Lubulellah & Associates Advocates v Zadok Furniture Systems Ltd (Miscellaneous Application E073 of 2021) [2024] KEHC 849 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)

Neutral citation: [2024] KEHC 849 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E073 OF 2021

FG MUGAMBI, J

JANUARY 30, 2024

BETWEEN

LUBULELLAH & ASSOCIATES ADVOCATES ..... APPLICANT

AND

ZADOK FURNITURE SYSTEMS LTD ..... RESPONDENT

RULING

1. Before the court are two applications. The first is a Notice of Motion application filed by Lubulellah & Associates Advocates (the advocate) on 22nd November 2022. It seeks to have judgment entered against Zadok Furniture Systems Ltd (the client) for the amount of Kshs. 963,526/= together with interest at 14% from 17th February 2021. The application is supported by an affidavit sworn by Eugene Lubulellah, on 22nd November 2022. It is opposed by Grounds of Opposition dated 19th January 2023.

2. The second application is dated 19th January 2023 and was filed by the client. It seeks leave for the firm of Swanya & Company Advocates to come on record, enlargement of time to file a reference, and stay of execution of the ruling of the taxing officer delivered on 29th July 2022. The application is supported by an affidavit sworn by Victor Swanya Ogeto one of the directors of the client. It is opposed by the advocates replying affidavit dated 5th May 2023. Parties filed submissions relating to both applications.

Analysis

3. Having carefully considered the pleadings, submissions and authorities filed by rival parties, it is my view that the client's application ought to be determined first. The first limb of that application is whether the firm of Swanya & Company Advocates should be allowed to come on record in place of MAO Advocates LLP.

4. Order 9 Rule 9 of the *Civil Procedure Rules* provides as follows:

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> a. upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

5. The rationale for Order 9 rule 9 is not to halt a client's right to representation by Counsel of his choice. Rather, it is to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. It also serves to impose orderliness in civil proceedings. Compliance with this provision is what gives an advocate the locus standi to address the court on behalf of his client and gives the court jurisdiction to address the matters raised by the advocate.

6. It is evident that the application has been served on the parties herein. The advocate and the previous counsel on record for the client have not raised any objection to this prayer. As such, leave is granted to the firm of Swanya & Company Advocates to come on record for the client in place of MAO Advocates LLP.

7. The second issue to consider is whether the client has made out a case for enlargement of time. Rule 11(1) and (2) provide as follows with respect to the strictures of time in the filing of a reference:

> (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."

8. That said, it is true that the power of this Court to enlarge time is wide and unfettered. It is a principle of law that an applicant must however demonstrate good and sufficient reasons why they were unable to bring their appeal within the set timelines. Rule 11(4) of the *ARO* provides that:

> "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;"

9. The jurisprudence on the unfettered discretion of the Court to expand time is well settled. The parameters for consideration in exercise of such discretion were laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others*, [2014] eKLR, in the following terms:

> i. "Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
>
> ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

v. Whether there will be any prejudice suffered by the respondents if the extension is granted;

vi. Whether the application has been brought without undue delay; and

vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

10. The Court of Appeal has equally emphasized that the considerations for expansion of time should include (but not be limited to) the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, whether the matter raises issues of public importance and finally the chances of the appeal succeeding if the application is granted. (See for instance *Paul Wanjohi Mathenge V Duncan Gichane Mathenge*, [2013] eKLR; *Mwangi V Kenya Airways Ltd*, [2003] KLR 486 and *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* – Civil Application No. Nai 255 of 1997(unreported)).

11. The record shows that the ruling by the taxing officer was delivered on 29th July 2022 in the presence of counsel for the client and in the presence of the advocate. The client's application for extension of time is dated 19th January 2023, 175 days after the taxation ruling.

12. The client further states that the oral ruling did not specify the reasons for the decision. By dint of Rule 11(1) of the *ARO*, the client's advocates had 14 days, which was up to 18th August 2022, to file a notice of objection and seek reasons for the ruling. They thereafter had 14 days, up to 1st September 2022 to file their reference against the taxation. The client changed representation on 8th September 2022.

