



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 386 OF 2016

LUDWICK MUSINDI.....CLAIMANT

VERSUS

NANCY NDATA.....RESPONDENT

RULING

1. The Respondent/Applicant seeks the enlargement of time to file an objection to taxation under Rule 11(1) of the Advocates Remuneration Order and that pending the hearing and determination of the motion and the intended reference, this Court be pleased to stay the execution of the Deputy Registrar's Taxation award issued on the 12th March 2020. The Chamber Summons application for filing a reference out of time was supported by grounds on the face of the motion as well as the affidavit of the Respondent/Applicant's counsel one Muema Kitulu sworn on 22nd May 2020.

2. The motion from the Court record, was not formally opposed but in the interests of justice the Court allowed the Claimant/Respondent to argue his opposition to the motion for leave in terms of Article 159(2)(d) so that the matter is not unduly delayed.

3. The Respondent/Applicant argues that she was not served despite the attempts and because the reference raises important and weighty questions of law. It was argued that there was an issue of jurisdiction and that the figures given excessive. Counsel for the Respondent/Applicant urged the Court to allow her to knock at the door of justice. He argued that the reference will not remove the Claimant/Respondent from the seat of justice and that the Respondent/Applicant has followed the matter up diligently.

4. In his reply, the Counsel for the Claimant/Respondent argued that the Respondent/Applicant was emailed with the requisite documents and therefore there was no reason for the failure to respond to the taxation. He submitted that the Respondent was duly served and this being the only ground for the Reference they were aware and should have acted. He argued that they raised the same issues being raised in the motion before the Deputy Registrar and that the Taxing Master took into account their arguments in taxing the matter. He cited the case of **Republic v Kenyatta University & Another [2018] eKLR** for the proposition that the motion was unmerited. He thus urged the dismissal of the application.

5. In his reply, counsel for the Respondent/Applicant argued that the Court should note that the Respondent had come to court with clean hands. He argued that the Claimant/Respondent's counsel had dwelt on the issue of the decision made and not the issue of enlargement of time and submitted that the Respondent's motion was merited.

6. At the core of the dispute is the challenge to the taxation by the Taxing Master. Under Rule 11 of the Advocates Remuneration Order there is provision on the mode of challenge to the taxation. Rule 11 of the Advocates Remuneration Order is for ease of reference set out verbatim. It reads:

11 (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 to 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 already expired.

7. The provision permits in exceptional cases for an extension of time to file a reference. In the case of **Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR** the Supreme Court stated thus:

This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the constitution, which proclaims that, "...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.

8. My understanding of the provisions of paragraph 11 of Advocates Remuneration Order is that a party who desires to object to a taxation decision must give notice in writing of such objection specifying, the items of taxation objected to, within 14 days after the decision. Upon receipt of the notice in writing, the Taxing Officer is required to record and forward to the objector, the reasons for his decision on those items which the objector has 14 days, upon receipt of the reasons, to file a Reference to the Judge by chamber summons. In my considered view there is no basis for the extension sought as no cogent or compelling reason has been advanced for the leave to file out of time. Since the Respondent/Applicant was required to file a reference within 14 days of the taxation and this was not done, what is offered as an explanation is that the Respondent/Applicant was not served. Affidavits on record indicate the Taxation notices were duly served and the Respondent therefore cannot claim to have been blindsided by the taxation. In the mind of the Court there is no basis for the challenge and the failure to abide by the provisions of Rule 11 is seen in the light of the decision in **Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others** (*supra*) where the Supreme Court stated that the conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

The attempt to challenge the taxation this late in the day is incompetent and therefore only fit for dismissal. In the final analysis the motion hereby is dismissed with costs to the Claimant/Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY 2021

NZIOKI WA MAKAU

JUDGE