REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO 68 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

EX PARTE APPLICANT:.....LOSEM NAOMI CHEPKEMOI

RULING

The Applications

1. A judgment was issued herein on 14th May, 2020 in favour of the *ex parte* Applicant herein, who thereafter filed a Party and Party Bill of Costs dated 17th August, 2020. The Taxing Officer's delivered a ruling thereon on 3rd December, 2020, wherein the Bill of Costs was taxed at Kshs 571,425/=. Three applications were subsequently filed by the Respondent and *ex parte* Applicant arising from the said taxation ruling and its execution, and are the subject of this ruling.

2. Two of the applications are filed by the Respondent, both dated 17th December 2020. In the first application by way of a reference in a Chamber Summons, the Respondent is seeking the following orders:

a) THAT the Court be pleased to set aside the Taxing Officer's ruling delivered on 3rd December 2020 as it relates to the reasoning and determination of item No. 2 of the Bill of Costs dated 17th August 2020.

b) THAT this Court be pleased to adjust the figures and reassess the fee due to the Advocate as instruction fees.

c) THAT the costs of the application be provided for.

3.The said application is supported by an affidavit sworn on 17th December 2020 by Kibe Mungai, the Respondent's advocate. The *ex parte* Applicant filed a replying affidavit sworn on 22nd January, 2021 by Gacheru Ng'ang'a, the *ex parte* Applicant's advocate on record, in response to the said reference.

4. The Respondent's second application was by way of a Notice of Motion seeks the following orders:

a) THAT there be a stay of execution of the Warrants of Atachment and Sale issued on 14th December, 2020 and the Proclamation of Attachment dated 15th December, 2020 issued by M/s Jumbo Airlink Auctioneers pending hearing and determination of the instant application inter-parties.

b) THAT there be and it is hereby ordered by way of an injunction restraining the Respondent and their agents, auctioneers or any other person acting on their behalf from towing, carrying away goods belonging to the Applicant pending the hearing of this application inter parties.

c) THAT upon hearing of the Application herein, the Honourable Court be pleased to lift the warrants of attachment and sale all dated 14th December, 2020, in furtherance of the decree issued on 17th September, 2020 and the judgement of 14th

May, 2020.

d) THAT the Honourable Court be pleased to enlarge time within which the Applicant may file it Notice of Appeal out of time and consequently its appeal to the Court of Appeal.

e) THAT upon granting prayer 5 above, the Honourable Court be pleased to stay the execution of the decree issued on 17th December, 2020 pending filing, hearing and determination of the Applicant's intended appeal.

f) THAT the costs of this application follow the outcome of the intended appeal.

5. The application is supported by an affidavit sworn on 17th December 2020 by Aaron Tanui, the Respondent's Legal Officer. On 21st December 2020, this Court granted the prayers sought in the said application seeking a temporary stay of execution of the Warrants of Attachment and Sale issued on 14th December, 2020 and the proclamation of Attachment dated 15th December, 2020 issued by M/s Jumbo Airlink Auctioneers, pending the hearing and determination of the said Notice of Motion.

6. The *ex parte* Applicant thereupon filed an application by way an application by way of a Notice of Motion dated 13th January 2021, seeking the following orders:

(a) This Court be pleased to review and set aside the ex parte orders of stay of execution of warrants or attachment and sale issued on 14th December 2020 and granted on 17th December 2020.

(b) This Court be pleased dismiss with costs, the Respondent's applications by way of Notice of Motion and Chamber Summons respectively, both dated 17th December 2021.

7. The application is supported by an affidavit sworn on 13th January 2021 by the ex parte Applicant. The Respondent filed a replying affidavit sworn on 26th January, 2021 by Aaron Tanui in response to the said application. This Court directed that the *ex parte* Applicant's application be heard and determined together with the Respondent's applications. The parties' respective cases on the three applications are summarized in the following section.

The *ex parte* Applicant's Case

8. The *ex parte* Applicant's urged her application to set aside the temporary orders and dismiss the Respondent's applications, and the Respondent's application on the lifting of the warrants of attachment and sale, enlarging of time to file a Notice of Appeal out of time, and staying of execution of the decree issued on 17th December 2020 together. The *ex parte* Applicant contended that although she has been served with the Respondent's applications electronically, the Respondent has failed to comply with the orders/directions made by the Court specifically with regard to filing and serving its skeleton submissions on the applications dated 17th December 2020 within 14 days of the orders.

