



Premier Daffodil Limited v Speedbird Travel and Safaris Limited (Environment & Land Case 53 of 2020) [2022] KEELC 15584 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEELC 15584 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 53 OF 2020**

**JO MBOYA, J
OCTOBER 31, 2022**

BETWEEN

PREMIER DAFFODIL LIMITED PLAINTIFF

AND

SPEEDBIRD TRAVEL AND SAFARIS LIMITED DEFENDANT

RULING

Introduction & Background

1. Vide Chamber Summons Application dated the 30th July 2022, the Defendant/Applicant herein has approached the court seeking for the following Reliefs;
 - i. This Application be and is certified urgent for Ex Parte hearing and the service of the Application be dispensed with in the first instance.
 - ii. The Application be heard during this Vacation in accordance with the High Court (Practice and Procedure) rules with subsequent Orders That:
 - a. There be a Stay of Execution of the Certificate of Taxation dated 6th June 2022 pending hearing and determination of the Reference to be filed in accordance with Paragraph 11 of the *Advocates' Remuneration Order*.
 - b. This Honourable Court enlarges the time within which to file a Reference against the Ruling delivered on 16/05/2022 by Hon. Diana Orago, the Taxing Master, taxing the Plaintiff's Party to Party bill of costs dated 09/09/2021 for Kshs.26,925,516.67/=.
 - c. That Seven (7) days be granted to the Applicant to give the requisite Notice in writing to the taxing master on the items in the Bill of Costs objected to in accordance with Paragraph 11 (1) of the *Advocates' Remuneration Order*.



2. The subject application is premised and anchored on the basis of the various, albeit numerous grounds which have been enumerated at the foot of the Application. Besides, the application is supported by the affidavit of Dave Munya Mwangi sworn on the 30th July 2022 and to which the deponent has attached 8 documents thereto.
3. Upon being served with the application herein, the Plaintiff responded thereto vide a Replying affidavit sworn on the 26th August 2022. For clarity, the Replying affidavit has been sworn by one namely, Dushyant N Patel.
4. The subject application came up for hearing on the 21st September 2022, whereupon the court gave directions that the Application be canvased and disposed of by way of written submissions.
5. On the other hand, the court similarly proceeded to and set timelines for the filing and exchange of the written submissions. For completeness, the Parties herein duly complied and filed their respective submissions.

Submissions by the Parties:

a. Defendant's/Applicant's Submissions:

6. The Defendant/Applicant filed written submissions dated the 5th October 2022 and in respect of which same has itemized, highlighted and canvased three issues for consideration.
7. First and foremost, counsel for the Defendant/Applicant has submitted that the Honourable court herein is bestowed and conferred with the requisite discretion to entertain and adjudicate upon an application for extension of time within which to file a Notice of Objection to taxation and by extension, a Reference to taxation.
8. Further, counsel for the Defendant/Applicant has added that the discretion granted unto the court is wide and unfettered. Consequently, it has been argued that in appropriate circumstances, the court should find it fit and expedient to grant the extension of time.
9. In any event, counsel has further invited the Honourable court to take cognizance of the import and tenor of the provisions of Rule 11(4) of the *Advocates Remuneration Order*, which essentially underscores the Jurisdiction of the court, when faced with an application for extension of time.
10. In support of the foregoing submissions, counsel for the Applicant has cited and relied on various decisions *inter-alia* *Mumias Sugar Company Ltd v Tom Ojienda Associates* (2018)eKLR and *Republic v Kenyatta University & another Ex-parte Wellington Kihato Wamburu* (2018)eKLR.
11. Premised on the foregoing, counsel for the Applicant has therefore contended that the Honourable Court herein ought to extend time for the lodgment of the Notice of objection to taxation and thereby facilitate the Applicant's right to challenge the impugned certificate of taxation, whereby the party and party costs has been taxed and certified in the colossal sum of Kshs.26, 925, 516.67 Only.
12. Secondly, counsel for the Applicant has submitted that the honourable court is also conferred with the requisite Jurisdiction to grant an order of stay of execution of the certificate of taxation, pending the filing and ultimate determination of a reference against the Certificate of taxation.
13. To this end, counsel for the Applicant has contended that the amount at the foot of the Certificate of taxation, namely, Kshs.26, 925, 516.67/= Only, is quite exorbitant and hence if no order of stay is granted, then the Applicant shall suffer Substantial loss and grave Injustice.



14. In any event, counsel for the Applicant has added that the certificate of taxation arose from and followed the issuance of a decree in respect of the subject matter. Consequently, it has been submitted that the certificate of taxation is therefore part and parcel of the impugned decree and thus same is amenable to the *Civil procedure Rules*, 2010.
15. On the other hand, counsel for the Applicant has further submitted that to the extent that the certificate of taxation arose from or followed the issuance of the decree, the Honourable Court is therefore obligated to deal with the application touching on the certificate of taxation, on the basis of same being part of the Civil Proceedings.
16. Essentially, counsel for the Applicant has therefore underscored that the Honourable court is seized of the requisite Jurisdiction to entertain the limb of the subject application touching on and concerning stay of execution.
17. In this respect, counsel for the Applicant has relied on the holding in the case of *Labh Singh Haman Singh Ltd v Attorney General & 2 Others* (2016)eKLR.
18. Thirdly, counsel for the Applicant has submitted that the subject application discloses and demonstrates sufficient cause and basis, to warrant the intervention of the Honourable court.
19. In this respect, counsel for the Applicant has submitted that the taxation and certification of the Party and Party costs in the sum of Kshs.26, 925, 516. 67 Only, is contrary to and in violation of the provisions of Article 48 of the *Constitution* 2010.
20. Additionally, counsel for the Applicant has also submitted that the taxation and certification of the Party and Party costs in the figure alluded to, breached and violated all known tenets of the law as pertains to the assessments/taxation of costs as provided for under the *Advocates Remuneration Order*, 2014.
21. Finally, counsel for the Applicant has added that the amounts at the foot of the certificate of taxation is grossly excessive and if same is neither impugned nor challenged, then access to court and by extension, Access to Justice shall be confined to the wealthy and not otherwise.
22. In support of the foregoing submissions, counsel for the Applicant has invited the Honourable court to take cognizance of and to rely on the decision in the case of *Premchand Raichand Ltd & Another v Query Services of East Africa Ltd & Others* (1972)EA 162 and *Mumias Sugar Company Ltd v Tom Ojienda & Associates* (2018)eKLR.

b. Plaintiff's/respondent's Submissions:

23. The Plaintiff/Respondent has filed written submissions dated the 6th October 2022 and same has similarly isolated, highlighted and thereafter canvassed 3 issues for considerations.
24. Firstly, counsel for the Respondent has contended that the Applicant herein has not satisfied the necessary ingredients contained and underlined vide the provisions of Rule 11 (1), (2) & (4) of the *Advocate Remuneration Order*, to warrant the grant of an order for extension of time, either as sought or at all.
25. Further, counsel for the Respondent has submitted that it was incumbent upon the Applicant herein to show that same has indeed issued and served the requisite Notice of objection to taxation, before seeking for extension of time to file/lodge a reference.



