

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL MISC. APPL. NO. 33 OF 2002**

JOTHAM MULATI APPLICANT

VS

CHAIRMAN – ELECTORAL

COMMISSION OF KENYA RESPONDENT

RULING

The applicant moved this court pursuant to the provisions of Order XLVIII rule 3 of the Civil Procedure Rules. The applicant's main prayer is for an order of stay of execution for recovery of costs pending the hearing and determination of the intended reference under rule 11 (2) of the Advocates Remuneration Order.

The motion is supported by the affidavit of Jotham Mulati Welamondi sworn on 19th February 2004.

The applicant has put forward three main reasons in support of the motion. The first ground being that the Deputy Registrar has taken too long to give his reasons for his decision on the taxation which took place on 31.7.2003 despite having been served with the objection. The applicant impressed this court that he could be in a position to demonstrate that he has an arguable reference before this court upon receiving the reasons. Mr. Were who appeared for the Respondent opposed the ground by filing grounds of opposition dated 9th March 2004. He was of the view that the applicant has not shown that his reference has high chances of success. He was of the opinion that the applicant should have come under the ambit of Order XLI r. 4 of the Civil Procedure rules. I have carefully examined the provisions of Order XLVIII rule 3 of the Civil Procedure Rules. I have formed the opinion that the applicant has come under the correct provisions of the law. This gives an aggrieved party a leeway to come before a Judge when taking up objection proceedings against decisions of the Deputy Registrar's decisions on taxation. I am of the view that the applicant is likely to show that his reference has good chances of success when reasons are provided for. At this stage it is premature to make assumptions. The Deputy Registrar has unreasonably withheld his reasons.

The applicant also raised the issue touching on the health of the applicant. The applicant has annexed a receipt of purchase of drugs and urine bag as evidence of serious illness. The facts are uncontested in view of the fact that the Respondent did not file a replying affidavit to controvert the issues averred under oath. I think I am prepared to accept the arguments advanced by the applicant that he is a sick man. The provisions of Section 43 of the Civil Procedure Act gives this court the discretion to release a Judgment debtor if it is of the opinion that he is not in a fit state of health to be detained in prison.

I am convinced the applicant's motion has merit. It is allowed in terms of prayer No. 3. The applicant should be released from prison forthwith.

READ AND DELIVERED THIS 26th DAY OF March 2004

J.K. SERGON

JUDGE