9. It was also averred that the Respondent's application for stay of execution of the decree and warrants of attachment and for enlargement of time for filing a Notice of Appeal is incompetent, in that the provision of law cited by the Respondent does not empower the court to extend time for filing a notice of appeal or to grant the stay orders sought. Further, that the jurisdiction for extending time for filing a notice of appeal under Rule 78 of the Court of Appeal Rules is vested exclusively to the Court of Appeal. Therefore, since this court lacks jurisdiction to extend time for filing an appeal and there being no valid pending appeal, it also lacks jurisdiction to grant other consequential orders such as stay pending appeal.

10. Be that as it may, it was also averred that the Respondent has concealed material facts from the court and therefore undeserving of the orders sought. The ex-parte Applicant contended that on 12th June, 2020 shortly after the judgment had been delivered, her advocates emailed the Respondent's advocates informing them of the outcome and urging them to inform their client to comply with the said orders but that email elicited no reply. As a result, the Ex-parte Applicant's advocates extracted the decree and served it on the Respondent on 28th October, 2020 together with a letter demanding that they comply with the court order which again did not elicit any response. That on 18th November, 2020 the Ex-parte Applicant's advocates wrote a final demand letter to the Respondent demanding that it complies with the court and again, the said letter did not elicit any response.

11. In the circumstances, the *ex parte* Applicant avers that her advocates commenced the process of executing the decree by first filing the Bill of Costs which the Respondent's advocates participated without raising any issue as to their dissatisfaction of the judgment of the court delivered on 20th May, 2020. Furthermore, it was averred that the Respondents have not explained why it did not instruct counsel to appeal or file an application for extension of time or stay when they allegedly resumed partial operations, neither have they explained their reasons for failing to admit the *ex parte* Applicant back to the University even after several demands, despite there being a graduation ceremony in December, 2020. Accordingly, the *ex parte* Applicant avers that the intended appeal is frivolous and that she is entitled to enjoy the fruits of her judgment.

12. On the Respondent's reference to set aside the Taxing Officer's ruling, the *ex parte* Applicant averred that the application is incompetent and premature in that the Taxing Officer is yet to supply her reasons for taxation pursuant to paragraph 11(2) of the Advocates Remuneration Order. Furthermore, it is contended that the Respondent has never served the *ex parte* Applicant with the objection to taxation as required by the Rules. In addition, that the Respondent has not demonstrated how the Taxing Officer erred in principle in allowing Kshs. 500,000/- out of Kshs. 1,000,000/- sought by the *ex parte* Applicant as instruction fees.

13. According to the *ex parte* Applicant, the Taxing Officer has discretion to increase the minimum of Kshs. 100,000/- under the

Remuneration Order for judicial review matters to a reasonable sum, and a Judge sitting on a reference cannot substitute that discretion with his or her own, it must be shown that the Taxing Officer erred in principle. Further, that the Taxing Officer took into account all the relevant factors and submission of the parties in awarding a reasonable sum of Kshs. 500,000/- as instruction fees.

The Respondent's Case

14. On the application to set aside the warrants and decree issued herein and to enlarge time to appeal**,** the Respondent contended that due to the Covid-19 pandemic, the judgment in this matter was delivered on 14th May, 2020 in the absence of parties. Further, that the Respondent had also shut down its operations in line with government directives regarding the response to the Covid-19 pandemic, and that it is only when the University resumed partial operations in October that their Advocates were able to seek instructions from them. As a result, they were not able to file a Notice of Appeal within fourteen (14) days of delivery of the judgment and now seek that this Honourable Court enlarges the time within which they can file a Notice of Appeal and consequently file the appeal before the Court of Appeal.

15. The Respondent is further seeking a stay of execution against the decree issued on 17th September, 2020, given that the *ex parte* Applicant had completed all her units and was awaiting graduation, and the effect of this Court's orders is that the *ex parte* Applicant would be re-admitted solely for the purpose of graduation. Be that as it may, that the *ex-parte* Applicant filed her Bill of Costs dated 17th August, 2020 which was taxed on 3rd December, 2020 at Kshs. 571, 425/-, and that the *ex-parte* Applicant proceeded without issuance of a Certificate of Taxation or notice to the Respondent's advocates on record to issue warrants of attachment and sale against the Respondent.