26. However, counsel for the Respondent has added that instead of filing or lodging the requisite Notice of Objection to taxation, the Applicant herein only filed a letter wherein same intimated her intention to apply for an order to enlarge time.
27. In the premises, counsel for the Respondent has contended and submitted that in the absence of the requisite Notice of objection to taxation, then the Applicant herein would not be entitled to an order for extension of time to file and /or lodge the reference.
28. Notwithstanding the foregoing, counsel for the Respondent has also added that the Applicant has similarly neither tendered nor availed any sufficient cause or basis to warrant the grant of an order for extension of time.
29. In support of the foregoing submissions, counsel for the Respondent has relied on the decision in the case of *Nicolas Kiptoo Arap Salat v Independent Electoral & Boundaries Commission & 7 Others* (2014)eKLR and *Republic v Kenyatta University Ex-parte Wellington Kiabatu Wamburu* (2018)eKLR and *Twiga Motor Ltd v Dalmas Otieno Onyango* (2015)eKLR.
30. Secondly, counsel for the Respondent has also submitted that though a court of law is seized and possessed of the requisite Jurisdiction to grant an order of stay of execution, however such an order can only issue or be granted in exceptional circumstances and upon proof of substantial loss.
31. Nevertheless, counsel for the Respondent has added that in respect of the subject matter, the Applicant herein has not laid before the court any evidence to show that same is bound or disposed to suffer any Substantial loss or at all, if the orders of stay of execution are not granted.
32. Be that as it may, counsel for the Respondent has conceded that the Party and Party bill of costs was taxed and certified in the sum of Kshs.26, 925, 516.16/= only.
33. On the other hand, counsel has submitted that the costs having been duly taxed and certified, it is within the constitutional right of the Respondent to take out execution proceedings and to benefit from the fruits of litigation herein.
34. Consequently, counsel for the Respondent has submitted that there being no evidence of substantial loss, no basis has therefore been laid to warrant the grant of an order of stay of Execution, either as sought or at all.
35. To vindicate the foregoing submissions, counsel for the Respondent has invited the court to take cognizance on various decisions *inter-alia* *Mukuma v Abwoga* (1998)eKLR 645, *Frank Mbetete Aluda & Another (both trading as Frank Creative) v Carlvo Technology Co. Ltd* (2017)eKLR, *Teamsales Ltd v Hiram Gichubi Mwangi* (2013)eKLR and *James Wangalwa & Another v Agnes Naliaka* (2012)eKLR.
36. Finally, counsel for the Respondent has submitted that the learned taxing master applied the correct procedure and principle in the course of taxing the Party and Party bill and therefore same arrived at the correct taxation/figure.
37. Further, counsel for the Respondent has also submitted that in arriving at the amount reflected and contained at the foot of the impugned Certificate of taxation, the taxing master indeed took into account the value of the suit property as contained and reflected in the pleadings that were filed before the court.
38. Other than the foregoing, counsel for the Respondent has also submitted that the pleadings include the various documents attached to and filed alongside the Primary pleadings. In this regard, counsel added



that even a valuation report that forms part of the Bundle of documents is included in the terminology of pleadings.

39. Finally, counsel for the Respondent submitted that prior and before a Judge can interfere with a Certificate of taxation, the Applicant must certify certain prescribed conditions/ingredients.
40. However, in respect of the subject matter, counsel for the Respondent has submitted that the Applicant herein has neither exhibited nor satisfied the prescribed to warrant interference with the certificate of taxation.
41. Premised on the foregoing, counsel for the Respondent has therefore submitted that the amounts shown at the foot of the certificate of taxation, is therefore reasonable and well anchored on the totality of the pleadings that were placed before the court.
42. In support of the foregoing submissions, counsel for the Respondent has relied on various decisions *inter-alia*, the decision in the case of *Masore Ny'ang'au & Co Advocates v Kensalt Ltd* (2019)eKLR and *Kipkorir Tito & Kihara Adviocates v Deposit Protection Fund Board* (2005)eKLR, to support and amplify the submissions pertaining to the ingredients that must be satisfied before interference with the discretion of the taxing master.

Issues for Determination

43. Having evaluated the Chamber Summons Application dated the 30th July 2022, the Supporting affidavit thereto and the Replying affidavit filed in opposition thereof; and similarly having considered the written submissions filed by the Parties, the following issues are pertinent and thus worthy of determination;
 - i. Whether the absence of a Notice of Objection to taxation in terms of Rule 11(1) of the *Advocates Remuneration Order* would vitiate the exercise of discretion by the court.
 - ii. Whether the Applicant has established and availed sufficient cause to warrant the exercise of discretion.
 - iii. Whether the Honourable Court is seized of the requisite Jurisdiction to grant stay of execution pending the Lodgment of Reference to taxation and if so, whether the Applicant has established a basis for such an order.

Analysis and Determination

Issue Number 1

Whether the Absence of a Notice of Objection to Taxation in terms of Rule 11(1) of the Advocates Remuneration Order would vitiate the Exercise of Discretion by the Court.

44. It is common ground that prior to and before a party can file a reference to challenge the certificate of taxation, same is obliged to file/lodge a notice of objection to taxation within the stipulated duration.
45. On the other hand, there is also no gainsaying that the notice of objection to taxation must of necessity, isolate or highlight the items in the taxation, which are objected to and therefore intended to be challenged *vide* reference.
46. Other than the foregoing, it is also appropriate to state that the Notice of objection to taxation must be lodged and served within 14 days from the date of the impugned certificate of taxation.



47. Be that as it may, there is no dispute that the Defendant/Applicant herein has neither filed nor lodged the requisite notice of objection to taxation. In any event, no such notice of objection to taxation could have been lodged by the Applicant upon lapse of the statutory 14-day period from the date of delivery of the ruling culminating into the certificate of taxation.
48. Additionally, it is also not lost on this Honourable court that part of the application before hand seeks leave of the court to enable the Applicant to issue and serve the requisite notice of objection to taxation.
49. Notwithstanding the foregoing, counsel for the Respondent has submitted that to the extent that no notice of objection to taxation has been issued and served, then the honourable court has no discretion to entertain the subject application and essentially to extend time for lodgment of a reference.
50. Further, counsel for the Respondent has added that the only document which the Applicant has since filed is a letter dated the 25th July 2022, but that the said letter does not constitute the Notice of objection to taxation.
51. Having considered the contention by the Respondent, it is now appropriate to address the twin issues raised and canvassed herein.
52. First and foremost, the Letter dated the 25th July 2022, was not meant to constitute or to take the place of the notice of objection to taxation.
53. Contrarily, the impugned Letter dated the 25th July 2022 has been lodged and filed by the Applicant in adherence to and compliance with the provisions of Rule 11(4) of the [*Advocates Remuneration Order*](#), which stipulates that prior to and before mounting an application for extension of time to lodge and file a notice of objection or file a reference, albeit out of time, the Applicant must issue a Notice with the court and to the adverse Party giving not less than three clear days.
54. In my considered view, the impugned letter which has been challenged by counsel for the Respondent, serves a critical and important legal purpose. For clarity, the purpose is statutorily circumscribed.
55. To this end, it is instructive to take note of the provisions of Rule 11(4) of the [*Advocates Remuneration Order*](#), 2014.
56. For convenience, the said Rules provide as hereunder;
 - (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.
57. To my mind, the letter giving three clear days' notice, in line with Rule 11(4) of the [*Advocates Remuneration Order*](#) is separate and distinct from the notice of objection to taxation, the latter which is provided for by dint of Rule 11(1) of the [*Advocates Remuneration Order*](#).
58. The second limb of the objection that was taken by the Respondent relates to the absence, that is, in the absence of the Notice of objection to taxation, this Honourable court would not be seized of the requisite Jurisdiction to exercise discretion.
59. Without belaboring the issue and in answer to the foregoing contention, it is appropriate to observe that indeed part of the reliefs sought by the current Applicant is extension of time within which to lodge the Notice of objection to taxation.



