.C.C.C. NO. 300 OF 2008

RULING

Following the dismissal of an appeal to this Court by the **Teachers Service Commission** (*the appellant*) against the decision of the superior court (Maraga J.) in **Nakuru High Court Civil Case No. 65 of 2006**, Simon P. Kamau and 19 others, (*the respondents*) filed their bill of costs which was later, on 4th April 2011, taxed at Kshs.382,600,000/=. The appellant was dissatisfied with the taxation, and by dint of the provisions of rule 112 of the Rules of this Court, it was expected to file a reference to a judge for his decision on the matter as the justice of the case may require. The reference by **rule 112 (3)**, should be made within seven days of the taxation.

The applicant did not make the reference within the stipulated period and hence the application before me for an extension of time within which to make the reference. The application is expressed to be brought under **rules 4, 108, 111 and 112** of the Court Rules and **section 3** of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya. Rule 4, donates the power to this Court to extend time “**for the doing of any act authorized or required by these Rules whether before or after the doing of the act.**” Rules 108 gives the court power to assess costs or the power to direct that costs be taxed. And rules 111 appoints the Registrar of this Court as the Taxing Officer. Rules 108 and 111, have, therefore no application to the application before me, as the court is not being asked in the application before me either to assess the costs or to direct that a taxation be conducted.

Rule 4, aforesaid, confers discretionary jurisdiction on this Court to extend the time for the doing of any act authorized by the Rules of court. It is upon an applicant to lay material before the court to enable it exercise its discretion as aforesaid. Ruling on taxation was given on 4th April 2011 in the absence of the appellant and its advocates. James Musee Nduna, who has sworn the affidavit in support of the motion herein has deponed that he became aware of the ruling on 7th April 2011 and immediately conferred with the applicant's advocate and it was agreed that a reference was necessary. No reference was however made and this application was considered necessary when auctioneers visited the appellant's premises and attached its property. The appellant has not explained the delay in making the reference. All that has been stated on its behalf is that the amount of the costs is manifestly excessive and that it should not be allowed to stand.

In a replying affidavit sworn by Dominic Mukua Kimatta, counsel on record for the respondents, the issue of delay in filing the reference and absence of an explanation for the delay have been raised as grounds for opposing the motion. Mr. Kimatta has also indicated that there have been negotiations on costs payable but no agreement has so far been reached. In his view this motion lacks merit on the ground that the costs being challenged were based on an admitted sum.

Quite clearly the taxed costs are colossal and provide cause for a reference. In **Jamnadas vs. Sodha v. Gordhaudas Hemraj** [1952]7 U.L.R. at P. 11 Ainly J. (as he then was) observed that it is a serious matter to deny a subject a hearing, and such a course should be the last resort of a court. The learned judge also observed that the court should weigh all the circumstances including whether the opposite party can be reasonably compensated by costs for any delay occasioned. The above are not the only factors a court is called upon to consider in an application under rule 4. The applicant was obliged to explain, the cause of the delay, which as stated earlier it has not done. The length of the delay, is also a factor. The list of the reasons a court should consider in an application of this nature is not limited to any number. That is because there are no two cases which are identical and it is up to the judge handling the matter to look at the circumstances of the case before him or her as a whole before coming to a decision one way or the other.

As stated earlier the figure claimed is colossal and it is only fair that a judge considers the matter. It is clear that the applicant did not explain the delay, which is long but not inordinate. It may be, as Mr. Kimatta said parties have been negotiating on the sums due as costs. It is also clear that the applicant's counsel was indolent as filing a reference is not an act which requires a serious effort. These are however, matters which in exercise of my unfettered discretion I excuse in favour of a determination of the issue of costs on the merits. Consequently in exercise of my discretion under rule 4, which is unfettered, I allow the application and extend the time within which to file a reference under **rule 112(3)**, above, by seven days. The costs of the motion dated 19th May 2011, are awarded to the respondents.

Dated and delivered at Nairobi this 10th day of June 2011

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR