



REPUBLIC OF KENYA



**Kariuki v Mwabia (Miscellaneous Civil Application
E156 of 2024) [2024] KEHC 9381 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E156 OF 2024**

HM NYAGA, J

JULY 29, 2024

BETWEEN

JULIAH MUTHONI KARIUKI APPLICANT

AND

IRENE NKATHA MWABIA RESPONDENT

RULING

1. The application for determination is the Applicant’s Notice of Motion dated 4th June, 2024 and filed on 7th June, 2024. It is brought under Sections 1A, 1B, 3, 3A & 3B of the Civil Procedure Act, Order 42 Rule 5 & 6 of the Civil Procedure Rules, 2010 and Articles 48, 50(1) (j) & 159(2) of the Constitution.
2. Prayers 1 and 2 in the Application are now spent. The prayers which are pending this court’s determination are prayers number 3 and 4. The said prayers are reproduced verbatim as follows:
 - I. That pending the hearing and determination of Reference filed by the Applicant and as regards to costs assessed in a Certificate of Costs issued on 24.5.2024 in Small Claims Court at Nakuru SCCCOMM No. 349 of 2024, Juliah Muthoni Kariuki v Irene Nkatha Mwabia, there be stay of execution for the said costs.
 - II. That this Court be pleased to issue all and any other orders as are appropriate in the circumstance of the case to preserve status quo pending Reference filed by Applicant and attached to the Application.
3. The Application is premised on grounds that the Applicant is dissatisfied with the assessed costs in the Certificate of costs dated May 24, 2024 and has filed a reference against some of the items therein; that the Applicant was not served with the Bill of Costs for her input before such costs were assessed and/or taxed; that the said Bill of costs particularly the award on party and party costs of Kshs. 45,000/= is grossly exaggerated and inapplicable in small claims court; that the Respondent has threatened to execute within 3 days from today if stay orders against execution is not issued; that the Applicant



- has filed the Reference timeously and after failing to convince the Respondent to relook at the Bill and certificate of costs in order to agree on current assessment; that the applicant is likely to suffer irreparable loss since the Respondent will be unable to settle claim and costs in a separate matter as is a person of unknown means; that further costs are likely to be incurred if Auctioneers were to be instructed to increase costs; that the Reference filed is arguable and has high chances of success; that the costs of Kshs.52,000/= is excessive in a small claims court since the maximum costs should be Kshs.10,000/=; & that unlike her, no prejudice is likely to be caused to the Respondent.
4. The Application is supported by the Applicant's supporting affidavit reiterating the above grounds. She also annexed a copy of Certificate of Costs marked as J.M-1, a Copy of Reference marked as J.M-2, a Letter by her Advocate protesting some of the taxed items marked as J.M-3 and a Letter by the Respondent's counsel threatening to execute within 3 days marked as J.M-4.
 5. The Applicant also swore a supplementary affidavit on 8th June,2024 annexing the following documents:-
 - a. Copy of an agreement between her and the Respondent indicating she was unable to pay and genesis of the Original Suit marked as J.M.K-1A
 - b. Notice of withdrawal of Claim Marked as J.M.K-2A
 - c. Copy of Decree issued in her favour in a separate suit SCCCOMM No. E1324 of 2023 on 15th December, 2023.
 - d. Copy of Decree issued in the claim which was withdrawn marked as J.M.K-3A
 - e. Copy of Reference dated 4th June,2024 marked as J.M.K-4A
 6. The Respondent opposed the Application through her Replying Affidavit sworn on 23rd June, 2024. She averred that the Application is time barred, statute barred and contra-statute considering the said reference has been preferred outside the contemplated timelines of 14 days.
 7. She deposed that the reference has been filed 15 days after the Certificate of costs was issued and as such the reference is an afterthought and reactive response to the intended execution to realize the costs.
 8. She posited that timelines are not technicalities of procedure which may be accommodated indiscriminately especially in instances of excessive and inordinate delays as in the instant case.
 9. She contended that the Applicant has not illustrated why she failed to file the reference within the stipulated time and why she has disregarded the pronouncements of paragraph 11(1) of the *Advocates Remuneration Order*.
 10. That furthermore, the Applicant has not sought leave to institute the present incompetent reference out of time as contemplated by Paragraph 11(1) (2) of the *Advocates Remuneration Order* (ARO).
 11. She deposed that the issue of whether she owes the Applicant any decree sum is neither here nor there for reasons that the suit she is pursuing costs on is a whole different suit from their purported suit.
 12. She averred that her Advocate served the Applicant with the letter requesting the Decree and Certificate through Whatsapp but the same message cannot be retrieved since the Applicant activated her disappearing messages feature.
 13. She averred that she has not been served with the reference and/or a letter requesting for reasons from the taxing adjudicator and that the Applicant has not sought for reasons from the taxing officer before preferring a reference, and as such the present reference is premature and null ab initio.