60. The question is, does the court has the jurisdiction to extend time for the lodgment of such a notice? Clearly, the answer in the affirmative.
61. In this regard, one needs to take a look at the explicit provisions of Rule 11(4) of the *Advocates Remuneration Order*, which have been reproduced herein before.
62. Notwithstanding the foregoing, the issues as pertains to the Jurisdiction of the Court to extend time has also been canvased and deliberated upon in various decisions. To this end, it is appropriate to take cognizance in the case of *Mumias Sugar Company Limited v Tom Ojienda & Associate* (2018)eKLR, where the court stated and observed as hereunder;

What is clear from the provisions I have set out above is that the court has unfettered discretion to enlarge the time to lodge the objection and the reference under Paragraph 11(1) and 11(2) respectively of the *Advocates Remuneration Order*. In exercising such discretion, the court acts judiciously bearing mind the facts placed before it and to meet the ends of justice. In *Njagi Wanjeru & Company Advocates v Ben Momanyi t/a Momanyi & Associates* (*Supra*), Ougo J., adopted what the Court of Appeal stated in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* CA Civil Application No. Nai 25 of 1997 (UR) that:

It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether or not to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chance of the appeal succeeding if the application is not granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.

63. Premised on the foregoing, I find and hold that this honourable court is seized of the requisite Jurisdiction to entertain an application for extension of time to lodge a Notice of objection to taxation and a reference challenging the Impugned Certificate of Taxation, albeit out of time.
64. Be that as it may, as to whether or not the extension of time sought shall be granted, is another issue.
65. For clarity, the grant or otherwise of such discretion shall depend on the obtaining circumstances, the explanation provided and the nature of prejudice, if any, to be suffered by the adverse Party.

Issue Number 2: Whether the Applicant has Established and Availed Sufficient Cause to Warrant the Exercise of Discretion.

66. Before venturing to address the issue herein, it is imperative to note that the ruling culminating into the impugned certificate of taxation was rendered/delivered on the 16th May 2022.
67. On the other hand, it is also appropriate to observe that the Applicant herein thereafter proceeded to and filed a chamber summons application dated the 30th May 2022, challenging the certificate of taxation.
68. However, despite filing the reference by way of chamber summons application dated the 30th May 2022, the Applicant failed to issue and serve the requisite Notice of objection to taxation, either as envisaged vide Rule 11(1) of the *Advocates Remuneration Order* or at all.
69. Be that as it may, the application dated the 30th May 2022, came up for hearing on the 14th July 2022, when the Issue of the failure to file/ lodge the Notice of objection to taxation was raised and pointed out by the Honourable court.



70. Suffice it to state that counsel for the Applicant thereafter conceded that the requisite notice of objection to taxation had not been filed and lodged, either in accordance with the law, or at all.
71. Premised on the acknowledgment and concession that no notice of objection to taxation had been filed, counsel for the Applicant thereafter sought for and obtained leave of the Honourable Court to withdraw the reference vide chamber summons application dated the 30th May 2022.
72. Consequently and in this regard, the honourable court granted the request and the impugned reference vide chamber summons application dated the 30th May 2022, was duly marked as withdrawn.
73. Subsequently, the Applicant returned to court and filed the current application. For clarity, the Applicant is now seeking extension of time within which to lodge the requisite notice of objection to taxation and also, to lodge the reference challenging the impugned certificate of taxation.
74. On the basis of the current application, the Applicant contends that same has been keen and desirous to challenge the impugned certificate of taxation.
75. Secondly, the Applicant has also submitted that other than the legal defect that affected the application the 30th May 2022, same was however, filed and lodged within the prescribed/stipulated timeline.
76. Thirdly, the Applicant has also submitted that the assessment at the foot of the certificate of taxation is grossly exaggerated and exorbitant. For clarity, the Applicant contends that the award of costs in the sum of Kshs.26, 925, 516.67/= only, violated and contravened all known tenets of taxation.
77. In the premises, the Applicant has thus submitted that there exists sufficient cause and or basis upon which the honourable court ought to extend time to enable the Applicant to file the requisite Notice of Objection to taxation and reference against the certificate of taxation.
78. To the contrary, the Respondent herein has contended that the impugned application has been filed more than 60 days from the date of the delivery of the impugned ruling and by extension the issuance of the certificate of taxation.
79. Consequently and in the premises, the Respondent contends that the subject application is inflicted by gross and unreasonable delay, which has not been suitably explained.
80. In my own assessment, there is no gainsaying that the Applicant herein has previously exhibited due diligence in her endeavor to challenge the impugned certificate of taxation. No doubt, the previous application was filed and lodged within the statutory 14-day period from the date of the impugned certificate of taxation.
81. Other than the foregoing, upon the withdrawal of the previous application, the current application was lodged within a duration of 16 days, inclusive of the 3 days stipulated under the provisions of Rule 11(4) of the [*Advocates Remuneration Order*](#).
82. Clearly, the current Application has been lodged timeously and with due promptitude and hence I do not discern any unreasonable delay, either as alluded to by the Respondent or at all.
83. Notwithstanding the foregoing, it is imperative to observe that the Judgment which was rendered by the Honourable court and which forms the basis of the impugned certificate of taxation granted inter-alia, non-monetary reliefs and an award of General Damages in the sum of kes.1, 000, 000/= only, together with costs.