16. The Respondent therefore contends that in the absence of stay orders, the *ex-parte* Applicant will be at liberty to execute the warrants of attachment and levy execution, and that being a public institution funded by the taxpayer, the said execution shall occasion immense loss and damage which losses are not recoverable by way of damages. Accordingly, the Respondent urged that if the stay of execution is not granted, the objects of this application and the intended appeal will be defeated and rendered nugatory. Further, that the Respondent is ready and willing to abide by any conditions and terms as to security as the court may deem fit to impose.

17. As regards the reference from the Taxing Officer's ruling delivered on 3rd December, 2020, the Respondent averred that Taxing Officer taxed the item on instruction fees of the *ex parte* Applicant's Party and Party Bill of Costs dated 17th August 2020 at an exorbitant Kshs 500,000/=. According to the Respondent, the suit was filed on 18th March, 2019 and determined on 14th May, 2020 which is a short period of time; the suit did not raise any complex issues neither were the facts new to the advocates on record as the parties and advocates previously litigated over similar facts in **JR 573 of 2017 - R v Kenyatta University Ex-parte Losem Naomi Chepkemoi**.

18. In the Respondent's view, the Taxing Officer misdirected herself on the discretion and awarded a fee that is manifestly excessive as to justify an interference by this Court. It was also contended that the Taxing Officer failed to give sufficient weight to the relevant factors on record in considering the quantum pertaining to item no. 2 of the Bill of Costs and they urged the court to assess the instruction fees at a maximum of Kshs. 200,000/- given the minimum provided in the Advocates Remuneration Order is Kshs. 100,000/-.

The Determination.

19. The three applications were canvassed by written submissions. The Respondent and the *ex parte* Applicant's advocates on record each filed two sets of written submissions dated 26th January 2021. A preliminary issue that has been raised by the *ex parte* Applicant's application is whether the Respondent's applications are competently before this Court. This issue needs to be addressed first, as this Court cannot address the substantive issues raised in the Respondent's applications, unless a finding is made as regards their competence.

On the Competence of the Respondent's Applications

20. The *ex parte* Applicant submitted that under Section 1A (3) of the Civil Procedure Act, the Respondent and its advocates have a duty to assist the court to further the overriding objectives of civil litigation to ensure expeditious disposal of civil cases which include complying with the directions of the court and by failing to comply with the court directions of 21st December, 2020, they are in breach of that duty.

21. The Respondent on its part submitted that the delay to act on the orders was not inordinate as the it's advocates had closed their chambers for the Christmas holidays., and that in any event, the High Court Christmas Recess, 2020 commenced on 21st December, 2020 to 13th January, 2021 both days inclusive, and for purposes of computation of timelines in active court cases, time would not be deemed to have been running. It was further submitted that the Respondent has not concealed any material facts relevant to the suit as insinuated by the *ex parte* Applicant and that it has been satisfactorily explained the delay.

22. While this Court is obliged by the Civil Procedure Act to ensure expeditious disposal of cases under section 1A of the Civil Procedure Act, Article 159 of the Constitution also enjoins this Court to dispense substantive justice, and not to pay undue regard to procedural technicalities. The Court of Appeal in **Charles Karanja Kiiru vs Charles Githinji Muigwa [2017] eKLR** made the following observation in this regard:

> **"23. Be that as it may, this Court in Kamlesh Mansukhalal Damji Pattni vs. Director Of Public Prosecutions & 3 others [2015] eKLR articulated that-**
>
> > **"It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Judicial Officers are also State officers, and consequently are enjoined by Article 10 of the Constitution to adhere to national values and principles**

of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice."

23. It is my view that the explanation given by the Respondent for the delay in filing its pleadings in compliance with this Court's directions is reasonable. In addition, the *ex parte* Applicant has not demonstrated any prejudice she has suffered by the delay, as the applications herein proceeded to substantive hearing and all the parties had the opportunity to filed their pleadings and canvass the said applications.

24. This Court will therefore admit the Respondents' pleadings filed out of time to the record for the foregoing reasons, and the Respondent's applications are therefore competently before this Court. I will accordingly proceed to determine the outstanding substantive issues which are as follows:

(a) Whether the Respondent merits enlargement of time to file a Notice of Appeal and its appeal.

(b) Whether a stay of execution of the decree issued herein on 17th September 2020 and warrants of attachment and sale can be granted.

(c) Whether the Taxing Officer's ruling on item No. 2 of the *ex parte* Applicant's Bill of Costs was erroneous.

