



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 03 OF 2019

ERICK KIBIWOTT TARUS & 51 OTHERS.....PETITIONER/APPLICANT

VERSUS

DONALD JAMES GEAR.....1ST RESPONDENT

THE ESTATE OF ESMAIL NURANI.....2ND RESPONDENT

THE ESTATE OF NYONGIO KIMITEL.....3RD RESPONDENT

RULING

The applicants filed an application dated 11th November 2020 seeking orders that;

- a) Spent
- b) There be a stay of execution of the taxing officer's ruling dated 25/09/2020 and the consequent certificate of costs pending the hearing and determination of the application
- c) This honourable court enlarges time within which to file a reference against the ruling of the taxing master delivered on 25th September 2020.
- d) Leave be granted to the applicant to file a reference against the decision of the taxing master delivered on 25/09/2020 within 14 days from the date of receipt of the reasons of taxing officer
- e) There be stay of execution of the ruling dated 25/11/2020 delivered in this suit pending the hearing and determination of the applicant's intended reference.
- f) That costs of this application be provided for.

The application is premised on the grounds set out in the application which in a nutshell are; that the taxing officer delivered her ruling on the 3rd respondent's bill of costs dated 20/04/2020 on 25/9/2020 without notice to the applicants. The applicants counsel had challenges accessing the law courts due to the Covid 19 pandemic and therefore instructed Mr. Ngigi Mbugua, counsel based in Eldoret to hold his brief. The delay in filing the reference was occasioned by the fact that neither counsel for the applicant or Mr. Ngigi was aware of the ruling having been delivered.

It was not until 6th November 2020 when Mr. Ngigi enquired from the registry that he was notified that the ruling had been delivered on 25th September 2020.

Upon notifying the counsel for the applicants Mr. Ngigi was informed that they had not received any ruling on the bill of costs.

The execution process has already commenced and the applicant will suffer irreparable loss. The bill of costs is colossal having been taxed at Kshs. 454,523/- and a proclamation was done on 9th November 2020. The taxing officer's decision was based on error of principle as the award of taxed costs suffers from legal infirmity due to the variance of procedure and final outcome.

APPLICANT'S CASE

The applicant submits that the court has power to enlarge time within which they file a reference against the ruling of the taxing master

delivered on 25th September 2020. They cite paragraph 11(4) of the Advocates (Remuneration) Order 2014 and the case of *Edith Gichugu Koine vs Stephen Njagi Thoiti (2014) eKLR* in support of their submission seeking enlargement of time.

The applicants submit that they were not able to file a reference within the prescribed time and the reason for this is that the bill of costs dated 20/04/2020 was delivered on 25/09/2020 without notice to the applicants.

The delay was occasioned by the fact that neither Mr. Ngigi nor the applicants advocate were aware of the delivery of the ruling.

The allegation in paragraph 6 of the 3rd respondents' replying affidavit that a representative of the firm of Gathaara & Co Advocates was present during the taxation is untrue. At all times to this case the two partners from the advocates' firm on record for the petitioners were out of the country. Mr. Gathaara who was in the country did not attend the session.

The allegation that Mr. Gathaara called Mr. Omboto and requested for indulgence and a copy of certificate of costs, is also a lie in an attempt to mislead the court.

The instant application has been made without inordinate delay. No prejudice shall be suffered by the respondent if the court enlarges the time with which to file a reference against the ruling.

If the orders of stay are not granted, the intended reference will be rendered nugatory. The intended reference has a high chance of success and the costs awarded to the 3rd respondent are a colossal sum of money and if executed against the applicants they will suffer irreparable damage yet no prejudice will be caused on the respondent if the stay is granted.

The applicants submit that the decision of the taxing officer should be set aside or the bill of costs referred to another taxing officer as the taxing officer erred in enhancing the fees without any justifiable reasons as the matter was not complex and did not proceed to full hearing. They cite the case if *Labh Singh Harman Singh Ltd vs Attorney General & 2 others (2016) eKLR* in support of this submission.

The execution proceedings have already commenced and the applicants are likely to suffer substantial loss if the court fails to grant an order for stay of execution of the taxing officer's ruling.

The petitioners have not negotiated any settlement of the taxed bill of costs with the 3rd respondent's counsel or the 3rd respondents.

They urge the court to allow the application.

3RD RESPONDENT'S CASE

The 3rd respondent submits that the bill of costs was delivered on 25/09/2020 and the applicants were duly notified of the same. The taxing officer granted 30 days stay of execution which all the parties were notified through the Microsoft Teams and they also informed Mr. Gathaara who sought for indulgence to call for payment of Bill of costs.

The application offends the mandatory provisions of *rule 11(1)* and *rule 11(2)* of the *Advocates Remuneration Order* where the applicant has to file the reference within 14 days from the date of the ruling and giving notice to the taxing officer the reasons for objecting particular items.

The order for enlargement of time to file a reference is untenable as much as the court has powers or discretion to enlarge time under *rule 11(1)* and *(2)* it ought to take into account the existing circumstances or reasons for the delay in complying with the rules.

The advocates for the petitioners was immediately notified on the ruling and even the advocates for the 3rd respondent has been in constant communication with the said advocates and Mr. Ngigi who has been holding his brief was well informed of the ruling.

The order for stay being brought by the applicants pending the intended reference is misconceived as the applicants have not demonstrated by exhibiting any draft references and the draft objection to the taxing officer on the item opposed or objected to.

The applicants have been seeking the taxing officer to recuse herself or that another taxing officer assess the bill of costs without any justifiable reason hence the application is brought in bad faith. The 1st petitioner has approached the respondents and agreed to the mode of payment of the assessed bill of costs and any rebuttal by the applicant's counsel is neither here nor there.

The respondents urge the court to dismiss the application.

ISSUES FOR DETERMINATION

1. Whether the court should enlarge the applicants' time to file a reference.

Paragraph 11(4) of the *Advocates (Remuneration) Order 2014* provides;

“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 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 already expired"

This gives the court jurisdiction to enlarge time for filing of the reference based on its own discretion.

The applicant's explanation is that he was not aware of the delivery of the ruling as he had not been notified of the ruling date. The respondent has not annexed any proof that they received a notice from the court or issued a notice themselves. Therefore, the allegation that both parties were aware of the ruling is unproven. In the interest of justice the court should exercise its discretion and enlarge the applicants' time to file a reference. In this regard, grant for stay of execution of the ruling is necessary so as not to render the reference a nullity.

Order 46 Rule 6(2) of the *Civil Procedure Rules* provides;

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

The amount is colossal and therefore the applicant stands to suffer a substantial loss if the execution commences. The ruling was delivered on 25th September 2020 and the application filed on 11th November 2020. The applicant has explained that he was made aware of the ruling on 6th November 2020 upon enquiring about the same. I find that there is no inordinate delay.

None of the parties has submitted on security. I do order that half of the sum be deposited in a joint interest earning account in the names of the two firms representing the parties as security.

The applicant is therefore allowed 14 days within which to file a reference against the ruling of the taxing master delivered on 25/9/2020; stay of execution of the ruling dated 25/11/2020 is granted pending hearing and determination of the reference. Applicant is to deposit Kshs. 227,262 in an interest earning account in the name of the two firms representing the parties herein, as security.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 21st day of December, 2020.

In the presence of:-

Miss Mitei holding brief for Mr. Gathara for the applicant

Miss Kibichiy holding brief for Mr. Omboto for respondent

Ms Gladys - Court assistant