

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 82 OF 2002

LUCY WANJIRU KABUTHA.....APPELLANT

VERSUS

JANE MUTHONI MUCHERU.....RESPONDENT

RULING

The applicant, Jane Muthoni Mucheru, has made an application under the provisions of **paragraph 11 (4)** of the **Advocates (Remuneration) Order** seeking the order of this court to enlarge the time fixed for filing a reference against the taxation made by the Deputy Registrar of this court on the 26th of July 2005 on such terms that may be just and reasonable. The applicant also sought stay of execution of the respondent's taxed costs pending the hearing and determination of this application. The grounds in support of the application are that the applicant contends that the delay in filing the reference was not inordinate and had been occasioned by factors beyond her control. She contends that the Deputy Registrar of this court applied the wrong principles of the law in taxing the said costs of the respondent and in the circumstances it would be just for the applicant to be allowed to challenge the same before this court. The application is supported by the annexed affidavit of the applicant.

The application is opposed. The respondent Lucy Wanjira Kabutha has sworn a replying affidavit in opposition to the said application. The gist of the contents of the said affidavit is that the respondent depones that the applicant had frustrated the respondent from enjoying the fruits of the judgment entered against the applicant on costs. The respondent deponed that the applicant had been indolent and had on various occasions unreasonably sought adjournments of the said taxation in order to delay the just conclusion of this case. The respondent also filed grounds of opposition to the application filed by the applicant.

At the hearing of the application, Mr Chege learned counsel for the applicant submitted that this court had unfettered discretion to enlarge time to enable the applicant file reference out of time. He explained that after the Deputy Registrar of this court had given reasons for the taxation of the respondent's bill of costs, he was unable to contact his client in time to enable him file a reference because the applicant had fallen ill and had been admitted to hospital. He submitted that the delay in filing the said reference was therefore excusable and this court should allow the applicant to file the said reference. He further submitted that he had been prevented from attending court during the taxation of the respondent's bill of costs by the Deputy Registrar due to the fact that his motor vehicle had developed a mechanical problem on his way from Nyahururu to Nakuru. He urged this court to allow the application.

Mr. Nderitu, learned counsel for the respondent opposed the application. He submitted that the application had been filed in bad faith. He argued that there were no grounds which would enable this court enlarge time as sought by the applicant. He submitted that the applicant had filed this application to frustrate the respondent from enjoying the taxed costs which were awarded to her by the Deputy Registrar of this court. He submitted that the application was brought four months after the taxation of the respondent's bill of costs. In his view, this period was inordinate and should be considered by this court in refusing to grant the applicant the orders of enlargement of time sought.

I have carefully considered the arguments made by the applicant in this case. I have also considered the response made thereto by the respondent. I have also read the rival pleadings filed by the parties to this application. The issue for determination by this court is whether the applicant has satisfied this court that she should be given leave to file her reference from the taxation of the Deputy Registrar of this court out

of time. **Paragraph 11 (4) of the Advocates (Remuneration) Order** provides as follows:

“The High court shall have power in its discretion by order to enlarge time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order maybe made by chamber summons upon giving to every other interested party not less than three days’ notice in writing or as the court may direct, and may be so made notwithstanding that the time sought time to be enlarged may have already expired.”

The above provision of the law is clear. This court has unfettered discretion to enlarge time for any party to do what is required under the provisions of **paragraph 11 of the Advocates (Remuneration) Order**. This discretion however has to be exercised judicially.

In the present case, the applicant timeously applied to the Deputy Registrar of this court to give her the reasons for taxing the respondent’s bill of costs. The Deputy Registrar of this court however supplied the reasons more than 1^{1/2} months later. By this time, the applicant had already fallen ill and was admitted at the hospital and could not therefore contact his advocate to enable the reference to be filed in time. Although there is no requirement of the law that an affidavit be sworn by a party challenging the decision of the Deputy Registrar in taxing a bill of costs, in the scheme of things, no advocate can take a course of action without seeking instructions from his client.

In this case, the applicant has established that she was unable to give instructions to her advocate because she was admitted in hospital at the material time. The fact that the applicant was sick and was admitted at the hospital was not challenged by the respondent. Upon perusing the medical documents which were annexed to the application by the applicant, it is clear that the applicant made the current application immediately upon being discharged from the hospital. I do not agree with the submissions made by the respondent that the applicant had been indolent and therefore should not benefit from the exercise of this court’s discretion in her favour.

Having evaluated the facts in contention in this application, it is clear that this court would exercise its discretion in favour of the applicant. The applicant should be given an opportunity to ventilate her case in the reference to be filed against taxation by the Deputy Registrar of this court of the respondent’s bill of costs. The applicant is hereby given fourteen (14) days from today’s date to file the said reference challenging the taxation by the Deputy Registrar of this court of the respondent’s bill of costs and which bill was taxed on the 26th of July 2005. Since the respondent was not at fault, she shall be paid the costs of this application which I assess at Kshs 3,000/=. The said amount shall be paid within fourteen (14) days of today’s date. In the interest of justice, I will stay execution of the said taxation by the Deputy Registrar of this court pending the hearing and determination of the reference.

DATED at NAKURU this 8th day of March, 2006.

L. KIMARU

JUDGE