



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**CONSTITUTIONAL PETITION NO. 345 OF 2017**

**BETWEEN**

ADAM BARISA DHIDHA.....1<sup>ST</sup> PETITIONER  
MOHAMED DADO HATU.....2<sup>ND</sup> PETITIONER  
MOHAMED BWANAIDI.....3<sup>RD</sup> PETITIONER  
DICKSON KOFA.....4<sup>TH</sup> PETITIONER  
MKYABUCHU ALI.....5<sup>TH</sup> PETITIONER

**AND**

INDEPENDENT ELECTORAL  
& BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT  
SECRETARY GENERAL ORANGE  
DEMOCRATIC MOVEMENT PARTY.....2<sup>ND</sup> RESPONDENT  
DHADHO GADDAE GODANA.....3<sup>RD</sup> RESPONDENT

**RULING**

1. The 1<sup>st</sup> Petitioner through a Chamber Summons brought pursuant to *Rule 19 of the Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013; paragraph 11 (4) of the Advocates (Remuneration) Order, 1962 and all enabling laws* seek the following orders:-

a) *Prayer 1, spent.*

b) *That this Honourable Court be pleased to grant a stay of execution of the Decree herein pending the hearing and determination of this Application and the herein Reference.*

c) *That this Honourable Court be pleased to grant leave to the 1<sup>st</sup> Petitioner to object to and file a reference against the Ruling delivered by the Deputy Registrar on 28<sup>th</sup> May 2018 out of time.*

d) *That this Honourable Court be pleased to deem the 1<sup>st</sup> Petitioner's Notice of Objection dated 16<sup>th</sup> June 2010 and the herein Reference to be properly and duly filed.*

e) *That the cost of and incidental to this Application abide by the result of the herein Reference.*

2. The Application is premised on an amended affidavit of Edwin Saluny dated 4//6/2020 and on several grounds on the face of the

application. The application is further grounded on a further affidavit sworn by Edwin Saluny on 17<sup>th</sup> August 2020.

3. The instant application is targeted upon the 3<sup>rd</sup> Respondent whose Bill of Costs has been taxed and seeking execution for payment of its costs. The 3<sup>rd</sup> Respondent is opposed to the application and in doing so has filed Replying Affidavit sworn on 20<sup>th</sup> July 2020 praying the Chamber Summons dated 26<sup>th</sup> June 2020 be dismissed with costs.

#### **BRIEF FACTS**

4. On 2<sup>nd</sup> August 2017, Hon. Justice Olega Sewe delivered Judgment dismissing the Petition filed herein and awarded costs to the Respondents.

5. On 24<sup>th</sup> August 2017, the 3<sup>rd</sup> Respondent filed and served its Bill of Costs against the Petitioners and the Bill of Costs was taxed on 13<sup>th</sup> October 2017, and ruling thereto delivered on 2<sup>nd</sup> May 2018 taxing the Bill of costs at a sum of Kshs.681,416.60.

6. The 3<sup>rd</sup> Respondent therefore set in motion the process of recovery of its costs and on 4<sup>th</sup> December 2018, extracted warrants of attachment and sale and on 30<sup>th</sup> January 2019, the 1<sup>st</sup> Petitioner goods were proclaimed. That after eight (8) good months, on 19<sup>th</sup> August 2019 the 1<sup>st</sup> Petitioner filed a Notice of Motion seeking an order that the ruling dated 2<sup>nd</sup> May 2018 on the taxation of the Party and Party costs be set aside, but the same was dismissed by the Honourable C. Kithinji, Deputy Registrar; on 28<sup>th</sup> May 2020.