84. However, despite the reliefs that were granted by the Honourable court, which have been articulated in the preceding paragraph, the learned taxing master proceeded to and certified costs in the sum of Kshs.26, 925, 516.67/= only.
85. Without venturing into the merits or otherwise of the award, there is no doubt that the quantum of award/ assessment of costs, appears to be exorbitant and may require appropriate interrogation, so as to authenticate the legality or otherwise, of the said award.
86. As pertains to the reasonableness or otherwise of the quantum of costs certified and reflected at the foot of the certificate of taxation, the Honourable court shall be obliged to look at various issues.
87. To this end, some guiding principles are discernable from the holding of the Court of Appeal vide the case of *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR, where the court stated as hereunder;

“It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.

What we have said is in direct harmony with what this Court stated in *Joreth Limited v Kigano & Associates(Supra)*,

“We would at this stage, point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess Instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, and direction by the trial judge and all other relevant circumstances.”

88. Evidently, the quantum and award of costs v the quantum of Judgment and the reliefs granted, appear disproportionate and may, at the opportune time require due consideration and evaluation.
89. In the circumstances, I am persuaded from the totality of the evidence and the obtaining circumstances that sufficient cause and basis exists to warrant the extension of time and thereby to allow the requisite reference to be filed.
90. Additionally, a refusal to grant the application herein and by extension the leave sought, would be tantamount to denying and depriving the Applicant of the only lawful avenue to impeach the impugned certificate of taxation.
91. For clarity, such an endeavor, if adopted and applied, would essentially amount to gross violation of the provisions of Articles 10(2) (b), 27, 47, 48 and 50(1) of the *Constitution* 2010.



92. Other than the foregoing, it is also my finding and holding that the Applicant has satisfied the requisite conditions to warrant extension of time. In this regard, it suffices to adopt and reiterate the holding of the Supreme Court in the case of *Nicolas Kiptoo Arap Salat v Independent Electoral & Boundaries Commission & 7 Others* (2014)eKLR, where the Supreme Court enumerated the circumstances to be considered before exercise of discretion to extend time.
93. For coherence, the Supreme Court enumerated the circumstances as hereunder;
1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
94. Additionally, it is also instructive to cite and quote the holding of the Court of Appeal in the case of *Leo Sila Mutiso v Rose Helen Wangari Mwangi* Civil Appeal (Application No. 25 of 1997) (unreported) where the court stated and observed as hereunder;
- “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”
95. Duly nourished and well guided by the elaborate observations reflected in the decisions quoted in the preceding paragraphs, I come to the conclusion that the Applicant has placed before the court sufficient basis to warrant the extension of time sought.

Issue Number 3 Whether the Honourable Court is seized of the requisite Jurisdiction to grant stay of execution pending the Lodgment of Reference to taxation and if so, whether the Applicant has established a basis for such an order.

