



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 68 OF 2012

JOSEPH GIKONYO T/A

GARAM INVESTMENTS AUCTIONEER/RESPONDENT

VERSUS

NATIONAL SOCIAL SECURITY

FUND BOARD OF TRUSTEES APPLICANT

R U L I N G

1. For the determination of the Court is the application dated 7th October, 2013 filed by the Defendant, brought pursuant to the provisions of **Order 51** of the *Civil Procedure Rules* and **Rules 50, 51 and 55(5)** of the *Auctioneer's Rules*. The Applicant prays for the following orders inter alia:

“1. THAT this application be and is hereby certified as urgent and service be dispensed with in the first instance;

2. THAT pending hearing of this application inter parties, any further proceedings and/or consequential steps and/or execution of the certificate of costs in the sum of Kshs. 17,227,019/- as per and arising from the ruling of Taxing Master R. N Nyakundi delivered herein on 17th September, 2013 be and is hereby stayed;

3. THAT in the alternative to prayer (2) above, there be a maintenance of status quo pending hearing of this application inter parties and/or until further orders of this Honourable Court;

4. THAT the time limited for lodging this Appeal from the decision of the Taxing Master R.N. Nyakundi herein dated 17th September, 2013 and filing of the Memorandum of Appeal by way of Chamber Summons be and is hereby extended from 24th September, 2013 and the Appeal herein in terms of prayers (4), (5) and (6) be and is hereby deemed as duly lodged within the prescribed time;

5. THAT the ruling of the Taxing Master R.N Nyakundi delivered herein on 17th September, 2013 in the matter of taxation of auctioneer's Bill of Costs dated 3rd February, 2012 and

amended on 28th November, 2012 between Joseph Gikonyo T/A Garam Investments and N.S.S.F Board of Trustees be and is hereby set aside;

6. THAT the Auctioneer/Respondent be and is hereby ordered to submit a fresh bill of costs before a Taxing Master other than R.N. Nyakundi;

7. THAT the costs of this Appeal be provided for.”

2. The application is predicated upon the grounds as set out therein. It is contended that the Applicant delayed in filing the Appeal as against the taxation on the mistaken apprehension by an associate in the firm and that the Applicant is still desirous of pursuing an Appeal. It is further contended that the Taxing Master failed to comprehend the effect of the Order issued on 26th October, 2013 striking out the Bill of Costs, which then the Taxing Master proceeded to tax, without jurisdiction, in the absence of a fresh Bill of Costs. Further, it is averred that the Taxing Master proceeded to allow costs based on a proclamation that was nullified by the decision of Apondi, J made on 27th January, 2011 and that the amounts awarded by the Taxing Master were based on the exaggerated value of the proclaimed movables by the Auctioneer. Further and in any event, the Applicant was not afforded an opportunity of seeking an independent valuation of the proclaimed movables. It was the Applicant's contention that there were manifest errors in law and principle committed by the Taxing Master and that it would be in the public interest for the Pension Fund to be safeguarded from being saddled with exorbitant and unrealistic charges.
3. The application is further supported by the affidavit of **Austin Ouko**, the Legal Officer of the Applicant, sworn on even date. In conceding that the appeal was filed outside the prescribed time limitations, the deponent contended that the same was inadvertent and was a mistake that was excusable. It was further contended that the Taxing Master in his determination dated 17th September, 2013 was not cognizant and/or did not take into consideration material facts as reiterated by the Applicant. Moreover, the rendering of the decision thereof was therefore flawed and that the Taxing Master erred therein. Further, it was contended that the Bill of Costs was premised on exaggerated valuations of the proclaimed movables. The amended Bill of Costs was not properly before the Court and that the Ruling of Apondi, J delivered on 27th January, 2012 disregarded the validity of the "first proclamation" which the Bill of Costs dated 3rd February, 2012 was predicated upon. It is the Applicant's contention that the Bill of Costs as amended and dated 28th November, 2012 should be set aside and a fresh Bill of Costs be filed and determined before a different Taxing Master.
4. In opposing the application, the Respondent filed both Grounds of Objection and the Replying Affidavit of **Joseph Gikonyo** both dated 18th November, 2013. The Respondent contended that the application is misconceived, incompetent, bad in law, an abuse of the process of the Court, unmeritorious and predicated on a misapprehension of the law. Further, the Respondent contends that the Court vide its Ruling on the Notice of Motion application dated 19th March, 2012 (in which the applicant objected to the Bill of Costs *inter alia* that the grounds for the Auctioneer's costs were pegged on the decretal sum rather than the value of the proclaimed movables), granted that the Auctioneer would either amend or file a fresh Bill of Costs, to which the Respondent opted for the former. It is averred that the Ruling of the Taxing Master delivered on 17th September, 2013 took into account the Applicant's contentions as regards the Amended Auctioneer's Bill of Costs dated 22nd December, 2012. Further that the filed Appeal is intended to deny the Respondent of his just fees.
5. Prayers (1) and (2) of the application have since been dispensed with. What is for consideration and determination by the Court therefore, are prayers (3),(4),(5) and (6) of the Application. The issues raised therein include the enlargement of time for the filing of the Appeal on taxation under the provisions of **Rule 55(5)** of the Auctioneers Rules, stay of execution and the setting aside of

the Ruling and decision by the Taxing Master delivered on 17th September, 2013. Such was pursuant to the inherent powers of the Court and the valuation of the movables as per the Proclamation. In determining the application to enlarge time for filing an Appeal, **Rule 55(5)** of the *Auctioneers Act* provides that:

“5. The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.”