On enlargement of time to file a Notice of Appeal and Appeal

25. The *ex parte* Applicant submitted that this Court does not have jurisdiction to extend time for filing a notice of appeal out of time under Rule 76 of the Court of Appeal Rules, which jurisdiction is exclusively reserved for the Court of Appeal by dint of Rule 4 of the said Rules. Consequently, it was submitted that this court did not have powers to order the stay it granted. To further buttress his argument, the *ex parte* Applicant cited Rules 2, 4, 53, 55, 76 and 77 of the Court of Appeal Rules in respect to extension of time, and submitted that timeline for filing of a notice of appeal is not fixed by the Civil Procedure Rules, and therefore Order 50 Rule 5 of the Civil Procedure Rules cited by the Respondent does not apply.

26. The case of **Obadiah & Others vs Dasan & Others (1970) EA** where the High Court in Uganda in dealing with similar Rules held that there is no power to extend the time for filing an appeal to the Court of Appeal under the Civil Procedure Rules. The *ex parte* Applicant also relied on the case of **Samuel Limutai Korir vs Nyanchwa Adventist Secondary School & Anor (2017) eKLR** where the court while interpreting the Court of Appeal Rules held that it has no jurisdiction to deal with issues of validity of a notice of appeal which is the province of the Court of Appeal under the Rules thereunder.

27. The Respondent on its part submitted that section 7 of the Appellate Jurisdiction Act grants the High Court power to extend time for giving notice of intention to appeal from a judgment of the High Court, notwithstanding that the time for giving such notice or making such appeal may have already expired. The decisions in **Edward Njane Nganga & Another vs Damaris Wanjiku Kamau & Another (2016) eKLR** wherein she adopted the judgment of Munyao J. in the case of **Loise Chemutai Ngurule & Another vs Winfred Leshwari Kimung'en & 2 Others (2015) eKLR** were cited for the holding hat the power to extend time for filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal , and one can approach either court for the order which is the import of Rule 41 of the Court of Appeal Rules. Accordingly, that this Court has jurisdiction to enlarge time within which the Respondent can file its Notice of Appeal out of time.

28. **Section 7 of the Appellate Jurisdiction Act explicitly and specifically grants the High Court the power to extend time to file a Notice of Appeal in the Court of Appeal as follows:-**

" The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence."

29. **The factors to be considered in** exercising the discretion whether or not to enlarge time **have been elucidated in various decisions. I**n **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi, (2002) 1 EA 65** the Court set out the factors to be considered in as follows: (i) the explanation if any for the delay; (ii) the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and (iii) whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

30. The Court of Appeal in **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**, set out the factors thus:

"Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is

granted, and whether the matter raises issues of public importance, amongst others..."

31. Likewise, the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** held as follows on the exercise of the Court's discretion to extend time:

> **"... It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. "We derive the following as the underlying principles that a court should consider in exercising such discretion:-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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time."**

32. The Respondent's reasons are that due to the Covid-19 pandemic, the judgment in this matter was delivered on 14th May, 2020 in the absence of parties, and that the Respondent had also shut down its operations in line with government directives regarding the response to the Covid-19 pandemic, and that it is only when the University resumed partial operations in October 2020 that their Advocates were able to seek instructions from them. As a result, they were not able to file a Notice of Appeal within fourteen (14) days of delivery of the judgment.

33. While the Court takes judicial notice of the Covid-19 pandemic, it is notable that there is still a two-month delay between October 2019 and the filing of the Respondent's applications for extension of time on 17th December 2020 that is not explained. The Court has also considered the prejudice that the *ex parte* Applicant is likely to suffer, given that she not only has judgment in this matter, but also subsequently filed for costs which were taxed in her favour since the said judgment, and in which taxation the Respondent participated as shown from a perusal of the court record. There is also now a duty now imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

34. In addition, while this Court has discretion to extend time to file a Notice of Appeal, neither the Civil Procedure Act, nor section 7 of the Appellate Jurisdiction Act or the Court of Appeal Rules donate power and jurisdiction to the High Court to extend time for the filing of a substantive appeal in the Court of Appeal. This is for the reason that Rule 81 of the Court of Appeal Rules provides as follows as what constitutes the institution of an appeal in the said Court:

> **"(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—**
>
> **(a) a memorandum of appeal, in quadruplicate;**
>
> **(b) the record of appeal, in quadruplicate;**
>
> **(c) the prescribed fee; and**
>
> **(d) security for the costs of the appeal:**
>
> **Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.**
>
> **(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.**
>
> **(3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction."**

35. The power to extend time to file any of the above-stated documents in the Court of Appeal is not granted to this Court by any provisions of the law, and such extension of time is the exclusive preserve of the Court of Appeal under Rule 4 of the Court of Appeal Rules as follows:

> **"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."**

36. This Court therefore declines to exercise its discretion in the Respondent's favour and extend time to file its Notice of Appeal and Appeal for the foregoing reasons. It is notable that the Respondent however still has the opportunity to persuade the Court of Appeal to grant it extension of time.

On Stay of Execution

37. The *ex parte* Applicant's submissions on the prayers for stay of execution were that the Respondent failed to disclose a material fact to the court, that by 12th June, 2020, the Respondent and their advocates were aware of the orders of the court neither have they explained why it took them 6 months to apply for the stay. Accordingly, the court was urged to find that the application lacks merit, and that the *ex parte* Applicant who has been kept out of her studies from 2017 is entitled to enjoy the fruits of her judgment and the application dated 17th December, 2017 and the consequential orders thereto be dismissed.

38. The Respondent submitted that it had met the conditions for granting stay, and on the condition of substantial loss resulting, it cited Order 42 rule 6 of the Civil Procedure Rules and the case of **Antoine Ndiaye vs Africa Virtual University Nairobi HCCC No. 422 of 2006** where Ogola J defined substantial loss as any loss, great or small that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal. The Respondent argued that its affidavit in support of its application demonstrated that it stands to suffer substantial loss if the stay is not granted.

39. On whether the application has been brought within reasonable time, the Respondent cited the case of **M'ndaka Mbiuki vs James Mbaaba Mugwira (2010) eKLR** where the court noted that there is no exact measure as to what amounts to unreasonable delay, it must be such delay that goes beyond acceptable limits given the nature of the act to be performed. To that end, counsel submitted that the delay in filing the motion was not deliberate and therefore suffice to say that the application was brought within a reasonable time. On security, counsel cited Order 42 rule 6(2)(b) of the Civil Procedure Rules which gives the court unfettered discretion to grant such security for the due performance of a decree which counsel submitted the Respondent was ready to comply with. In the circumstances therefore, counsel argued that the Respondent had satisfied the threshold for granting of stay of execution.

40. I note that the Respondent also relied on the provisions and compliance with conditions for stay of execution pending appeal to seek orders for the lifting of the warrants of attachment and sale. However, as between a decree holder and judgment holder the Civil Procedure Rules only provide either for stay of execution pending determination of a suit between the parties under Order 22 Rule 25 of the Civil Procedure Rules; or for the withdrawal of an attachment or termination of execution under Order 22 Rules 49 and 50. In the latter case, an attachment can be terminated in the following circumstances;

(a) The decreed amount, all costs, charges, and expenses from the attachment of property are paid into the court, or

(b) Satisfaction of the decree is made through the court or certified to the court, or

(c) The decree is set aside or reversed upon application.

41. Other than the above procedure which is the one available to the Respondent herein as judgment-debtor, the only other applicable procedure for lifting warrants of attachment and sale are the objection proceedings by a third party objector is provided in Order 22 Rule 51 to Rule 54. Order 22 Rule 51 in particular provides as follows:

(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.

(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.

(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

42. It is evident that the Respondent has applied a wrong procedure in seeking to have the warrants of attachment and sale lifted, and has not demonstrated any of the grounds provided by law for such attachment to be substantively determined, since the decree that is the basis of the execution herein still remains valid and unsatisfied.

43. On the other hand, the purpose of stay of execution pending appeal proceedings was addressed in ***RWW v EKW*** **[2019] eKLR**, as follows:

"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

44. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause

order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) …

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given."

45. For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

46. The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties. In the present application, this Court has already found that the Respondent's delay in filing its applications has not been sufficiently explained, and was therefore inordinate and unreasonable. As to what substantial loss is, it was observed in **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR,** that:

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

47. Likewise, the Court of Appeal in **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike, Nrb CA Civil Application No 238 of 2005** where it was held as follows:

"The court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge see for example Section 112 of the Evidence Act Cap 80 Laws of Kenya."

