



**Kinyanjui Njuguna & Co Advocates v Board of Trustees, National
Social Security Fund (Miscellaneous Application 182 of 2017)
[2024] KEHC 5948 (KLR) (Commercial and Tax) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5948 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 182 OF 2017
FG MUGAMBI, J
MAY 24, 2024**

BETWEEN

KINYANJUI NJUGUNA & CO ADVOCATES APPLICANT

AND

**THE BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY
FUND RESPONDENT**

RULING

1. Pending for determination is an application dated 29th October 2018 filed by the client, seeking the consolidation of this matter with the references filed in HCCC 543 of 2007 Housing Finance Company of Kenya v Nssf & Another And Misc 276 of 2016 Kajwang & Kajwang Advocates v NSSF, an order for statement of accounts and deposit of the principal amount paid to the client in respect of the parent suit together with interest accrued in a joint interest earning account as well as for leave to enlarge time for the filing of a reference and to set aside the taxation ruling delivered by Hon. Aswani Opande on 7th November 2017 (the taxation ruling).
2. Also for determination is the application dated 1st October 2018, filed by the advocate, seeking judgment in terms of the certificate of taxation dated 20th June 2018 for Kshs. 42,585,500/=, issued pursuant to the said taxation ruling.

The client's application dated 29th October 2018

3. For good order, I will start by determining the client's application. It is premised on the fact that the taxing master proceeded on the basis that the bill of costs filed by the advocate was unopposed and hence failed to consider the objection raised by the client.



4. The client avers and in fact it is not disputed that this application has its genesis in HCCC 543 OF 2007 where it was sued for specific performance and special damages (the parent suit). The suit proceeded to hearing and a judgment was delivered on 9th September 2014. Arising from the judgment and the costs awarded to the client in the suit and counterclaim, the party and party bill of costs was taxed on 20th September 2015 at an all-inclusive sum of Kshs. 20,484,375/=.
5. The client further asserts that the advocates herein were acting jointly with Ms Kajwang & Kajwang Advocates whereby Ms Kajwang & Kajwang Advocates would be lead counsel and the advocates herein would be assisting counsel. These written instructions had been communicated to both law firms. Upon judgment being entered, Ms Kajwang & Kajwang Advocates filed an advocate/client bill of costs in HC MISC 276 OF 2016 which was presumed by the client to be inclusive of the fees for the advocates herein.
6. The client confirms that the bill of costs in HC MISC 276 has been challenged and that the reference is pending determination.
7. The client further takes issue with the fact that the present bill of costs is a duplication of costs and was filed by the advocates without the consent or concurrence of the lead counsel. The clients also decry the lack of a certificate as required under paragraph 62A of the ARO or disclosure that a separate bill of costs had been filed in MISC 276 OF 2016 and taxed at Kshs. 32,646,562/=, which amount is disputed.
8. The prayer for statement of accounts is premised on the assertion by the client that the advocates herein additionally received the amount of Kshs. 20,484,375/= paid by the plaintiff's as ordered in the parent suit, but failed to disclose the same to the client and to co-counsel.
9. The application is opposed. The advocate avers that the application is fatally defective and that the client has not established justifiable grounds for the expansion of time to file a reference having not explained the delay of 11 months and 23 days after the ruling on the taxation had been delivered. The advocate confirms that both parties had been notified of the ruling date and the delay was therefore inordinate, lengthy, unexplained and inexcusable.
10. Additionally, the advocate notes that all the issues raised in the application ought to have been raised during taxation of the impugned bill of costs as the clients were fully aware of the same.

Analysis and determination

11. I have considered the rival pleadings, the written submissions and authorities presented by the parties in support of their cases.
12. The application before court is brought under paragraph 11 of the ARO, the inherent jurisdiction of the court, the Advocates (Accounts) Rules 1966 and Advocates (Deposit Interest) Rules 1967 as well as sections 3A, and 3B of the Civil Procedure Rules. The advocates case is that the provisions of the law cited do not support the prayers sought, and as such the application is for striking out.
13. There are a host of judicial pronouncements to support the view that an excusable indiscretion should not overlook the need to do justice. Likewise, the court may invoke the overriding objectives of the Civil Procedure Act to salvage such situations. The Court of Appeal in Harit Sheth T/A Harit Sheth Advocate v Shamascharania, Civil Application No. Nai. 68 of 2008 held that:

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the



principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

14. This position is supported in the *Microsoft Corporation v Mitsumi Computer Garage Ltd & Another*, Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460. The Learned Judge equally cautioned that:

“Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue.”