96. Other than the limb of the application seeking for extension of time within which to file the requisite reference to challenge the certificate of taxation, the Applicant herein also seeks an order of stay of execution pending the filing and determination of the reference.
97. According to the Applicant, the amount at the foot of the certificate of taxation is indeed substantial, nay exorbitant and unless same is stayed, the Respondent would proceed and levy execution in realization of the said sum.



98. Further, the Applicant has contended that if the execution proceeds on account of the impugned certificate of taxation, then same shall be grossly prejudiced and be exposed to substantial loss.
99. Premised on the foregoing. The Applicant has thus contended that it would be appropriate and expedient to grant an order of stay of execution pending the formal filing and ultimate determination of the intended reference.
100. On her part, the Respondent has submitted that the Applicant herein has neither established nor laid before the Honourable court any evidence to show that same shall suffer substantial loss.
101. In any event, counsel for the Respondent has added that the fact that the execution may be commenced, carried out and undertaken against the Applicant herein, does not by itself constitutes substantial loss.
102. Despite the contrasting submissions tendered by the Parties, there is no gainsaying that the amount of Kshs.26, 925, 516.67/= only, is substantial and indeed colossal.
103. Besides, there is also no dispute that the payment of the said amount of money, will indeed occasion great hardship and palpable difficulty on the part of the Applicant.
104. Thirdly, no evidence has been placed before the court by the Respondent that if the said monies were paid out unto her, same would be in a position to refund the said amount or a substantial portion thereof, subject to the outcome of the intended reference.
105. Either way, there is evidence that the payment of the said colossal amount of money to and in favor of the Respondent, shall occasion substantial loss and prejudice to the Applicant.
106. Suffice it to point out and to underscored that substantial loss is the cornerstone for granting for an order of stay of execution, especially pending an appeal and, I may wish to add, pending a Reference like the one, beforehand.
107. To vindicate and buttress foregoing established and well-known principle, it is appropriate to take cognizance of the holding in the case of *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* (1986)eKLR, where the Court of Appeal stated and observed as hereunder;
- “If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.
108. Additionally, the issue of what constitutes substantial loss as pertains to a monetary decree was revisited by the Court of Appeal in the case of *Oraro & Rachier v Co-operative Bank of Kenya Ltd* (2000)eKLR, where the court stated and observed as hereunder;
- “We must weigh the claims of both sides. If M/S Oraro & Rachier are required to pay up the full decretal amount, as a law firm, they might find themselves in a very tight situation. Whereas if the respondent bank is kept out of the sum of Shs.10,000,000/= it would not be affected. This is in our view, in this case, the position, when we are considering the situation. The balance of convenience overall favours the applicant. For these reasons we would allow this application, stay the execution of the decree.”
109. Respectfully, the words and observation of the Court of Appeal in the decision of Oraro & Rachier Advocates (*supra*), apply with equal force to the subject matter.



110. In the circumstances, I find and hold that the payment of the sum of Kshs.26, 925, 516.67/= Only, by the Applicant herein, prior to the lodgment and ultimate determination of the intended reference, shall no doubt occasion substantial loss.
111. Similarly, it is also important to observe that the honourable court is also seized with the requisite jurisdiction to grant an order of stay of Execution Pending the hearing and determination of a reference pursuant to and in line with the provisions of the Civil Procedure Act and the Civil Procedure Rule, 2010.
112. To this end, I beg to adopt and endorse the holding in the case of Labh Singh Haman Singh Ltd v Attorney General & 2 Others (2016)eKLR, where the court held as hereunder;

8. I am unable to agree with the submission by counsel for the respondent that the Court has no power to order stay in cases of taxation for costs as exists in the Civil Procedure Rules. It is clear to me that taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. Indeed, section 94 of the *Civil Procedure Act* provides as a general rule that execution of orders of the court should await the confirmation of the costs by taxation unless the Court grants leave for execution before taxation of costs.