48. It is notable that the judgment and decree issued herein on 14th May 2020 and 17th September 2020 respectively ordered the Respondent to unconditionally re-admit the *ex parte* Applicant to the Respondent's University. The Respondent has not demonstrated what **damages it would suffer if the order for stay is not granted, and how its appeal may be rendered nugatory in this respect.** It is notable also that the Respondent has not filed its Notice of Appeal in the present case.

49. In addition, it is not evident what security the Respondent can offer in the circumstances, that shall ensure that the *ex parte* Applicant is not denied the opportunity to enjoy the fruits of her judgment, given that the decree herein is not a money decree. With regard to security for costs, the court in ***Absalom Dova vs Tarbo Transporters [2013] eKLR*** *held as follows:*

"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation…"

50. The conditions for stay pending appeal have therefore not been satisfied by the Respondent to warrant the stay of the judgment and

decree issued herein pending appeal.

On the Taxation Ruling

51. On the issue of the propriety of taxation of the instruction fees, the *ex parte* Applicant submitted that it is trite law that a Judge will not interfere with the exercise of discretion of the Taxing Officer unless it is shown that the Taxing Officer erred in principle. Reliance was placed on the case of **R vs Kenyatta University & Anor Ex Parte Wallington Kihati Wambura (2018) eKLR** where the court held that it will not interfere with the exercise of such discretion unless it appears that the Taxing officer has not exercised his discretion judicially and has exercised it improperly.

52. According to the *ex parte* Applicant, the Respondent has not demonstrated how the taxing officer erred in principle by allowing an amount of Kshs. 500,000/- for instruction fees out of the Kshs. 1,000,000/- sought. Further, that the taxing officer has discretion to the increase the minimum of Kshs. 100,000/- allowed under the Advocates Remuneration Order, and stated and considered the principles to be applied in assessing the instruction fees including citing relevant and binding authorities if this court in her ruling. Lastly, the *ex parte* Applicant submitted that in **R vs Kenyatta University & Anor Ex Parte Wallington Kihati Wambura** *(supra),* the court dismissed a reference where a party was challenging the sum of Kshs. 1,000,000/- as instruction fees and the taxing officer had awarded Kshs. 500,000/-.

53. The Respondent submitted that the material time for filing a reference to this court as set out in Rule 11(2) of the Advocates Remuneration Orders is within fourteen (14) days of receipt of the decision of the Taxing Officer. It was submitted that via a letter dated 10th December, 2020, the Respondent gave notice of filing of a reference against the Taxing Officer's decision and reasons contained in the ruling delivered on 3rd December, 2020. The reference having been filed on 17th December, 2020 is therefore timeous and properly on record and the assertion that the reference before this court is incompetent and premature is without basis.

54. It was further submitted that a cursory reading of the above rule, it is not a requirement that the *ex parte* Applicant be served with a notice of objection to taxation by the Respondent and failure to do so in this instant is therefore not fatal to the reference. Counsel also submitted that the gravamen of this reference is that the Taxing Officer erred in principle in allowing an amount of Kshs. 500,000/- in instruction fees, did not apply her discretion reasonable in assessing the said instruction fees which are guided by Schedule 6(1)(j)(ii) of the Advocates Remuneration Order, 2014.

55. According to the Respondent, the applicable law states that the Taxing Officer, in matters seeking constitutional or prerogative orders, may grant a reasonable amount of instruction fees of not less than Kshs. 100,000/- and may increase the same after taking into consideration the nature and importance of the application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter and the time expended by the advocate. Further, that the reasons enunciated by the Taxing Officer were erroneous in principle as she went ahead to award instruction fees of Kshs. 500,000/- despite having found that the matter could not have been deemed to be overly complex.

56. Lastly, the Respondent submitted that the matter took a short time to conclude and did not require the deployment of a considerable amount of industry as it was a mirror suit with **HC JR 573 of 2017 - Republic v Kenyatta University Ex parte Losem Naomi Chepkemoi** which had earlier been decided and revolved around the same issues therefore not necessitating any exceptional dispatch, skill, research or industry to prosecute on the part of the *ex-parte* Applicant. Accordingly, it was submitted that the award of instruction fees of Kshs. 500,000/- is a misdirection and is manifestly excessive in the circumstances.

