



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 2182 of 1997

IN THE MATTER OF THE ESTATE OF WAMBUI WANGOMBE – DECEASED

RULING

The two Applicants herein have filed an application dated 14th December, 2005 which is provided under Rules 11(a) and 72 of the Advocates' (Remuneration) Order, Order XXI Rules 22 and 25 of Civil Procedure Rules, Sections 3A and 63 of the Civil Procedure Act as well as Rules 49 and 73 of the Probate and Administration Rules and all other enabling provisions of the law.

It mainly seeks two orders:

- 1. That this Honourable court be pleased to extend time within which to file and serve the Notice of Objection to the taxation herein and (emphasis mine) the Notice of Objection filed on the 14th June, 2004 and served on 15th June, 2004 be claimed (*sic*) as regularly filed and served and the same be heard expeditiously.**
- 2. That there be a stay of any further proceedings and/or execution pending hearing and determination of the objection proceedings herein and/or the status quo be maintained till further orders of this Honourable court.**

The same is supported by the grounds on the face of the application and on an affidavit of Simon Muchiri sworn on 14th December, 2005.

The Application is opposed on grounds of objections filed on 7th April, 2006 and on replying affidavit sworn by the Applicant/Respondent, Virginia Njeri Churu on the same day.

It is common ground that the Bill of Costs filed by the Respondent herein was taxed on 18th February, 2004. As per the averments by Simon Muchiri the 1st Applicant, he was informed by the then counsel (name not specified) that no formal Notice of Taxation or Ruling was served on their office. However, he has also not specified the date of such information. Then he avers that sometimes in June, 2004 he was notified by his then counsel of the outcome of the taxation and, on his instruction, the Notice of Objection was filed on 14th June, 2004. He was then informed to await the outcome of the Notice of Objection filed. When his co-applicant was arrested pursuant to a warrant of the court in November, 2005 then he learnt that the notice was filed out of time and without leave of the court.

Mr. Mwangi, the learned counsel for the Applicants, submitted that the said notice was not proper and is a nullity without withdrawing his prayers that the same be claimed (*sic*) as regularly filed and served. He also pointed out that the main objections are the items of disbursement and traveling allowance which

are not allowed as per law and are not supported by receipts.

He urged that the error or mistake made by the previous Advocate shall not be visited upon the Applicants.

I must note that there is a Ruling dated 2nd December, 2005 by Hon. Lady Justice Martha Koome in respect of an application of the two Applicants herein for an order of stay of warrants of arrest and stay of execution of costs pending the hearing of the objection filed on 14th June, 2004. She dismissed the application and noted the objections raised by the Respondent herein.

I specifically note from the said ruling that the Applicant's counsel had intimated their intention to seek leave to file the objection out of time but till the date of the ruling, this has never been done. From the records, I can notice that the said application was heard on 14th November, 2005 and the issue of necessity of the application to seek leave to file the Objection out of time was present in the mind of the Applicants.

It is obvious that only after their application to stay was refused on 2nd December, 2005, the present application is filed on 14th December, 2005, almost after twelve days, by a new firm of Advocates.

Despite the fact that none of the counsel has brought to my notice the aforesaid ruling and specifically the dismissal therein of the order of stay of execution, I cannot overlook the said fact. The said ruling has dealt with the order of stay of execution on similar grounds and hence is Res Judicata. I therefore disallow the order of stay of execution prayed for in prayer No.3 of the application.

That leaves me with the prayer No.2 of the said application.

As per the said ruling the co-applicant of Simon Muchiri was arrested in October, 2005 and not in November, 2005 as averred by him in his affidavit before me. It is noteworthy that the Applicants have not appealed against that ruling or made an application to review or vary the same. Thus I shall take the same as an unchallenged one.

I have already mentioned that during the hearing of the application whereon the said Ruling was delivered, the issue of the Notice of Objection having been filed late has been raised and thus the Applicants were or ought to be aware of the defective Notice of Objection. They sat on it up to 14th December, 2006 without explaining that delay.

It is trite law that to get an order on extension of time from the court, the Applicant has to explain the delay of each day. The discretion of the court to grant the extension of time has to be exercised judiciously considering the interest of both sides.

Furthermore it is not contended that the Applicant shall suffer any prejudice. It may be so because of his failure to get any order of stay of execution of the Bill taxed.

Mr. Mwangi raised issues on some of the items on disbursements as well as the traveling allowance and urged the court to grant the prayer.

As against these contentions Mr. Aswani, the Learned Counsel for the Respondent, took me through the proceedings on record. These facts are averred in the replying affidavit sworn by the Respondent.

It became apparent that the Applicants have not raised objections on the specific items of the Bill of costs presented by the Respondent, in their belated Notice of Objection. Despite informing the court that the parties may settle the taxation after discussing some disputed items, this was not to happen. The Counsel for the Applicants was also not present at the time the bill was taxed. The technical issue of Notice of Taxation also, in my view, has been considered in the earlier ruling of Hon. Koome J.

I have earlier indicated that prayer No.2 of the application has two limbs and despite the submissions of its nullity, they both are still on the record.

Moreover the Notice of objection to Taxation does not indicate the items of taxation to which the objections are raised. That is what is required and stipulated under Rule II (1) of the Advocates (Remuneration) order made under Advocates Act (Cap 16 Laws of Kenya)

The said Rules states:

“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”.

In the said Notice of Objection it is merely stated and I quote:

“The ground of objection is that the amount taxed and allowed is excessive and over and above the minimum scales provided by the Advocates (Remuneration) order, 1997”.

Considering all the facts from and submissions made by both sides, I am unable to exercise the discretion which is conferred on this court under Rule 11(4) of the Advocates (Remuneration) Order.

I therefore dismiss the application dated 14th December, 2005 with costs.

Dated and signed at Nairobi this 13th day of October, 2006.

K.H. RAWAL

JUDGE

13.9.06