#### **ANALYSIS AND DETERMINATION**

7. I have very carefully perused the 1<sup>st</sup> Petitioner's application; affidavits in support and grounds relied upon; the 3<sup>rd</sup> Respondents' Replying affidavit; the Parties rival submissions and authorities relied upon; and from the same I find the following issues arises for consideration:-

***a) Whether the 1<sup>st</sup> Petitioner's Chamber Summons dated 26<sup>th</sup> June 2020 seeking leave to file reference out of time is defective and inordinately delayed?***

***b) Whether the application has met the threshold for it to be granted?***

#### ***A. WHETHER THE 1<sup>ST</sup> PETITIONER'S CHAMBER SUMMONS DATED 26<sup>TH</sup> JUNE 2020 SEEKING LEAVE TO FILE REFERENCE OUT OF TIME IS DEFECTIVE AND INORDINATELY DELAYED?***

8. The 1<sup>st</sup> Petitioner in his application dated 26<sup>th</sup> June 2020 under prayer no. 3 seeks the following orders:-

***"That this Honourable Court be pleased to grant leave to the 1<sup>st</sup> Petitioner to object to and file the reference against the Ruling delivered by the Deputy Registrar on 28<sup>th</sup> May 2018 out of time."***

9. A quick perusal of the Court record will reveal that the ruling on taxation of the Bill of Costs was delivered on 2<sup>nd</sup> May 2018, and that there is no ruling that was delivered on 28<sup>th</sup> May 2018 and further there are no proceedings for 28<sup>th</sup> May 2018 in the Court record.

10. The 1<sup>st</sup> Petitioner in seeking grant of stay of the decree urge that the court should act in view of the fact that its discretion ought to be exercised in a manner that does not render a party's statutory right of appeal and/or to file a reference nugatory and further that the status quo should be maintained. The 1<sup>st</sup> Petitioner further urge he will suffer grave prejudice and harm if he is not granted leave to object to and file a reference against the Ruling delivered by the Deputy Registrar on 2<sup>nd</sup> May 2018 out of time for he will be condemned unheard.

11. The 1<sup>st</sup> Petitioner further contend that the law regarding the grant of stay of execution is well settled in Kenya; referring to the case of ***M M Butt v. The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979***. (following ***Wilson v Church (No. 2) (1879) 12 Ch 454 at p 488***) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.

12. In granting or not granting an order of stay, the Courts are to be guided by provisions of ***Order 42 Rule 6 of the Civil Procedure Rules*** which provides:-

***"[Order 42, rule 6.] Stay in case of appeal.***

***6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(2) No order for stay of execution shall be made under subrule (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.*

*(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

*(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*

*(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”*

13. In the instant application the 1<sup>st</sup> Petitioner is clearly offended by a purported Ruling issued on 28<sup>th</sup> May 2018. There is no ruling that was issued on 28<sup>th</sup> May 2018. The 1<sup>st</sup> Petitioner never sought formally or orally to amend the application to put the date of the ruling. This Court cannot assume any other date of the Ruling aggrieving the 1<sup>st</sup> Petitioner and substitute the same for the 1<sup>st</sup> Petitioner. Having found that there was no ruling even delivered on 28<sup>th</sup> May 2018 on record, I find the order as sought cannot be granted and is accordingly defective to that extent.

14. In the instant application it is urged by the 3<sup>rd</sup> Respondent that the 1<sup>st</sup> Petitioner’s conduct is to evade justice as he does not at all see the need to file an affidavit on his own behalf to explain the cause of delay in filing the reference, instead his Advocate has taken up that role and purports to swear an Affidavit on his behalf, which the 3<sup>rd</sup> Respondent asserts demonstrates the 1<sup>st</sup> Petitioner’s aloofness to this matter reflecting to his inability to act timeously when court make its orders.

15. This Court notes the issues deponed upon by the Advocate on behalf of his client herein; are contentious issues, and as such the Advocate ought not to have sworn the Affidavits in support of the Chamber Summons dated 26<sup>th</sup> June 2020 seeking to file the reference out of time. In the case of *Simon Isaac Ngugi vs. Overseas Courier Services (K) Ltd [1998] eKLR and Kisya Investments Ltd & Others vs. Kenya Finance Corporation Ltd*, the Court held that:-

*“.....it is not competent for a party’s advocate to depose to evidentiary fact at any stage of the suit.”*

16. The 1<sup>st</sup> Petitioner seeking leave to file the reference out of time was duty bound to adduce reasons for delay through an affidavit, which he has not done. The 1<sup>st</sup> Petitioner’s Advocate being not competent to depose to evidentiary fact at any stage is this suit acted wrongfully. I find that the reasons for delay herein has not been explained to justify grounds for leave to be granted for the application to file reference out of time. The delay since the delivery of the ruling on 2<sup>nd</sup> May 2018 to the date of filing of this application, thus on 26/6/2020 is a period over 2 years. I find the delay inordinately long, unexplained and that the 3<sup>rd</sup> Respondent would be prejudiced by granting the 1<sup>st</sup> Petitioner the orders sought without any basis.

#### **B. WHETHER THE APPLICATION HAS MET THE THRESHOLD FOR IT TO BE GRANTED?**

17. The Ruling on taxation herein was delivered on 2<sup>nd</sup> May 2018, the 3<sup>rd</sup> Respondent extracted Warrant of Attachments and Sale of goods and on 30<sup>th</sup> January 2019 the 1<sup>st</sup> Petitioner’s goods were attached/proclaimed. The 1<sup>st</sup> Petitioner was then aware the proclamation was pursuant to the ruling of 2<sup>nd</sup> May 2018, but the 1<sup>st</sup> Petitioner did not bother to immediately file an application to seek leave to file a reference out of time but instead filed an application dated 19<sup>th</sup> August 2019 seeking to set aside the ruling of 2<sup>nd</sup> May 2018. The application was filed after 1 year and three (3) months which application was dismissed on 29<sup>th</sup> May 2020. In the case of *Machira & Co. Advocates v. Mugugu (2002) 2 EA 428*, Ringera, J (as he then was) indicated that:-

*“that practice relating to taxation or complaint towards any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference in accordance with paragraph 11 of the Advocates Remuneration Order.”*

18. I note in the instant application the ruling in respect of the taxation of the 3<sup>rd</sup> Respondent’s Bill of Costs was delivered on 2<sup>nd</sup> May 2018, whereas the current application is seeking leave to file reference out of time has been made after 2 years and 1 month, I find that a delay of 2 years and 1 month is not only inordinate but unjustified taking into account the period within which a reference ought to be filed from the date of a ruling on taxation. Secondly the 1<sup>st</sup> Petitioner has not bothered to explain the delay.

19. This court is alive to the fact that *Paragraph 11(4) of the Advocates (Remuneration Order) 1962* grants this Honourable discretion to enlarge time for filing a reference, the 1<sup>st</sup> Petitioner has not advanced reasons for the delay in filing the reference or delay in filing application seeking leave to file the reference, but instead of offering an explanation for the delay the 1<sup>st</sup> Petitioner throws the matter to his Advocates to make an application for leave to file reference and explain the delay. In matter of *Gerphas Alphonse Odhiambo vs. Felix Adiego (2006) eKLR* the learned Judge of Appal found that:-

***“no matter how small the period of delay one should have an explanation for it.” Similarly in Governors Balloon Safaris Ltd v. Sky Ship Company Limited & Another [2013] eKLR a delay of 48 days towards filing a reference was still declared as inordinate delay”***

20. It is clear from the 1<sup>st</sup> Petitioner’s application herein that the 1<sup>st</sup> Petitioner has not explained the delay from the time the ruling was delivered (2/5/2018) to the time of filing the application herein. The delay remains inordinate and unexplained.

21. In the instant application the parties on 6/11/2019 entered into a consent wherein the 1<sup>st</sup> Petitioner undertook and agreed to provide a ***Bank Guarantee of Kenya Shillings Six Hundred and Eighty One Thousand Four Hundred and Sixteen Shillings Sixty Cents (Kshs.681,416.60)*** and a stay granted. This Court notes despite consent order being in existence the 1<sup>st</sup> Petitioner has with contempt approached this Court with unclean hands and again seeking indulgence to file a reference out of time. It appears that the 1<sup>st</sup> Petitioner is abusing the court process and is not serious with the consent order made before this Honourable Court. There has to be an end to litigation.

***22. The upshot is that the 1<sup>st</sup> Petitioner’s application dated 26<sup>th</sup> June 2020 is without merit and is accordingly dismissed with costs to the 3<sup>rd</sup> Respondent.***

**Dated, Signed and Delivered at Nairobi on this 17<sup>th</sup> day of December, 2020.**

.....

**J. A. MAKAU**

**JUDGE**