REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

MISCELLANEOUS APPLICATION NO. 1 OF 2020

KIRWA JONAH T/A MWAKIO, KIRWA & CO ADVOCATE.....APPLICANT

AND

COUNTY PUBLIC SERVICES BOARD BOMET.....1ST RESPONDENT

JOSHUA TERER .....2ND RESPONDENT

RULING

1. This Ruling relates to the chamber Summons dated 5/6/2021 brought by the respondents in the suits hereinafter called the Applicants.The application is brought under paragraph 11(2) of the Advocates Remuneration Order and article 159(2) of the Constitution of Kenyaand the inherent jurisdiction of the court. It seeks the following orders:-

a) The time within which to lodge a reference to the judge against the ruling of the honourable taxing officer of this court be extended/enlarged.

b) The applicant be at liberty to apply for such directions as may be expedient in the circumstances.

c) Costs of the application.

2. The application is supported by the affidavit sworn on 26/5/2021 by the 1st respondent's Secretary Mr. Peter Biiand a supplementary affidavit sworn by the same affidavit on 14/7/2021. The Respondent, opposed the application vide his own replying Affidavit sworn on 16/6/2021

FACTS OF THE CASE

3. The applicants instructed the respondent firm of Advocates to represent them in **Kericho ELRC No. 46 of 2017**in which 350 former employees of Bomet County Government were challenging termination of their employment by the applicants.The suit was heard by MareteJ and it dismissed for lack of merits and directed parties bear their own costs.

4. The respondent filed an Advocate Client Bill of Costs dated 12/3/2020 and served the applicants who entered appearance on 13/7/2020. The Bill was considered by the Taxing Officer of the Court vide the ruling delivered on 14/10/2020 whereby the respondent was awarded Kshs 7,338,978.96 and a certificate of costs was issued to that effect.

5. The applicants were aggrieved and within the required 14 days they filed a notice of objection dated 27/10/2020 by which they also sought from the Taxing Officer, the reasons for the award of each item.The Taxing Officer respondent by letter dated 13/11/2020 stating that the reasons for the taxation were contained in the ruling. However, the response came after the lapse of the 14 days' window provided for filing a reference against the decision of the Taxing Officer.

6. In a rather stranger procedure, the applicants filed chamber summons dated 27/11/2020 to challenge the taxation in separate and new file registered as **civil Appeal no. 1 of 2020.**According to the applicants, the said appeal was received one day out of time and therefore they filed yet another application in a separate file registered as**Misc. Application No. 3 of 2020** dated 9/12/2020 seeking leave for extension of time for filingthe appeal in the application dated 27/11/2020.

7. However, the applicants withdraw the initial application dated 21/10/2020 vide the notice of withdrawal dated 8/3/2021. Again the civil appeal no 1 of 2020 was also withdrawn on 11/5/2021 when the matter was listed before Wasilwa J. Thereafter the Applicants brought the

instant summons on 7.6.2021, which is about 9 months from the date the impugned ruling was delivered.

8. The respondent believes that the instant application is res judicata, the applicants did not file submissions to the Bill of Costs, the sum awarded was never appealed against, the applicants have refused to pay the sum awarded, the application offends Paragraph 11 of the Advocates Remuneration Order, the court lacks jurisdiction to hear and determine the application, the provision cited does not provide for extension of time, the applicants should be punished for the mistake of their counsel, the applicants knew of the impugned ruling, no notice of objection was filed and the applicants have not shown how the taxing officer erred in the said ruling.

APPLICANT'S CASE

9. The applicant's case is anchored on three general grounds, namely; mistake on the part of the counsel in his construction of paragraph 11 of the Advocates Remuneration Order leading to filing of **Civil Appeal No 1 of 2020,** the need for the applicants to be allowed to be heard substantively on the Advocates – Client Bill of costs, and the need for the applicants to exercise their right to content the said bill by way of a reference.