The application is proper before this Court as provided under **Rule 55(4)** and the issue in contention is that the Appeal was filed out of time. In this regards, the Applicant reiterated in its affidavit in support of the Application that the late filing was due to the mistaken apprehension that the reasons for the decision of the Taxing Master were to be delivered to the Applicant as necessary before filing the appeal and that it took twelve (12) days for the decision of the Taxing Master to be typed, by which time the period allowed (see **Rule 55(5)**) had lapsed. The Applicant contended that the inadvertent delay was beyond the time and control of the Applicant, but which is nevertheless excusable. The Respondent countermanded these averments and further contended that the application was filed out of time as prescribed under statute. He relied on the case of **Kilonzo & Co. Advocates v John Njenga Mututho H.C.C No. 49 of 2010;[2012] eKLR** in which the Honourable Court declined to enlarge time for insufficient reasons given for delay. In that case, the Court declined to enlarge time after an examination of the error or omission. In his final analysis and determination that the Defendant had not been vigilant in protecting its interests and taken the necessary steps that they ought to have taken, Odunga J held *inter alia*:

“In this case the defendant’s case is that due to the inadvertence on the part of counsel although an appearance was entered, no defence was filed. Whereas inadvertence on the part of the counsel may be a factor to be considered in an application for setting aside the judgment, the Court must gauge the quality of the error or omission. In this application, apart from making a bare statement that the failure to file the defence was due to inadvertence, the applicant has not expounded on the nature of this inadvertence. Without the same being expounded it is difficult for the Court to gauge its quality.” Emphasis added.

6. In response to the Respondent’s submission, the Applicant relied on the case of **Murai v Wainaina (No. 4)(1982) KLR 38** in which Madan, J (as he then was) reiterated as follows:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the Court might feel compassionately more readily. A blunder of law can be a mistake. The door of justice is not closed because a mistake has been committed. The Court may not forgive or condone it, but it ought certainly do whatever is necessary to rectify it if the interests of justice so dictate.”

In recent applications in line with the provisions of *Article 159(2)(d)* of the Constitution as read with **Sections 1A and 1B** of the *Civil Procedure Act*, the Courts have been more liberal in allowing breaches of procedural technicalities in order to determine the substantive issues at hand. In the present case, the applicant filed the Appeal late by about twelve (12) days. The inadvertence of the mistake has been adequately explained, and the Court takes cognizance of the fact that mistakes do happen (see **Muria v Wainaina (supra)**) As such, the Court ought to do whatever is necessary to rectify the mistake of the Applicant’s counsel, in the interest of justice. Certainly the provisions of *Article 159(2)(d)* and **Sections 1A, 1B, 3A and 95** of the *Civil Procedure Act*, as well as **Rule 55(5)** of the *Auctioneers Rules* empower this Court to make a just determination on procedural technicalities in the interest of justice and the equitable, expedient and fair resolution of matters. As reiterated in **Wasike v Khisia (2004) 1 KLR 197**

and **Joseph Njau v Benson Mwai (2013) eKLR** this Court finds it necessary to determine the substantive issues and grounds and allows the Applicant leave to file its appeal out of time as per prayer 4 of the Application.

