



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISC. APPLICATION NO. 107 OF 2013**

**MARGARET KAVUTHA MWILU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KIOKO HARRISON.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**JUSTUS MUEMA WAMBUA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**R U L I N G**

1. The application dated the 27<sup>th</sup> day of **May, 2013** is brought pursuant to the provisions of **Order 50 rule 6** of the **Civil Procedure Rules 2010** and **Rule 11 (4)** of the **Advocates Remuneration Order** and all enabling provisions of the law. By the application the applicants seek stay of execution of the Order/Decree issued on the **30<sup>th</sup> April, 2013** emanating from the judgment of the trial court delivered on the **11<sup>th</sup> April, 2013** pending hearing and determination of this application.
2. Secondly, they seek an order enlarging time within which the defendants can object to the decision of the taxing officer in issuing the certificate of costs dated **30<sup>th</sup> April, 2013** and that the court do compel the taxing master to give reasons for his decision to issue the certificate of costs dated **30<sup>th</sup> April, 2013**.
3. The application is premised on grounds that: Judgment having been delivered a certificate of costs was obtained by the respondent; the applicants paid special and general damages awarded and they are in the process of paying the undisputed costs tabulated per the remuneration order. However, they were objecting to the costs because the figure was too high and the defendants were not invited for assessment as required by the law. The time allowed for objecting to the taxing officer's decision by parties had lapsed.
4. The application is supported by an affidavit sworn by **Lindsey Mugambi** a legal officer at Directline Assurance Company Limited who states that the suit arose from a road accident alleged to have occurred along Kitui-Mutomo road whereby the respondent was alleged to have been injured while alighting from motor-vehicle registration number KAM 038Y. Reiterating what is stated in the grounds upon which the application is based she stated that no bill of costs was filed as required by paragraph **70** of the **Advocates (Remuneration) Order, 2009** and **Order 21 rule 8** of the **Civil Procedure Rules 2010** as read with **Order 21 rule 5** of the **Civil Procedure Rules 2010**. Orders were obtained exparte as the plaintiff was not notified of the ongoing taxation.
5. In a response thereto the respondent opposed the application. In her replying affidavit dated **12<sup>th</sup> June, 2013** she averred that the applicants were aware of the costs of the suit but did not object to them. There were no bills of costs filed in the lower court and parties only requested for an assessment. There was no

good reason advanced by the applicants for lodging the objection proceedings out of time.

6. Further, she stated that she was capable of refunding the amounts objected to if the application is successful. No substantial loss will be suffered warranting granting of a stay of execution. And that the application for extension of time ought to have been made in the court where the objection proceedings are meant to be lodged.

7. In seeking an order of this court compelling the taxing officer to give reasons for issuing a certificate of costs they deem as too high the applicant invoked the provisions of **Rule II** of the **Advocates Remuneration Order** that provides thus:

*“i) Should any party object to the decision of the Taxing Officer, he may within fourteen days after the decision give notice in writing to the Taxing Officer of the items of taxation to which he objects. (Emphasis mine).*

*ii) Taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objectors may within fourteen days from the receipt of the reasons apply to a Judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection”.*

8. We must, therefore, interrogate who a taxing officer is. **Section 10** of the **Advocates Remuneration Order** provides thus:

*“The taxing officer for the taxation of bills under this Order shall be the registrar or district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule IV the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.”*

Looking at the marginal note to **Rule II** of the Order it is apparent that it is in respect of objections to decisions of taxation and appeals to Court of Appeal. This per se suggests that the matter to be appealed must emanate from the High Court.

9. In essence paragraph 11(1) of the order enables any party objecting to the decision of the taxing officer to give notice in writing within fourteen days of the taxation listing the items of which he objects. **Sub rule (2)** obligates the taxing officer to record and forward the reasons of his decision to the Objector who acts within fourteen (14) days by making a reference to the judge.

10. A reading of the rule alluded to clearly show that it specifically apply to taxation of costs in the High Court.

11. The instant case was of costs assessed in the subordinate court which is usually done as provided by **Order 21 rule 8** of the **Civil Procedure Rules**. It has been stated that the applicant was not invited for assessment of costs as required by law. According to the practice in the subordinate court in compliance with **Order 21 rule 8 (2)** of the **Civil Procedure Rules**, the plaintiff prepares a draft certificate of costs that accompanies the decree and submits it to the defendant or any other party to the suit for approval. The party served with the document is expected to approve it with or without amendment, or even reject it but without undue delay. The document can only be submitted to the Magistrate by an Executive Officer for a signature if it is drawn in accordance with the judgment. The judicial officer who signs the document must verify its accuracy. Ordinarily such a document would bear a stamp impression from the defendant or other party to the suit and/or be accompanied by an affidavit of service.

12. In the case of **Dalmas Okach Randa and Peter Lowe Orabo (2013) eKLR** the court in emphasizing the distinction between taxation in the High Court and assessment of costs had this to state:

*“The court is not dealing with a reference from the taxing officer, but an assessment of costs in*

*a matter that was heard and determined by a subordinate court. The motion that filed the “reference” was indicated to be brought under paragraph II (2) of the Advocates Remuneration Order. I agree with Mr. Odhiambo for the respondent that the Principal Magistrate who assessed the bill was not a taxing officer as defined under paragraph 10 and therefore there was no jurisdiction to file a reference under paragraph II(2). If the applicant was aggrieved by the assessment by the trial court he should have gone back on review, or appealed the decision of the High Court.”*

13. It was not sufficient for the applicant to allege that they were not invited for assessment of the costs, they should have demonstrated that the respondent did not comply with **Order 21 rule 8** of the **Civil Procedure Rules** as required by the law. Having failed to do so, the prayer to compel the taxing officer to give reason for his decision which is not substantiated by any law cannot stand and must, therefore, fail.

14. With regard to enlargement of time, it is provided under **Order 50 rule 6** thus:

*“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:*

*Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”*

The court has the discretion to enlarge time but this must be done judicially and it would depend on the circumstances of each case. This was well put in the case of **Fidelity Commercial Bank Ltd v Azim Jiwa Rajwani (2014) eKLR** where the court held thus:

*“See Section 95 of the CPA and Order 50 rule 6 of CPR. These provisions are styled in a manner that recognizes that there had been an earlier period of time which had been fixed or extension or extensions of time which had been granted but expired. I think, this is so because enlargement of time is a matter of discretion of the court; and will depend on the circumstances of each case which certainly vary from case to case. Therefore, previous enlargement per se does not limit the power of the court to enlarge time. Except, any previous enlargement or enlargements will be considered by the court in determining whether the Applicant has abused the process of the court and should not, therefore, benefit from any discretion of the court.”*

15. I have aforesaid that **Rule II** of the Order is not applicable in the instant case. Pursuant to the provisions of **Order 21 rule 8 (4)** of the **Civil Procedure Rules**, if the applicant was dissatisfied with the decree and certificate of costs thereof, they ought to have appeared before the learned magistrate for purposes of being heard. Instead of complying with the law, they paid the general and special damages awarded and they are in the process of paying what they consider “**undisputed costs.**”

16. In the premises the applicants have not demonstrated why the orders sought should be granted. In the result, I decline to grant orders sought. Accordingly, the application is dismissed with costs to the respondent.

17. It is so ordered.

**DATED, SIGNED and DELIVERED** at **MACHAKOS** this **16<sup>TH</sup>** day of **APRIL, 2015.**

**L.N. MUTENDE**

**JUDGE**