10. On the first issue, it was submitted that the steps taken by Counsel for the Applicants show that the applicants have been and are still keen on contestingthe taxation.Unfortunatelythe counsel'ssteps were inthe wrong direction and his mistake should not be visited on the applicants.

11. For emphasis they relied on **Independent Electoral and Boundaries Commission v OmolloNyakongo t/a Ganinjee& sons [2020] eKLR**where the court held that an application under paragraph 11(4) of the Advocates Remuneration order ought to brought in the Suit in which the impugned decision was made.

12. They further relied on **EresN.V.& Another-v- MainaMurage& Co. Advocates [2013]eKLR**where the court held that the blunder on law on the part of the counsel could be a mistake and it does not matter the experience of the person who made it.

13. As regard, the second issue of the need for substantive hearing, it was submitted that the applicants are entitled to contests the Bill of costs because under Article 48 of the Constitution fees for accessing justice ought to be reasonable so as not to impede access to justice.In support of the foregoing, hey relied on **Trust Bank Ltd –v- Amalo Company Ltd [2002]eKLR**where the Court of Appeal held that as a matter of principle, where possible, the courts should adjudicate disputes by hearing them on merits.

14. The applicants submitted that the instant application is not *res judicata*with respect application dated 27/11/2020 and 21/10/2020 contending that the said application were not determined on merits but they werewithdrawn.For emphasis they relied on **Kenya Hotel Ltdotgel properties -V- Willesden InvestmentsLtd & 6 others [2013]**where the Court of Appeal held that the objective of re- judicata is to ensure that litigation must have on end, and that parties who go through litigation are not subjected to the test again.

15. They further submitted that they filed written submission on 30/7/2020 before the impugneddecision was delivered and as such the taxing officer ought to have considered the same in his ruling. They contended that they were condemned unheard because the Taxing officer erroneously stated in his ruling that they did not file submissions yet they had filed the same and receipt thereof acknowledged by the court.

16. For emphasis they relied on the **Trust Bank case**, above, where the Court of Appeal held that a court is obliged to consider documents filed out of time in response to an application unless there is another reason for the exclusion.

17. As regards the law under which the application is brought, the applicants submitted that the application cannot be defeated merely because they cited paragraph II (2) instead of sub paragraph (4) of the Advocates Remuneration Order.For emphasis they relied on **Anchor Ltd –V Sports Kenya [2017] eKLR**where the court rejected objection on ground that the application was brought under the wrong provision of the lawand held that Article 159(2) (d) of the Constitution mandates the court to administer justice without undue regard to legal technicalities.

18. The applicants further submitted that they have a valid Notice of Objection dated 27.10.20 whichthey annexed on page 60 of the application. They contended that the objection notice was acknowledged by the taxing officer by letter dated 13/11/2020 which is annexed on page 61 of the Application. They urged that although they knew of the decision by the taxing officer dated 14/10/2020, and filed the objection notice, their counsel took steps in the wrong direction instead of filing the instant application.

19. Finally, the applicants submitted that there is no law which bars the former Chairman of the 1st Respondent from swearing affidavit in support of the application herein on behalf of the 1st respondent because he was also sued as a party in the proceedings, in his own name and also as the chairman of the 1st respondent.

20. For the above reasons and considering the colossal sum of costs certifiedto be paid from public funds, they prayed for the application to be allowed. In their view, they are the ones going to suffer prejudice of paying out the said public funds if the leave is denied but the respondent will not suffer any prejudice because hewill be heard in the reference.

RESPONDENTS CASE

21. The respondent submitted that the application should not be allowed because the failure to file reference within the required time was not due to any justifiable reason. They were all aware of the ruling of the Taxing officer dated 14/10/2020 but they went ahead to file civil Appeal No. 1 of 2020 and Miscellaneous Cause No. 3 of 2020 instead of filing Notice of Objection and a Reference in this file as required by paragraph 11 of the Advocates Remuneration Order.