7. The issues perpended by the Applicant are that the Taxing Master, in making his determination as regards the auctioneer's Bill of Costs, failed to take into consideration the fact that the Court had in the Ruling delivered by Apondi, J on 27th January, 2011 nullified the Proclamation and that the Taxing Master disregarded this fact in his Ruling dated 26th October, 2013 by striking out the Bill of Costs. The Applicant reiterated that it was denied the opportunity to apply for an independent and true valuation of the proclaimed items in order to ascertain the costs awardable to the auctioneer, which costs, nonetheless, the Taxing Master taxed. Such was a legal lapse warranting an appeal from the Taxing Master's Ruling dated 17th September, 2013. On perusal of the ruling of Apondi, J dated 27th January, 2012 the Court notes that the learned judge in allowing prayers no. 2 and 3 of the application dated 15th October, 2010 held that the Respondent did not follow the right procedure in executing against the Applicant. The learned Judge further determined that the Respondent had proceeded to execute without any Bill of Costs having been presented as against the Applicant and that the only procedure allowing for such action is **Section 94** of the *Civil Procedure Act* which was not followed.
8. The Application dated 15th October, 2010 did not seek to set aside the warrants issued on 4th October, 2010 but rather to have the same stayed. The Court rejected prayer No. 4 of the application which was the only prayer which sought to set aside the arbitral award made by the arbitrators dated 22nd July, 2010. The warrants of execution were stayed as there was no Bill of Costs issued against the Respondent. In **Phillips v Symes [2006] EWHC 2595** it was held that the Court had properly exercised its discretion in granting stay orders thus ensuring that the overriding objective had been achieved and that all circumstances had been taken into consideration. However, the Court in that case also noted that such a halt on proceedings would subsist so as to allow the parties to take such steps as allowed by the Rules or under the terms of the stay.
9. The Bill of Costs dated 3rd February, 2012 was filed by the Respondent as against the Applicant. The same was struck out by the said Ruling delivered on 26th October, 2013 as evidenced by the copy of the Order exhibited at page 73 of the Applicant's annexure marked "AO-1". The said Order reads:

"The Bill of Costs dated 3rd February, 2012 be and is hereby struck out with liberty to amend and file a proper Bill of Costs." (emphasis added).

It is the Applicant's contention that the two (2) Orders i.e. striking out and amending cannot exist alongside other and that, in any event, a Bill of Costs cannot be amended. The only proper procedure available to the Respondent would be to withdraw and file a fresh Bill of Costs. The Applicant contended that, in any event, there had been no application for the amendment of the Bill of Costs and that therefore, the Taxing Master was wrong to order for such amendments.

10. On its part, the Respondent claims that the Ruling delivered on 17th September, 2013 was proper and that the Taxing Master gave leave to either amend the Bill of Costs or file a fresh one. The Respondent opted for the former. It further contended that the Bill of Costs is a pleading capable of amendment as provided for under **Section 100** of the *Civil Procedure Act*, as well as **Section 2** of the same Act, as read together with **Order 8** of the *Civil Procedure Rules*, for the purposes of determining the real issues in a matter.
11. **Section 100** as read with **Order 8 Rule 5** gives the Court the general power to amend any pleadings for the purpose of determining the real issues in the matter. **Order 2 Rule 15** provides

for the striking out or amendment of pleadings. **Rule 15(1)** reads:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that;

- a. **it discloses no reasonable cause of action or defence in law; or**
- b. **it is scandalous, frivolous or vexatious; or**
- c. **it may prejudice, embarrass or delay the fair trial of the action; or**
- d. **it is otherwise an abuse of the process of the court,**

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

The fundamental principle under this provision is that it makes it imperative for the Court to issue orders in the alternative i.e. either for the pleading to be struck out or amended, but not both. The Court should not have issued both orders. Once a pleading is struck out, it cannot later be amended, either with or without leave of the Court, unless the law specifically provides for such provision. The Court’s discretion should be exercised cautiously and in the best interests of justice, and not capriciously or callously. The Taxing Master, in his Ruling, was of the misconstrued view that the struck out pleading could and would be amended and thus granted leave to the Auctioneer to amend and/or file a fresh Bill of Costs. The Auctioneer opted for the former. However, the Court finds that once a pleading is struck out, it amounts to the same being expunged and thus there would be a non-existent pleading to be amended. In my view, the Taxing Master erred in determining that the Auctioneer had the choice of amending or filing a fresh Bill of Costs. The provisions under **Order 2 Rule 15** provide that the Court shall act in the alternative as regards pleadings -it may either strike out or order for the amendment of the pleadings, but not both. In exercising its power as donated by **Section 100** as read together with **Order 2 Rule 15**, this Court would have had the mandate to amend the Bill of Costs. However and in conclusion, the Court has no jurisdiction to order for a struck out pleading to be amended.

12. In consideration of the foregoing therefore, the Court finds that the Taxing Master erred in his determination dated 17th September, 2013 by granting leave to amend a struck out Bill of Costs. It is not necessary, in this instance, to determine the issue as regards the valuation of the items proclaimed by the Auctioneer as the amended Bill of Costs is hereby deemed to be fundamentally flawed. The Taxing Master failed to take into consideration the material facts as espoused above and thus the Court would have the impetus and obligation to set-aside the Ruling dated 17th September, 2013. In following the rationale as per the determination in **First American Bank v Shah & Others (2002) 1 E.A 64**, the Court hereby allows the Application and sets aside the Ruling of the Taxing Master dated 17th September, 2013. The Court further orders that the Respondent will submit and file a fresh Bill of Costs for taxation within fourteen (14) days of the delivery of this Ruling. Such will come before a different Taxing Master for the purposes of taxation. Costs of the Application are awarded to the Applicant.

DATED and delivered at Nairobi this 15th day of May, 2014.

J. B. HAVELOCK

JUDGE



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