



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MISC. CASE NO.389 OF 2011**

**MEREKA & CO.ADVOCATES.....ADVOCATE**

**VERSUS**

**ENGINEER A.S. KITOLOLO T/A KITOLOLO CONSULTANTS ENGINEERS.....CLIENT**

**R U L I N G**

1. The Application before me is a Notice of Motion dated 4<sup>th</sup> October 2012 filed on the same day. The same is brought under the provisions of Section 51(2) of the Advocates Act, Sections 1A, 3A and 63 (e) of the Civil Procedure Act by Engineer A.S Kitololo T/a Kitololo Consultants Engineers (“client”) against a firm of M/S Mereka & Co. Advocates (hereinafter “the Advocates”). It seeks one primary order, that there be a stay of proceedings touching on the Certificates of costs given at Nairobi touching on the present cause as well as **Miscellaneous Application Number 390 of 2011 Mereka & Co. Advocates –v- Engineer A.S. Kitololo t/a Kitololo Consultants Engineers, Miscellaneous Application Number 392 Of 2011 Mereka & Co. Advocates –v- Engineer A.S. Kitololo t/a Kitololo Consultants Engineers, Miscellaneous Application Number 385 of 2011 Mereka & Co. Advocates –v- Engineer A.S. Kitololo t/a Kitololo Consultants Engineers, Miscellaneous Application Number 387 of 2011 Mereka & Co. Advocates –v- Engineer A.S. Kitololo t/a Kitololo Consultants Engineers, Miscellaneous Application Number 388 of 2011 Mereka & Co. Advocates –v- Engineer A.S. Kitololo t/a Kitololo Consultants Engineers, Miscellaneous Application Number 394 of 2011 Mereka & Co. Advocates –v- Engineer A.S. Kitololo t/a Kitololo Consultants Engineers, Miscellaneous Application Number 391 of 2011 Mereka & Co. Advocates –v- Engineer A.S. Kitololo t/a Kitololo Consultants Engineers and Miscellaneous Application Number 386 of 2011 Mereka & Co. Advocates –v- Engineer A.S. Kitololo t/a Kitololo Consultants Engineers** (hereinafter referred to as the “Miscellaneous Causes”).

2. The grounds for the application are that the Client is desirous of challenging the Certificates of costs in respect of the aforesaid Miscellaneous causes, but is yet to be furnished with the reasons for taxation by the Deputy Registrar even though he has sought for the same. The Application is supported by the Affidavit of the Client sworn on 4<sup>th</sup> October, 2012. The Client deponed that the Advocates had filed numerous taxation causes against him which culminated in Certificates of Taxation that were given on 31<sup>st</sup> July, 2012 and 1<sup>st</sup> August, 2012, respectively. The Client further contended that the figures awarded to the Advocates by the Deputy Registrar were manifestly excessive and the client had the desire to challenge the same by way of a reference to the High Court. Consequently, the Client averred that he had instructed his Advocates to initiate steps aimed at filing the aforesaid reference and the said Advocates

had requested for the reasons for the taxation within the stipulated timeline vide a letter dated 10<sup>th</sup> August, 2012 to the Deputy Registrar. That the reasons for taxations were yet to be furnished to pave way for the filing of the references. The Client contended that he had reasonable grounds for the intended reference and it would only be fair, just and in the interests of justice that the orders sought be granted. It was submitted on the client's behalf that the request for reasons for the taxation was sufficient and that a reference could not be filed before those reasons have been given.

3. The Advocates opposed the Application by filing grounds of opposition dated 18<sup>th</sup> October, 2012. They contended that the Application as drawn was fatally defective and incompetent as it was brought under the wrong provisions of the law. That the Client had not objected to the taxation ruling as required under Rule 11(1) of the Advocates Remuneration Order nor had he filed a Notice of Objection and therefore the intended reference is prima facie defective. That the Client had failed to list the items he was objecting to as provided for in the Advocates Remuneration Order and had not demonstrated that the Taxing Officer erred in principle or that the intended reference had merit. The Advocates therefore urged the Court to dismiss the Application with costs.

4. I have carefully considered the application, affidavit on record and the rival submissions by learned Counsel. I have also considered the cases cited by the parties. The issue for determination is whether the Client has presented a sufficient cause for grant of an order for stay of proceedings. It was submitted on behalf of the Advocates that the instant Application is defective and incompetent, as the same was brought under Section 51(2) of the Advocates Act which does not relate to the orders sought. That in the circumstances the Client cannot rely on Section 3A of the Civil Procedure Act as the same does not apply to taxation matters. The Advocates relied on the case of **Dilbagh Singh Brothers ( Investments) Ltd-v- Alvi Auto Spares Ltd (2012) eKLR** in support of these assertions. Though I agree with this position, I do note that in the said case, the Court did further state that:-

***“ .....the other provisions of the Civil Procedure Act, it has been held, do not apply to taxation. I, agree with the decision of Kasango, J in Nyamogo and Nyamogo Advocates vs. Mwangi [2008] 1 EA 281, where the learned Judge held that whereas the Court is entitled to invoke its inherent jurisdiction, the Civil Procedure Act does not apply to matters relating to the Advocates Act since the Advocates Remuneration Order has elaborate procedures laid down for objecting to taxed costs..... However, the Court may in appropriate case invoke its said inherent jurisdiction in cases where there is no relevant provision and where to fail to do so would amount to the court being unable to ensure the ends of justice are attained and to prevent abuse of its process. That the High Court has power to order a stay of execution in the exercise of its inherent jurisdiction cannot therefore be doubted. See Ujagar Singh vs. Runda Coffee Estates Ltd. [1966] EA 263.”***  
***(Emphasis mine)***