22. The respondent further submitted that the applicants ought to have filed their reference by 28/10/2020, but they have delayed for 9 months. Since there was a detailed ruling by the taxing officer, there was no need for seeking reasons for the taxation. For emphasis he relied on **Evans GathuraThiga –v- Kenya commercial Bank Ltd** and**AhmedansirAbdikadir co Advocates –vs National Bank of Kenya and [2006] 2 EA 5** where court held that if the reasons are contained in the decision, the reference ought to be filed within 14 days of the decision otherwise it will be incomplete

23. The respondent further submitted that the application does not meet the criteria for extension of time as set out in **Nick Scalat –v Independent Electrol& Boundaries Commission & 7 other [2014] eKLR.** The said criteria includes that; extension of time is not a right but an equitable remedy, that it is available to a deserving party, a party seeking extension of time must lay a basis to the satisfaction of the court, the discretion to extend the time is a consideration tobe make in case tocase basis, the reason for the delay must be explained to thesatisfaction of the court,the court ought to consider if the opposite party will suffer prejudice if the extension is granted, whether the application has been brought without undue delay,and the public interest in matter.

24. The respondentarguedthat,the delay of 9 months before filing the reference is deliberate, and the aim is to frustrate him from realizing his costs; that the allegation that the delay was because counsel did not understand the procedure is lame and laughable; that the applicants have not laid out a clear basis or credible reason to warrant extension of time and as such they are underserving party; that he stands to suffer prejudice having been subjected to multiplicity of suits and applications by the applicants on the same matter; that he worked for the applicant from 2016 and he should now be allowed to enjoy he fruit of his sweat without further prejudice; and that he applicants are not keen on settle his fees but rather frustrate him, now for 4 years.

25. He submitted that in the circumstances of this case, the mistake of the counsel ought to be visited on the applicants because the wording of paragraph 11 of the Advocates Remuneration Order is clear and plain English which did not require magical reasoning to understand the procedure. He contended that the default on the part applicants' counsel amounts to an inexcusable negligence.He further contended that leave to file a reference after 9 months ought to be rejected because paragraph 11 does not envisage the applicants' novel procedure of filing fresh suits to challenge a decision by the taxing officer.

26. For emphasis he relied on**Macharia& co. advocates –v- Magugu [2002] 2 EA 428** where it was held that the advocates'remuneration order is a complete code hence invocation of the Provisions of the Civil Procedure Act and Rules thereunder renders the whole application defective.

27. The respondent submitted that the instant application should be struck out for being abuse of process of the court and relied on **Samuel KibuthaKamau –v Catherine CharoNyange [2021] eKLR**where the court held that not all mistakes of counsel are excusable in the protextor cover of client's interest. The interest of justice is well taken care of when it is balance against both parties. The court further held that counsel who exposes his client to foreseeable risk should not hide himself behind the interest of a client.

28. He further relied on **Tana and Athi River Development Authority –v Jeremiah KinighoMwakio& 3 others. [2015] eKRL** where the court held that although the court will readily excuse a mistake of counsel for a good cause and purposes of a holistic disposal of the matter, the discretion to do so is not automatic because the duty of counsel is not only to his client but also to the court and the opposite party.

29. Finally the respondent submitted that the instant application is *res judicata***Misc. Application 3 of 2020** and **Civil Appeal No. 1 of 2020** all filed separately before this court. He contended that in first one, the applicants have also filed another application dated 9/12/2020 seeking leave for extension of time to file appeal out of time against the same decision. Consequently, the respondent prayed for the instant application to be dismissed because it is *res judicata* and also an abuse of court process.

ISSUES FOR DETERMINATION AND ANALYSIS

30. There is no dispute that the taxing officer of this court rendered a ruling in respect of theBill of Costsbetween the partiesherein on 14/10/2o2o. There is also no dispute that the applicants did not file reference within the time lines provided by paragraph 11 (1) and (2) of the Advocates Remuneration Order. It is also a fact that the applicants filed an application dated 21.10.2020 seeking for setting aside the ruling, a civil Appeal No. 1 of 2020 on 27/11/2020 against the same ruling and an application dated 9.12.2020 seeking leave for extension of time to have thesaid appeal deemed as filed within the required time.