9. Section 94 of the *Civil Procedure Act* is in the following terms:

“94. Execution of decree of High Court before costs ascertained Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

10. Moreover, section 89 of the *Civil Procedure Act* provides for the application of the Civil Procedure Rules in all cases of a civil nature such as the present application arising from taxation of costs. Section 89 of the Act is in terms as follows:

“89. Miscellaneous proceedings

The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.”

It follows, in my view, that the provisions of the *Civil Procedure Act* with regard to stay of execution will apply to proceedings, which are of a civil nature, for the reference of an objection to the Court from the



taxation of a Bill of Cost by a Taxing Officer of the
Court under the *Advocates' Remuneration Order*.

11. This position accords with the interests of justice that a party against whom substantial sums of money have been adjudged in the nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the *Advocates' Remuneration Order*, which is the procedure provided for such determination. Otherwise such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time.

Final Disposition:

113. From the foregoing analysis, it must have become evident and apparent that the Applicant herein has laid before the honourable court sufficient and credible basis to warrant the exercise of the discretion sought.
114. However, before venturing to make the final orders, in respect of the subject matter, there is need to mention of one additional issue.
115. For coherence, the issue relates to the submissions that were made by the Respondent pertaining to and concerning the circumstances under which the court can interfere with the exercise of discretion of the taxing officer as reflected in the certificate of taxation.
116. Nevertheless, it is imperative to note that the interrogation and ultimate determination of whether or not the taxing officer properly exercised her discretion or otherwise, can only be dealt with once a substantive reference is filed and not otherwise.
117. Similarly, the determination, of whether witness statement and bundle of documents (sic) including a valuation report filed, if at all, constitutes a pleading, shall also await the lodgment of a formal Reference.
118. Nevertheless, I must point out that what constitutes a pleading is well highlighted and amplified pursuant to the provisions of Section 2 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. Consequently, any one seeking to discern the meaning of a pleading would not be called upon to travel yonder.
119. Be that as it may, it is also imperative to state and underscore that there indeed exists a dichotomy between a witness statement and bundle documents filed in evidence v a Pleading. In this regard, the Doctrine of departure would provide a useful guide.
120. Having made and highlighted the foregoing observations, it is now appropriate to render the final orders in this matter.
121. Consequently and in the premises, I now make the following orders;
 - a. The Chamber Summons Application dated the 30th July 2022 be and is hereby allowed.
 - b. Leave be and is hereby granted to the Applicant to lodge the Notice of Objection to Taxation and same be lodged and served within 7 days from the date hereof.
 - c. Upon receipt of the reasons for taxation/ruling relating to the taxation, the Applicant shall file and serve the intended Reference within 14 days from the date of receipt of the reasons/ruling of the taxing officer.



- d. Pending the filing herein and ultimate determination of the Reference, there be and is hereby granted an order of stay of execution of the certificate of taxation issued on the 16th May 2022 and/or any consequential orders and warrants arising therefrom.
- e. The Applicant herein shall also pay to and in favor of the Respondent the sum of Kshs.1, 000, 000/= only on account of security for cost and same shall be held by the Respondent pending the hearing and determination of the intended reference.
- f. For completeness, the sum of Kshs.1, 000, 000/= Only, in terms of clause (e) hereinabove shall be paid with 30 days from the date hereof.
- g. In default to pay the sum of Kshs.1, 000, 000/= Only, on account for security for costs, within the stipulated timeline, the order of stay of execution herein shall automatically lapse.
- h. Cost of the Application herein assessed and certified in the sum of Kshs.25, 000/= only are awarded to the Respondent and same to paid within 14 days from the date hereof.
- i. In default to pay the costs in terms of clause (h), the Respondent shall be at liberty to execute.

122. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER, 2022.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Kevin Court Assistant

Mr. Kimani h/b for Mr. Mwangi for the Plaintiff/Respondent.

Mr. Kiptoo for the Defendant/Applicant.