5. I fully associate myself with the above sentiments. In this regard, I am of the view that since there is no specific provision under the Advocates Act that deals with the issue of stay of execution or proceedings pending a reference of taxation, this Court has the residual jurisdiction under its inherent powers to grant such a stay and invoke the provisions of the Civil Procedure Act and Rules only to that extent. The case of **Elkana Mukundi Gatimu & Another –vs- John B. Muya & 3 Others Nairobi (Milimani) HCCC Case No. 471 of 2004** proves instructive where **Azangalala J** was of the view that, the jurisdiction to order a stay of execution with respect to costs is one of discretion and has its foundation in the Court's inherent powers. Accordingly, I reject the contention that the application cannot be entertained because of the provisions of the law upon which it was brought.

6. Counsel for the Advocates submitted that the Client did not comply with Rule 11(1) of the Advocates Remuneration Order. That the Client merely wrote a letter to the Deputy Registrar requesting for reasons for taxation so as to file a reference. That the letter failed to categorically state that the Client was objecting to the taxation. Counsel argued that the letters dated 10<sup>th</sup> August, 2012 merely demonstrated an intention to object without pointing to the specific items that were in contention contrary to Rule 11(1) of the Advocates Remuneration Act which requires a party to specify the items objected to.

7. Rule 11(1) of the Advocates Remuneration Order provides:-

**“Should any party object to the decision of the taxing Officer, he may within fifteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects”**

I have seen the letters to the Deputy Registrar with respect to the Miscellaneous Causes. It is true that the same do not precisely point out any specific items for taxation. However, it is rather apparent from the reading of the same that the Client objected to the “entire” Bill of costs inferring that the Client was objecting to each and every item in the Bill of Costs. This is apparent given the second Paragraph of the letters which state that:-

**“.....We would be glad to have the reasons for taxation in respect of the entire bill of costs to enable us file a reference on the same to the High Court” (emphasis mine )**

8. I have noted that the letters do indicate that the matter concerned a decision of the Taxing Master of 31<sup>st</sup> July 2012 and referred to the subject. The Letters also contained the Miscellaneous Causes. The same were further received by the Deputy Registrar. In the premises, I hold that the letters by the Client to the Deputy Registrar for the various miscellaneous causes contain sufficient information to qualify as valid notices of objection. The Deputy Registrar was thus bound to respond to the said letters. The record also shows that there has been no response from the Deputy Registrar. It is trite law that a party can only file his reference on receipt of the reasons for taxation. There is no two way about it.

9. The next question is whether the Client is guilty of laches as submitted by the Advocates. It should be noted that the letters to the Deputy Registrar were received in the registry on 13<sup>th</sup> August, 2012. This application is dated 4<sup>th</sup> October, 2012 and may have been prompted by the Advocates’ Application dated 21<sup>st</sup> August, 2012 that had sought judgment for the sum of Kshs.24,402/= in the Certificate of Taxation in this matter. I would assume the Advocates intend at an appropriate time to request this Court to enter judgment with respect to all Certificates in the Miscellaneous Causes referred to. Given the sequence of events, it is clear that the Client brought this application less than a month of requesting for reasons for taxation from the Taxing Master. To date, those reasons have not been received. Under the circumstances, I disagree with the Advocates assertions that the Client was indolent, as he sought for the reasons of the taxation within the required time. Further, any delay in the filing a reference of taxation, has not been occasioned by the Client but rather by the Taxing Master of this court who is yet to give the reasons for taxation since 13<sup>th</sup> August, 2012.

10. With regard to the alleged merit of the intended reference, my view is that at this stage the court cannot delve into that area. However, on *prima facie* basis there is the allegation that the sum awarded by the Deputy Registrar is manifestly excessive as to suggest an error of principle. That of course is a serious issue that require investigation.

11. Having dealt with the objections raised by the Advocates, I still must decide whether or not to exercise my discretion in favour of staying these proceedings. The Advocates’ proceedings are valid in law. They should be prosecuted to conclusion. The Advocates’ desire to do so without unnecessary hurdles is appreciated. On the other hand however, the Client strongly desires to challenge the decision of the Deputy Registrar. I have already found that if it reaches that stage, the challenge will not be an idle one. My view is that the Client should not be prejudiced in his legitimate effort to seek relief against the Deputy Registrar’s decision. If finally he fails, all that the Advocates will have suffered is a delay in receiving funds due and owing to them. Further to this, the Advocates have not demonstrated that they will suffer any real adverse consequences if these proceedings are stayed. In my view therefore, the balance tilts in favour of granting a stay.

12. In the result I find that there is sufficient cause shown for the Court to invoke its inherent jurisdiction under Section 3A of the Civil Procedure Act, which jurisdiction has been craved for by the Client on the face of the Application, to grant an order of stay in terms of prayer 3 of the Client’s Application dated 4<sup>th</sup> October, 2012. The stay however, is for sixty (60) days only after which if no references would have been filed, the stay shall automatically lapse. In the meantime, the Deputy Registrar of this court is

directed to supply the Client the reasons forthwith and in any event not later than 30 days of this ruling. The Advocates shall in any event have the costs of this Application.

**DATED** and **DELIVERED** at Nairobi this 14<sup>th</sup> day of June, 2013.

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**A. MABEYA**

**JUDGE**