57. The procedure for challenging a taxing master's decision is provided under the Rule 11 of the Advocates Remuneration Order as follows:

> **"(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.**
>
> **(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."**
>
> ***(3)Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***
>
> ***(4) The* High Court *shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***
>
> ***(5) 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."***

58. From the foregoing, an objector to a decision of a taxing officer is required to give notice within 14 days thereof of the items objected to, and the reference is to be filed within 14 days of receipt of the reasons for the decision from the taxing master. In the present case, it is not in dispute that the Respondent filed a its reference on 17th December 2020, which was fourteen days after the delivery of the ruling on taxation on 3rd December 2020, and attached a copy of the ruling to the reference. In my view the failure to give a notice of objection was not fatal as the items that are objected to are provided in the reference.

59. It is also notable that the parties do not dispute that the taxation of the *ex parte* Applicant's Party and Party Bill of Costs dated 17th August 2020 was regulated by Schedule 6A of the Advocates (Remuneration) Order 2014. Paragraph 1(j) of the said Schedule provides as follows as regards instruction fees in constitutional petitions and prerogative orders :

> **"To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—**
>
> **(i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000**
>
> **(ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than100,000**
>
> **(iii) to present or oppose application for setting aside arbitral award- 50,000."**

60. In addition, the applicable principles as regards setting aside or varying a taxation of a bill of costs are that a Court cannot interfere with the taxing officer's decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference. These legal parameters were laid down in **First American Bank of Kenya vs Shah and Others [2002] 1 E.A. 64 at 69** by Ringera J. (as he then was) who delivered himself thus;

> **"First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle".**

61. These principles reiterate the position of the Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002) 1 EA 92,** wherein the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

62. Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (2006) e KLR** :

> **" 1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;**
>
> **2. the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;**
>
> **3. the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;**
>
> **4. so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;**
>
> **5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;**
>
> **6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;**
>
> **7. where responsibility borne by advocates is taken into account, its nature is to be specified;**
>
> **8. where novelty is taken into account, its nature is to be clarified;**
>
> **9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form."**

63. These guidelines were also applied by Odunga J. in **Nyangito & Co Advocates – Vs - Doinyo Lessos Creameries Ltd, [2014] eKLR,** and the learned Judge in addition also held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

64. I have perused the ruling by the Taxing Officer dated 3rd December 2020, and note that she correctly applied Schedule 6A1(j) of the Advocates Remuneration Order, and noted that the basic instruction fee was Kshs 100,000/=. While taxing on the item on instruction fees, the Taxing Officer after considering the applicable law, judicial authorities and principles guiding the exercise of her discretion. After noting

that the substantive application was of great importance to the Applicant and was filed in the year 2019 and concluded in the year 2020 within 1 year, the Taxing Officer found as follows:

> **"On the question of the increase of the aforesaid basic fee and this being a Party and Party Bill of Costs, I am of the view that Kshs 500,000/= is a reasonable instruction fees taking into account the time taken in this matter, scope of the work done and the nature of the dispute herein as stated above."**

65. It is my finding that the Taxing Officer did take into account the relevant considerations, and there is no reason to interfere with the exercise of her discretion solely on the basis of quantum of the instruction fees, as the sum is not manifestly excessive in light of the reasons given by the Taxing Officer for increasing the basic fee. The prayer that this Court be pleased to adjust the figures and reassess the fee due to the Advocate as instruction fees therefore also falls by the way side. In any event, it was in this respect held as follows in **Republic vs Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarket Limited & 2 Others [2018] eKLR**:

> **"... It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached.."**

66. In the premises I find that the decision of the taxing master in awarding instruction fees of Kshs 500,000/= was not made in error of the law, and there is no justification for this Court to interfere with the exercise of the Taxing Officer's discretion in this regard.

The Disposition

67. In light of the foregoing findings, the Respondent's Chamber Summons and Notice of Motion both dated 17th December 2020, and the *ex parte* Applicant's Notice of Motion dated 13th January 2021 are all not merited. I accordingly order as follows:

> **I. The Respondent's Chamber Summons and Notice of Motion both dated 17th December 2020 are hereby dismissed with costs to the *ex parte* Applicant.**
>
> **II. The orders of temporary stay of execution granted herein on 21st December 2020 are accordingly vacated.**
>
> **III. The *ex parte* Applicant's application dated 13th January 2021 is dismissed with no order as to costs, as it arose from the directions given by this Court**.

68. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this ruling was delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondent's Advocates on record.

P. NYAMWEYA

JUDGE