



REPUBLIC OF KENYA

High Court of Kisii

Miscellaneous Civil Application 275 of 2012

SOTIK TEA COMPANY LIMITED APPLICANT

VERSUS

NYAMWEYA OSORO & NYAMWEYA ADVOCATE RESPONDENT

RULING

1. The applicant was the applicant in Misc. Application No. 27 of 2011. The applicant filed an application dated 29th March 2012 seeking:-

1. *This court be pleased to join Mr. George Nyamweya as 3rd party respondent in these proceedings.*
2. *The parties herein be at liberty to amend their pleadings to effect the addition of the proposed 3rd party/respondent.*
3. *The costs of this application be provided for.*

2. Mr. Njeru for the applicant submitted at the hearing that Mr. Nyamweya received the payment on behalf of the respondent from the applicant/appellant in settlement of the fees outstanding. He referred to the affidavit sworn by the Legal and Administration Officer of the applicant/appellant to which was attached the discharge voucher signed by the respondent. The said voucher indicated that any fee due to the applicant/appellant was paid and money was acknowledged, and that there would be no further fees due.

3. In reply, Mr. Bosire for the respondent submitted that the application was intended to delay the taxation of the respondents' bill of costs. He pointed out that when the Bill of costs first came up for taxation the applicant/appellant raised a preliminary objection and by raising a preliminary objection it was presumed that all facts had been agreed on. The said preliminary objection was however dismissed.

4. He further stated that George Nyamweya had not been a partner at the Respondent firm during the relevant period. He said that Mr. Japheth Mecha and himself were the only ones who were running the firm at the time. At the hearing of the preliminary objection the learned deputy registrar pointed out that the main issue for determination was whether the applicant had established sufficient ground to require the respondent to be enjoined at this stage, considering the fact that the discharge voucher was dated 26th April 2008.

5. In Mr. Gichana's replying affidavit at paragraph 8 he deponed that the Hon. George Nyamweya had been struck off the roll of advocates; that the fact was not disputed by the applicant and thus remained uncontroverted. That it was likely that the applicant may have paid a person who was not an advocate at the time, and that accordingly there would be no need to enjoin him as he was not an advocate as at 26th April 2008 and could therefore not receive money on behalf of an advocate's firm. For the said reasons, the application was found to be without merit and dismissed.

6. The applicant who was dissatisfied with the above ruling has moved this court vide their Notice of Motion dated 24th October 2012 brought under **Order 42 Rule 6, Order 50 Rules 5 and 6, Order 51 rule 1** of the **Civil Procedure Rules** seeking the following orders:-

1. *That this application be heard ex parte in the first instance.*

2. *That time for filing an appeal be and is hereby enlarged and the annexed Memorandum of Appeal be deemed as properly filed upon payment of requisite court fees.*

3. *That pending the hearing and determination of this application inter partes, there be a stay of any further proceedings in Miscellaneous Civil Application No.27 of 2011 consolidated with Miscellaneous Civil Applications Numbers 33, 34, 35, 40 and 41 of 2011 as well as in Miscellaneous Civil Application Number 51 of 2011 scheduled for hearing and or taxation on 29th October 2012.*

4. *That there be a stay of any further proceedings in Miscellaneous Civil Application No. 27 of 2011 consolidated with Miscellaneous Civil Applications Numbers 33,34,35, 40 and 41 of 2011 as well as in Miscellaneous Civil Applications Number 51 of 2011 scheduled for hearing and/or taxation on 29th October 2012.*

5. *That this application be heard inter partes as a matter of urgency on such date and at such time as this honourable court may direct.*

6. *That the costs of this application be in the cause.*

7. The above application was supported by an affidavit sworn by the Legal and Administration Officer of the Applicant one Doreen Kituku in which the deponent has given a chronology of events since the delivery of the Deputy Registrar's ruling on 27th July 2012 and has also explained why the instant application could not have been filed earlier. The deponent also explains that the applicant's counsel separately engaged the firms of Asati & Co. Advocates and Oguttu Mboya & Co. Advocates to assist them to obtain a copy of the ruling delivered on 27th July 2012 to enable them review the same and advise the applicants on the merits of the same as well as the way forward.

8. The deponent also says that it was not until 12th October 2012 that they received a copy of the ruling delivered on 27th July 2012; that the applicant immediately thereafter decided to lodge an appeal against the whole of the said ruling and that at the applicant could not have formed an opinion on whether to appeal against the said ruling before having read the ruling in its entirety.

9. The deponent also avers that if proceedings in Civil Application No. 27 of 2011 consolidated with Miscellaneous Civil Applications Numbers 33,34, 35, 40 and 41 of 2011 scheduled for hearing or taxation on 29th October 2012, are not stayed, then the intended appeal against the ruling delivered on 27th July 2012 will be rendered nugatory. It is contended that the intended appeal has merit and good chances of success and further that the instant application has in the circumstances been brought without unreasonable delay since receiving a hand written copy of the ruling delivered on 27th July 2012.

10. On 30th October 2012, the respondent filed grounds of opposition stating that:-

1. *The application is designed to assist the applicant by evasion and/or otherwise, to obstruct or*

delay the taxation of the Respondent Bill of Costs arising from the legal services rendered to the applicant.