14. She asserted that the Applicant has not demonstrated the loss she stands to suffer if execution was to proceed and that the instant application does not meet the threshold for grant of stay of execution.
15. She asserted that if at all the execution proceeds and she realizes the certificate of costs and this reference succeeds, she is capable of reimbursing the Applicant.
16. For the foregoing reasons, she prayed that the Application be dismissed.
17. On 26th June, 2024 I directed parties to file submissions. At the time of writing this ruling none of the parties had filed their respective submissions.

Analysis and Determination

18. Having considered the Application, the affidavits in support and in opposition to the Application, the issues for the Court's determination are; -
 - i. Whether the assessment of the costs was in accordance with the law.
 - ii. If the answer to 1 above is in the affirmative, whether the reference is incompetent for being filed contrary to paragraph 11 of the Advocate's Remuneration Order.
 - iii. Whether the applicants have met the prerequisite for grant of stay of execution pending appeal.
19. Order 21 rules 9A to 9 D were introduced to the *Civil Procedure Rules*(CPR) in 2020, to deal with assessment of costs in the magistrates' court. They provide as follows;
 - 9A. A party claiming costs at a Magistrates letter as to costs Court shall file a written request, statement of costs and supporting documents with the Court and serve it on the other parties with a breakdown of the costs sought.
 - 9B. Once served with the written request, a statement of costs and supporting documents under sub-rule 1, the Respondent may file a response with the Court within seven days of service.
 - 9C. The Court shall consider the written request, statement of costs and supporting documents filed by the parties within fourteen days of response by the respondent and make appropriate orders as to costs.
 - 9D. In awarding costs, the Court shall be guided by the *Advocates (Remuneration) Order*."
20. It is thus a requirement that that prior to assessment of costs, the opposing party ought to be notified of the request and be given an opportunity to file a response.
21. The applicant states that no such request for costs was forwarded to them. The Respondent did not address this issue but instead dwelt on the question of time set by the *Remuneration Order* on the filing of a reference.
22. The Respondent contends that the applicant filed the instant reference out of time contrary to paragraph 11 of *ARO*. They submitted that the Certificate of costs was issued on 24th May, 2024 and the applicants Reference preferred on 7th June,2024 that amounts to a period of 15 days contrary to the 14 days provided for.
23. The irony of the respondent's argument is that while she asks the applicant to abide by the rules, she herself has failed to show that she abided by the same rules.
24. It is important to point out why the rules were amended. Previously, in the subordinate courts, there was little or no input at all from the parties when it came to the assessment of costs. This situation



led to disagreements as to the correct amount of costs payable. Unlike in the superior courts where costs are taxed there was no way of knowing how the costs were arrived at. The introduction of the amendments was to bring a form of taxation of costs in the magistrates' courts. For all intents and purposes and save as specified under the *Small Claims Court Act*, the said court is a subordinate court as set out under Article 169(1) (a) of the *Constitution*. Therefore in so far as assessment of costs is concerned, the procedure set out under Order 9A to 9D is applicable to all Magistrates courts, which also include the Small Claims Court.

25. These rules were introduced with a purpose. That step is not just a procedural issue that can be disregarded or overlooked. That would render the said rules irrelevant and have no reason to have been passed in the first place. The party who is condemned to bear the costs is entitled to notice of the same.
26. I have perused the lower court record and it is apparent that there was no request done by the respondent as required. The court just issued a decree and a certificate of stated costs.
27. The lower court record also shows that the then intended advocate for the respondent appeared on 16th April 2024 and told the court that he was waiting to be mapped. It is not clear if this ever happened and if he eventually filed any papers. All these are issues that ought to have been addressed by the lower court if the rules as they are now were followed.
28. Failure to abide by the rules renders the subsequent assessment of costs irregular. The same ought to be set aside.
29. That being the case, I see no need to address myself on the merits of the reference.
30. For the foregoing reason, I allow the Application and set aside the certificate of costs issued by the lower court on 24th May 2024.
31. I direct that the lower court file be returned to the said court and that respondent files a request for costs as required by the rules, and serve the applicant, who shall be at liberty to respond. Thereafter the court may assess the costs.
32. There shall be no orders as to costs herein.
33. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jeniffer

No appearance for parties

