

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO.272 OF 1989

IN THE MATTER OF THE ESTATE OF LT. COL. KENNETH AMBER NORTH (DECEASED)
SHIRLEY LUCKHURST.....OBJECTOR

VERSUS

DEREK HOLMES.....

EXECUTOR

R U L I N G

On 5th March 2009, the Taxing officer of this court assessed the objector’s costs at Kshs.998,475/-. The executor was aggrieved by the said decision of the Taxing officer. Pursuant to the provisions of paragraph **11(1)** of the **Advocates Remuneration Order**, the executor filed a notice of objection to the said taxation. This notice was filed on 13th March 2009. This was within the mandated period of fourteen (14) days from the date the Taxing officer delivered the ruling. On 7th April 2009, the executor filed chamber summons purportedly pursuant to the provisions of **Order XXI Rule 25** of the then **Civil Procedure Rules** and paragraph **68(a)** and **11** of the **Advocates Remuneration Order** seeking several orders from the court. The executor sought an order of stay of execution of the said assessed costs pending the hearing and determination of the reference that the executor intended to file to the High Court. The executor further sought an order that the court reviews, varies or sets aside the taxation of the party to party bill of costs dated 3rd December 2002. In particular, the executor was aggrieved by the Taxing officer’s taxation of the instruction fees at Kshs.500,000/-. The executor further sought the order of the court to review, vary or set aside the taxation on items No.231 – 236. The grounds in support of the application are stated on the face of the application. In the 3rd ground, the executor stated that *“the applicant/executor is aggrieved with the whole of the decision of the taxing master and intends to file a reference on the same to the High Court.”* The application is supported by the annexed affidavit of the executor. The application is opposed. The objector swore a replying affidavit in opposition to the application.

At the hearing of the application, this court heard oral submissions made by Mr. Shijenje for the executor and Miss Gathara for the objector. After carefully considering the said submissions, the issues for determination by this court are twofold: whether the executor filed a reference before this court from the decision of the Taxing officer and whether the executor is entitled to be granted an order staying execution of the taxed costs pending the determination of the reference. The procedure by which an assessment of costs by a Taxing officer may be challenged in the High Court is provided for under **paragraph 11** of the **Advocates Remuneration Order**. Under **paragraph 11(1)**, the aggrieved party is required, within fourteen (14) days after the taxation, to give notice in writing to the Taxing officer setting out the items of taxation to which he objects. In the present application, the executor objected to the whole taxation within a period of fourteen (14) days of the assessment of the objector’s costs. The second requirement under **paragraph 11(2)** is that the Taxing officer shall be required to provide reasons for his decision on those items that the executor objected to.

As is clear from the record, the taxing officer of this court has so far not given reasons for the decision that was made. It is only after the reasons have been given by the Taxing officer that the executor could file reference challenging the said taxation before this court. As correctly noted by the executor, no reference has been filed before this court. That reference is yet to be filed because the Taxing officer has not given reasons for the decision that was rendered on the items of taxation challenged by the executor.

Can this court grant stay of execution for the objector's costs where no reference has been filed? I do not think so. The grant of the order of stay of execution was predicated on there being a reference filed before this court. The order of stay of execution cannot be granted in a vacuum. In the absence of a valid reference, this court cannot exercise its discretion in favour of the executor to grant the order of stay of execution sought in the application. It is not clear from the face of the application whether the applicant intended to file a reference or apply to review the Taxing officer's decision. The only way that a decision of a Taxing officer can be legally challenged to a higher court is by way of reference. This court has taken into account the fact that the dispute between the executor and the objector is a long standing one which ought to be resolved. All the other issues have been settled save for the issue of costs. The executor should first lodge a reference before he can file an application to stay execution of the said taxed costs.

The application for stay of execution therefore lacked a substratum and is hereby dismissed with costs to the objector.

DATED AT NAIROBI THIS 7TH DAY OF APRIL, 2011

**L. KIMARU
JUDGE**