2. *The intended appeal has no good prospects of success.*
3. *The explanation given for the delay is untrue in view of exhibit DK1 as the matter was fixed for taxation immediately after upon the delivery of the ruling to issue.*
4. *There is inconsistency between the affirmation in the applicant's application and the material averments of the supporting affidavit.*
5. *The application lacks merit.*
6. *The intended appeal is misconceived and premature.*
7. *The intended appeal is purely an academic exercise.*
8. *Adding an intended party was and still remains a matter outside the core business of taxing a Bill of Costs and had and/or still has no bearing on the taxation.*

11. Mr. Oguttu Mboya holding brief for Peter Njeru for the applicant submitted that the applicant sought to enjoin Hon. George Nyamweya as a party to the taxation proceedings which have given rise to the proceedings for good cause and that since the application for joinder was denied by deputy registrar, such denial has by itself deprived the applicant the right to ventilate his entire claim and even seek indemnity resulting to injustice and that it is this refusal that forms the basis of the intended appeal which will raise pertinent issues.

12. He further submitted that after delivery of ruling on 27th July 2012, the applicant was not able to form an opinion as to whether to appeal or not, that the applicant only obtained copy of ruling on 12th October 2012 and that by that time the time frame for lodging an appeal had lapsed. He prays that this court affords the applicant leave to appeal out of time as the reason for delay are clear from the annexures to the supporting affidavit.

13. He further submitted that if the taxation is allowed to proceed and realization commenced before this application is granted, then the results of this application and the intended appeal shall be rendered nugatory. Counsel prayed for stay of proceeding before the deputy registrar and urged the court to assist the applicant to realize the appeal.

14. In response to the above submissions, Mr. Gichana for the respondent submitted that the intended appeal has no chance of success as from annexure DK1 the second last page 3rd and 4th paragraphs capture the disposition of the applicant to the effect that when George Nyamweya allegedly received payments, the said Nyamweya was not an advocate, a fact which has not been controverted to date. That in any event, if there was evidence that G. Nyamweya was an advocate appellant should have filed for review of the ruling dated 27th July 2012.

15. Counsel further submitted that what was before court was taxation of advocate/client Bill of Costs and **Rule 13** of the **Advocates Remuneration Order** provides that taxation can be done without an order of the court and entirely within preserve of taxing master. That issues that have been raised could only have been raised if there was a plaint filed under **section 48** of the **Advocates Act** and that the intended appeal will be an academic exercise.

16. Mr. Bosire relied on **Khan & Katiku Advocates –vs- Central Electrical International Limited Nairobi HCCC NO. 741 of 2004** (unreported) at page 2 which sets out the business of a taxing master and issue of whether money and how much money had been paid was not a relevant issue at the stage of taxation. Counsel also cited **M. Kiaguyu & Co. –vs- Muraya Githi Nairobi HCCC NO.1114 of**

2000(unreported), and submitted that the intended appeal is intended to delay taxation, that the applicants raised a preliminary objection which was dismissed and that the applicant has not disclosed that under **Rule 3** of the **Advocates Remuneration Order** contention over payments of certain monies and how much is not an issue unless a substantive suit has been filed.

17. On the issue of delay, he submitted that from the affidavit sworn by Doreen Kituku at paragraph 2, the ruling was delivered on a date taken by consent, the applicants were served with hearing notice so they were aware of all the steps taken prior to and after 27th July 2012. He submitted that a preliminary objection is different from an application for joinder and therefore that the applicants only mounted the instant application after the preliminary objection was dismissed. Counsel also submitted that since the orders sought herein are within the discretion of the court, the discretion ought to be exercised judiciously and not to grant the orders as of right.

18. In reply to the respondent's submissions, counsel for the applicant submitted that the averments of the applicants in support of this application are consistent throughout and that at no point have the applicants contended that they were not aware of the ruling date. Counsel also submitted that the intended appeal is arguable since at the centre of the applicants' case is the question of whether or not George Nyamweya was a partner in the respondent firm, and whether he received any monies from the applicants.

19. It was further submitted that the applicants were entitled to mount the instant application, as the application the subject matter of the ruling of 27th July 2012 was an application brought under **Order 8 Rules 3, 7 and 8** of the **Civil Procedure Rules**, which provisions attract an automatic right of appeal by dint of the provisions of **Order 43 Rule 1** of the **Civil Procedure Rules**. It was also counsel's contention that the preliminary objection which was dismissed by the Deputy Registrar and the application for joinder were mutually exclusive pleadings and that the applicant's right to mount the application was not fettered by the filing of the preliminary objection.

20. In summary, counsel for the applicant submitted that the applicant has established that it has acted with due diligence and asked the court to grant the orders sought.

21. After considering all the pleadings and submissions herein, the issue that arises for determination is whether the applicant has demonstrated that it is entitled to the orders sought herein.

22. From the submissions made, the authorities cited to me and the relevant provisions of the law, I am satisfied that the applicant has demonstrated to this court that it is entitled to the orders sought vide the Notice of Motion dated 24th October 2012. The applicants have demonstrated due diligence in dealing with this matter since the ruling of 27th July 2012. The rules also entitle them to a right of appeal. It is also noteworthy that the Civil Procedure Rules and the provisions of **sections 1A and 1B** of the **Civil Procedure Act** behove the courts to dispense substantive justice to parties appearing before them in an expeditious, proportionate and affordable manner. And so does the **Constitution of Kenya 2010** at **Article 159**. No party shall be denied their right of appeal.

23. Accordingly and for the reasons above given, I allow the Notice of Motion dated 24th October 2012 and filed in court on the same day in terms of **prayers 2, 3 and 4** thereof. The intended appeal shall be filed within the next 14 days from the date hereof.

24. The costs of this application shall abide the outcome of the intended appeal.

25. It is so ordered.

Dated and delivered at Kisii this 23rd day of November, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Oguttu-Mboya for Mr. Njeru (present) for the Appellant

Mr. Minda h/b for Bosire Gichana (present) for the Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.