31. The main issue for determination in the instant application are:-

a) Whether the application is res judicata and an abuse of the process of the court.

b) ***Whether the leave sought in the application is merited.***

Res Judicata and abuse of the court process

32. The respondent objected to the instant application on ground that it is *res judicata* application dated 21/10/2020 seeking setting aside of the decision of the taxing officer dated 14/10/2020, and civil appeal No. 1 of 2020 challenging the same decision. The applicants, however denies the applicability of the *res judicata* rule to the instant application.

33. I have perused the court record and confirmed that the application dated 21/10/2020 was withdrawn vide Notice of withdrawal dated 8/3/2021 filed in court on 11/3/2021. The Appeal No. 1 of 2020 was also withdrawn vide the order made by Wasilla J on 11/5/2021 after which the respondent has since filed his Bill of costs dated 13/5/2021.

34. The foregoing circumstances do not fit within the meaning of *res judicata* because the relevant application and the Appeal were not

determined on merits but merely withdrawn.*Res judicata* is only applicable where the same dispute, between the same parties has been conclusively determined by a court of competent jurisdiction.The application is also not *subjudice*because, all the related previous proceedings were withdrawn before the application was filed.

35. The respondent contends that the application is an abuse of the process of the court considering the number of applications and appeal filed by the applicants in relation to the same decision by the taxing officer. The applicant's response to the said accusation is that their counsel did a blunder in the construction of Paragraph 11 of the Advocate Remuneration Order.

36. In **Satya Bhama Gandhi –Vs- Director of Public Prosecution & 3 Others [2018] eKLR**Mativo J held that:

> ***"The situation that give rise to an abuse of court process are in exhaustive, it involves situations where the process of the court has not been resorted to fairly, properly or honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:***
>
> ***a) Instituting multiplicity of action on the same subject matter, against the same opponent, on the same issue or multiplicity of actions on the same matter, between the same parties even where ere exists a right to begin the action.***
>
> ***b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.***
>
> ***c) Where two similar process are used in respect of the exercise of the same right for example a cross appeal and respondent notice.***
>
> ***d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.***
>
> ***e) Where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconveniences and inequalities involved in the aims and purposes of the action***
>
> ***f) Where an appellant files an application at trial court in respect of a matter, which is already subject of an earlier application by the respondent at the court of appeal.***
>
> ***g) Where two actions are commenced, the second seeking for relief which may have been obtained in the first.An abuse also involve some bias, malice as desire to misuse or prevent the course of justice or judicial process to the irritation or annoyance of an opponent"***

37. I have carefully considered the rival submissions herein, the applicants contended that their counsel did not understand the law on the procedure for challenging the certificate of costs. Whereas I agree with the respondent that such explanation is laughable, I would add that it manifests a case of professional negligence and recklessness on the part of the counsel.

38. The reason for the foregoing view is that the counsel seemed to have the general knowledge of the law but failed to read it to understand the procedure. Otherwisewhat is the explanation to one blunder after another in a trajectory that could only be stopped by firing him from the proceedings. Had he keenly read the law he would have grasped the clear procedure set out under paragraph 11 but he close his eyes to engage in an exercise of firing misses. In the end the simple dispute of an Advocates costs was reduced into a quagmire of untidy and messy multiplicity of proceeding scattered in a mosaic of court files.

39. I wish to add that it is an act professionalism for counsel or even other persons who offer to assist others in litigation before the court to peruse the relevant provision of law in order to grasp the substantive meaning as well as the procedural steps and consequences of any default before the court. In this case the counsel has abused the processes of the court but I will not strike out the application without considering its merit.