13. The client lays the blame on their previous advocates for the delay in filing the reference by failing to act on specific instructions that the client had given in this matter. I am not convinced that there were any such instructions because no evidence has been placed before this Court to enable me make such a finding.

14. In any case, I concur with the holding of this Court that a litigant has a duty to follow up on his case after he has instructed an advocate to ensure that the advocate has acted on instructions as given. This position was adopted in *Duale Mary Ann Gurre V Amina Mohamed Mahamood & Another*, [2014] eKLR and rehashed in *Joseph Lekodi Teleu V Jonathan Paapai & Another*, [2022] eKLR. The client has not tendered any evidence to show that after they gave specific instructions to file a reference (which is not proved), they followed up on the instructions.

15. The correspondence that the client relies on is a letter dated 21st October 2021 and an email dated 1st February 2022. Both of these relate to instructions on other matters. As far as this matter goes, the client wrote to its advocates on 2nd August 2022 only asking for a copy of the ruling. There is no response to the email from its then advocates. This email by itself is not sufficient to draw a conclusion that any instructions were given to file a reference which the previous counsel failed to take up.

16. The present advocates, upon taking over the conduct of this matter wrote to the Deputy Registrar on 14th September 2022, 28th September 2022 and 16th January 2023. The request to be provided with the reasons for the ruling of 29th July 2022 was made way outside the 14 days statutory period. The allegation by the client that the previous counsel had written to Court severally seeking to be provided with the written ruling is also not supported by any iota of evidence.

17. The client further submits that the delay was occasioned by the fact that the court file went missing and that a signed ruling was only availed on 19th January 2023. The Court file and the ruling both indicate that the ruling was delivered on 29th July 2022. The client's counsel has not provided any evidence to otherwise substantiate their allegations. In *Dennis K.N. Magare & Another V Armajit Singh Gahir & 5 Others*, [2021] eKLR, the Court, faced with a similar scenario, held as follows:

> " The claim by the applicants that the court file could not be traced is also not supported by the court record. The applicants have not placed before this Court any document to show the date they received the ruling from the Deputy Registrar. Considering the incorrectness of the averment of counsel, which has already been referred to in this ruling, I find that the word of counsel alone is not sufficient to make this Court accept that there was delay in the release of the ruling by the Deputy Registrar."

18. I am left with no choice but to conclude likewise. I also find that the application for extension of time to file a reference herein was brought with inordinate delay and the delay has not been sufficiently explained. The client has therefore not met the threshold for extension of time.

19. Having said this, I turn now to the application dated 22nd November 2022 filed by the advocate and the Grounds of Opposition to the said application, dated 9th January 2023.

20. By dint of section 51(2) of the *Advocates Act*, the only reason that this Court may not enter judgment on a certificate of costs is if the same has been set aside or altered, or where there is an issue of retainer. In light of the sentiments relating to the client's application, I am therefore satisfied that the advocate is entitled to the prayers sought.

21. As regards the prayer for interest, Rule 7 of the *ARO* provides that:

> " An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full." (emphasis mine).

22. The advocate is only entitled to interest from expiry of one month from the delivery of his bill to the client and not the date of delivery of the bill as claimed. The 14% interest would therefore accrue from 19th March 2021 and not 17th February 2021 which the advocates confirms to be the date of service of the Bill of Costs upon the client.

Determination

23. The upshot of this is that the client's application dated 19th January 2023 is devoid of merit and is dismissed with costs.

24. Consequently, the advocates application dated 22nd November 2022 succeeds on the terms that judgment is entered in favour of the advocate as against the client in the sum of Kshs. 963,526/- as per the certificate of taxation dated 1st September, 2022 together with interest at 14% per annum from 19th March 2021 plus costs of the application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JANUARY 2024.

F. MUGAMBI

JUDGE