15. In alignment with these and other judicial pronouncements, I hold the position that justice in this matter would be for the court to render a substantive determination of the issues raised. The omission to cite specific provisions of the law is not a fatal error, as the parties are well aware of the dispute between them, and no prejudice has been caused to the advocate by this oversight.

16. The main question in the application is whether the application of expansion of time should be allowed. Paragraph 11(2) of the Advocates Remuneration Order stipulates that a party opposing a decision of the taxing master has 14 days to file their application within 14 days of the reasons for such ruling.

17. Paragraph 11(4) is equally relevant. It provides as follows:

“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 expired.”

18. I am also cognisant of the parameters for consideration in an application such as this as set out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral & Boundaries Commission & 7 Others*, [2014] eKLR. The following guiding principles were established by the Court:

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



- viii. The degree of prejudice to the respondent if the application is granted.”
19. This court notes that the delay in filing this reference is conceded. The client admits that the reason for the delay is founded on their attempt at an out of court settlement first contingent on a concession from the advocate that the taxation decision of the Hon. Aswani Opande (DR) made/delivered on 7th November 2017 be vacated by consent and thereafter parties engage on the basis of status quo ante. No such concession could be obtained from the advocate, ultimately leading to the reference.
20. I have perused the pleadings filed by the advocate and I do not see any denial to this averment. Even if I were wrong, what is discernible from the court record and proceedings is that there was a myriad of issues that appear to have slowed the determination of this matter including the two other related matters as parties have pointed out, questions of representation as well as a possible negotiation between the counsels as intimated by counsel for the client.
21. Additionally, I note from the Supreme Court’s holding in the Nicholas Kiptoo case (*supra*) that public interest should be considered when exercising the discretion to extend time.
22. The facts and evidence presented before this court raise issues that warrant a substantive hearing in the public interest. There is no dispute regarding the origin of this matter, which involves a public entity funded by taxpayers’ money. The responsibility to safeguard public resources, along with the pertinent issues requiring determination, far outweigh the delay pointed out and explained by the client.
23. These pertinent issues that the court will need to pronounce itself on at a substantive hearing include the relationship between the 3 references and bills of costs, whether the advocates were entitled to more than one ruling on taxation; whether the bills of costs were defective as taxed; the scope of work for each counsel in the parent suit and whether an assisting counsel can file a separate bill of costs in a matter where counsels have been instructed as joint counsel.
24. The client prays that the other two taxation references in HCCC 543 OF 2007 and MISC APPL 276 OF 2016 be consolidated with this cause. It appears uncontroverted that the three matters are related, as they relate to separate taxation processes that arose from one parent suit. I note that the advocate opposes this application for consolidation partly on the ground that the reference applications are at different stages of trial and that consolidation will only serve to delay the matters.
25. In looking at the substance for consolidation I am guided by the holding in *Prem Lala Nabata & Another v Chandni Prasad Sikaria*, [2007] 2 Supreme Court Cases 551. The Supreme Court of India held as follows:

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases. ... The main purposes of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit.”

26. Likewise, in *Law Society of Kenya v Center for Human Rights & Democracy & 12 Others*, [2014] eKLR, the Supreme Court of Kenya held:

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties.



Consolidation was never intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it.”

27. Considering the evidence before me and the submissions made by parties, I am convinced that it would be convenient and expedient to try all the references together so as to avoid protracting the dispute and to enable the court consider all the relevant facts wholesomely.
28. The ground that the references are at different stages cannot per se be a bar to an order for consolidation since no judgment has been delivered. There would be no prejudice to be suffered by any of the parties herein if the consolidation sought is granted.
29. In any case, I am further guided by the Court of Appeal’s decision in *Benson G. Mutahi & Raphael Gichove Munene Kabutu & 4 Others*, [2014] eKLR, to the extent that:

“...a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded.”
30. On the ground for rendering accounts, I am of the view that such an order can only be made in the end, upon a substantive hearing of all the issues raised.

Disposition

31. For the reasons that I have stated, the application dated 29th October 2018 is allowed in the following terms:
 - i. That the client is granted leave to file its reference out of time.
 - ii. Consequently, the taxation ruling issued by Hon. Aswani Opande on 7th November 2017 and the resultant certificate of taxation dated 20th June 2018 are hereby set aside.
 - iii. This matter is hereby consolidated with HCCC 543 of 2007 and MISC APPL 276 of 2016. Since HCCC 543 of 2007 is the parent file, it shall be the the head file.
 - iv. Parties shall take directions on the expeditious disposal of the reference.
 - v. Having so found, it follows that the advocates application dated 1st October 2018, filed by the advocate is dismissed.
 - vi. The costs shall await the outcome of the references.

DATED,SIGNED AND DELIVERED IN NAIROBI

THIS 24TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