Whether the leave is merited

40. The ground upon which leave is sought is that the applicants' counsel made a mistake on the understanding of the law and the same ought not to be visited on them. It is also their case that they were condemned heard in the Bill of costs dated 12/3/2020 because their submissions were never considered. I have already made a finding herein above that the alleged mistaken of law was not innocent but an act of professional negligence and recklessness.

41. In **Eres N.V. & Another v MainaMurage& Co Advocates [2013] eKLR,** Sichale JAupheld the decision of Madan JA in **Belinda Murai v Amos Wainaina [1979] eKLR**that:-

> ***"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is not less pardonable because it is committed by Senior Counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because, a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal points which courts of appeal sometimes over rule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was***

delivered so requires. It is all done in the interest of justice"

42. Sichale JA further cited with approval the decision of Mandan JAin **GulamhusseinNurmohamedCassam&Another v ShashikantRamjiSachania& Another [1982-88] 1 KLR** that:

> ***"Had it not been for the error on the part of applicants' legal adviser in misinterpretation the plain wording of the relevant rule, the notice of appeal could have been served well within time and the application for extension of time therefore would have been unnecessary.***
>
> ***An error in the part of a legal adviser may help to build sufficient reason for an extension of time under Rule 4."***

43. In view of the foregoing binding precedents, I would agree that the blunder by the counsel for the applicants in interpreting the plain wording of paragraph 11 of the Advocates Remuneration Order is a sufficient reason for extension of time under sub-paragraph (4).

44. The respondent contended that the submissions by the applicants were filed out of time and as such, they cannot be considered. However, the applicants maintains that even if they were filed out of time the same ought to have been considered.

45. In **Trust bank Ltd vAmalo Company Ltd** the court of Appeal cited with approval the decision by Bosire J.A in **Central Bank of Kenya V Uhuru Highway Development Ltd and others C.A 75 OF 1998**[unreported] that:

> ***"I am therefore, unable to subscribe to the view expressed by Mr Rebello that documents filed out of time in response to an application are necessarily invalid and should not be looked at. To my mind, a court is obliged to consider them unless for a reason other than mere lateness, it considers it undesirable to do so."***

46. The court then went ahead to state that:

> ***"The appellant had a right to be heard on the documents he had placed before the court and were on record. It cannot be said that he did not explanation the delay in serving the documents to the opposite parties. Even if the application had proceeded exparte, the learned Judge was still under a duty to consider the application on merit, based on the usual principles governing the granting of injunctions. "***

47. In view of the foregoing binding precedents I agree with the applicants that their submissions ought to have considered in the impugned ruling because they were filed before the ruling was passed. The taxing officer may not have found the submissions on record, but the court registry had acknowledged receipt of the said submission and it ought to have ensured that the document was downloaded from the system and placed in the court file. Failure to consider the said submissions is sufficient reason for extension of time under paragraph 11 (4) of the Advocates Remuneration Order.

48. Having fund that the applicants has shown a sufficient reasons for extension of time, namely mistake of their counsel in understanding the plain wording of paragraph 11 of the said order and the failure by the Taxing Officer to consider the submissions they filed on 30.7.2020 in opposition to the Respondent's Bill of cost, I find and hold that the leave sought is merited. Consequently, I allow the application dated 5th June, 2021 in the following terms:

a) The applicants have 14 days of this ruling to file and serve the intended reference against the taxing officer's decision dated 14/10/2020.

b) The respondent is directed to depositthe sum awarded in the impugned ruling being Kshs.7,338,978.96in an interest earning account to be opened in the joint names of the Advocates on record for the parties herein, within 21 days of this ruling.

c) In default by the applicant to comply with (a) and/or (b) above the respondent will be at liberty to execute for the entire sum certified the Taxing Officer.

d) If the respondent fails to cooperate in the opening the joint bank account the said sum shall be deposited in court.

e) The applicant is condemned to pay the respondent Kshs. 50,ooo within 14 days as throw-costs in respect of the Application.

Dated, signed and delivered at Nakuru this 18th day of November 2021.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall

be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE