



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**ELECTION PETITION NO. 5 OF 2013**

**BETWEEN**

**MERCY KIRITO MUTEGLI.....PETITIONER**

**VERSUS**

**BEATRICE NKATHA NYAGA.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL BOUNDARIES & COMMISSION.....2<sup>ND</sup> RESPONDENT**

**SAMEUL MUCHERU.....3<sup>RD</sup> RESPONDENT**

**RULING**

The petitioner vide of Notice of Motion dated 19<sup>th</sup> April, 2016 filed under certificate of Urgency supported by grounds on face of the application and supporting affidavit of the petitioner and further affidavit of Brian Ochieng sought for stay of execution and/or implementation of certificate of costs dated 26<sup>th</sup> February, 2016 pending the hearing and determination of application, that they could enlarge time for the petitioner to file a Notice of Objection with a reference against the taxation proceedings and certificate of costs dated 26<sup>th</sup> February, 2016. Cost of the application were also sought.

The petitioner claimed that party and party costs were taxed without any notice to her. That petitioner only learnt of existence of certificate of costs on 15<sup>th</sup> April, 2016 when the 1<sup>st</sup> respondent sent 2 Auctioneer's in the company of hired goons to her residence in Chuka allegedly to attach and sell her household goods in execution of certificate of costs.

The taxation of costs proceeded *exparte* notwithstanding the fact that the petitioner had filed a Notice of Preliminary Objection on 30<sup>th</sup> March, 2015 on opposition to the bill of costs and the Notice Preliminary Objection was to come for directions on 29<sup>th</sup> August, 2015 and thereto had duly issued Notice.

That the preliminary objection if heard could have disposed the whole taxation proceedings and the taxing master should have determined it first. That on 21<sup>st</sup> August 2015 when the costs were scheduled to be taxed the taxing master had gone on transfer and it was not therefore possible to hear the matter.

It was argued that execution of Certificate of Costs arising out of irregular and unlawful *exparte* taxation proceeding is unlawful, oppressive and prejudicial to the petitioner and against the rules of natural justice.

It was further ground of application that petitioner will be naughty prejudiced when right to fair hearing or contained should the 1<sup>st</sup> respondent be allowed to proceed with execution.

In response the 1<sup>st</sup> respondent's counsel Mr. Karoki filed a Replying affidavit sworn on 26<sup>th</sup> April 2016 and narrated the sequence of events in the proceedings for taxation of the bill of costs.

Mr. Karoki averred that bill of costs dated 19<sup>th</sup> May 2015 was served upon the petitioners advocates on 6<sup>th</sup> March 2015 and a return of service duly filed MKK1- showing service was effected on 6.3.15. The notice for taxation was for 10<sup>th</sup> March 2015 when counsels advocate was represented by Mr. Otieno advocate who asked for adjournment. Adjournment was granted to 30<sup>th</sup> March, 2015.

On 30.3.2015 the petitioner and her advocate did not show up and there was no response or objection to the bill for costs filed.

That in absence of petitioner and her advocate the Deputy Registrar gave a date for ruling on bill of costs on 29<sup>th</sup> May 2015.

That while bill was pending taxation by Deputy Registrar petitioners counsel filed notice of preliminary objection and served on 14<sup>th</sup> April, 2015-MKK2. Mr. Karoki averred that this objection was similar to one dated 21.1.2014 which was dismissed by the court on 17<sup>th</sup> February, 2014. He said that ruling on taxed bill was delivered on 31<sup>st</sup> July 2015 with prior notice to all parties and Notice served by the court. That the Deputy Registrar had by then gone on transfer and the file was forwarded to her to write ruling on 2<sup>nd</sup> and 3<sup>rd</sup> respondents bill of costs.

That in the month of February, 2016 the court file was received back and on 26<sup>th</sup> February 2016 a certificate of cost was issued in favour of the respondent. The certificate of cost was forwarded to the petitioner advocate on 5<sup>th</sup> April 2016, and there is no good reason why the court should extend time as the application is meant to delay payment of costs.

From perusal of the petition filed herein, I am sorry to say then, proceedings from the point the issue of taxation of bill of costs is jumbled up and it is difficult which pleadings are coming earlier than the other and which proceedings were handled at what stage.

However, from as early as the time **Hon. Lady Justice Lesiit** rendered judgment herein the petitioner knew she had a responsibility to pay cost to respondents which the Judge capped at 3.5 million for the respondents. I have perused the decision of the Court of Appeal No. 48 of 2013 which arose from the election petition of the High court and it upholds the decision of **Justice Lesiit** save that the capped cost are revised at Kshs. 2.6 million and the costs in the Court of Appeal at Kshs. 5 million because costs follow the event.

The petitioner seeks for stay of execution of this disputed taxed costs. The 1<sup>st</sup> respondents counsel annexed affidavit of service to his Replying affidavit but did not annex the Notice of Taxation and that leaves this court to believe that actually the notice issued was for mention as annexed to supporting affidavit of the petitioner.

Mr. Karoki also claimed that the preliminary objection was a repeal of one that had been dismissed but there is no explanation why the Deputy Registrar did not place it before the judge to determine that it was Res judicata or otherwise.

The 1<sup>st</sup> respondent taxed bill of costs was delivered on 31<sup>st</sup> July, 2015 but it does not appear that he petitioner had notice of the same.

On 21<sup>st</sup> August, 2015 the 2<sup>nd</sup> and 3<sup>rd</sup> respondents counsel was in court in the absence of petitioner and her counsel and Ms. Obara instructed that they approach court formally. The bill of cost have to be taxed together to avoid confusion. However, considering that this matter has been pending for long and we are just gearing up for another election, the petitioner knowing she has an obligation to pay costs in this matter should deposit Kshs. 21 million in court pending fresh taxation of the bills by the Deputy

registrar. The deposit to be made within 30 days. The Deputy Registrar to tax bill within 30 days. Upon taxation the taxed bills to be paid from the deposited monies. In event the petitioner will not have deposited, execution to issue for without reference to the court. Costs of the application to be borne by the parties.

A. ONG'INJO

**JUDGE**

**27.4.2017**

Before A. Ong'injo J.

Penina court Assistant

Mr. Kariuki advocate for 1<sup>st</sup> respondent

M/s Prof Albert Mumma Advocate for

Petitioner/Applicant – No appearance

**COURT**

Ruling delivered, dated and signed in court. Typed copy of ruling to be served on petitioner.

A. ONG'INJO

**JUDGE**

Order

Mention 30.5.17 before Deputy Registrar for taxation respondent to file bills of costs on fresh dates and service on petitioner.

A. ONG'INJO

**JUDGE**