



Mombasa Khushi Motors Co Ltd & another v Waswa & another (Suing Through a Son and Brother Respectively and as Legal Representatives of the Estate of Late Alice Nambagala) (Miscellaneous Reference Application 76 of 2022) [2023] KEHC 18149 (KLR) (15 February 2023) (Ruling)

Neutral citation: [2023] KEHC 18149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS REFERENCE APPLICATION 76 OF 2022
REA OUGO, J
FEBRUARY 15, 2023**

BETWEEN

**MOMBASA KHUSHI MOTORS CO LTD 1ST APPLICANT
ROBERT YATOR 2ND APPLICANT**

AND

**BONFACIO NDOMBI WASWA 1ST RESPONDENT
PATRICK MUKHEMBI WANYONYI 2ND RESPONDENT
SUING THROUGH A SON AND BROTHER RESPECTIVELY AND AS LEGAL
REPRESENTATIVES OF THE ESTATE OF LATE ALICE NAMBAGALA**

RULING

1. This ruling relates to the Chamber Summons dated October 3, 2022 seeking the following orders:
 1. Spent
 2. That pending the hearing and determination of this application, this Honourable Court be pleased to order stay of execution of the Costs in Bungoma CMCC No 29 of 2017 Patrick Mukhembi Wanyonyi & Bonfacio Ndombi Waswa (suing as son and brother respectively and as legal representatives of the estate of late Alice Nambagala (Deceased) v Mombasa Khushi Motors Co Ltd & Robert Yator, pending hearing and determination of this application.
 3. That the applicant be granted leave to file an objection and a Taxation reference to this Honourable Court against the Ruling of the executive officer in the certificate of costs dated June 28, 2022.



4. That the Objection to the Taxing Officer and the Application for reference annexed hereto be deemed duly filed and served upon payment of requisite fees.
5. That costs of this Application be borne by the Respondent.
2. The application is supported by the grounds on the face of the application and the affidavit sworn by Everline Ogato. It was averred that the judgment in Bungoma CMCC No 29 of 2017 was delivered on September 30, 2022 for a sum of Kshs 179,652/- and due to an arithmetic error it was reviewed on December 7, 2021 it was reduced to Kshs 136,157/- and the same was settled by the Applicants insurance Directline Assurance Company. The respondent filed a bill of costs dated October 9, 2022 and the same was slated for assessment on February 15, 2022 and on the said date, the court directed that the matter be canvassed by way of written submissions. The matter was to be mentioned on April 5, 2022. However, on April 5, 2022 the court directed that the file be returned to the registry for assessment and therefore assessment was not done. The respondent did not also serve the applicant with an assessment notice or ruling and the applicant came to know of the ruling on the bill of cost on October 1, 2022 when the respondent served them with a decree and certificate of costs dated June 28, 2022.
3. The applicant contends that they are unable to file notice of objection and reference within 14 days specified under rule 11 (1) and (2) of the [Advocates Remuneration Order 2014](#) for reasons that they were not served with the assessment or ruling notice. They also claim that the executive officer who assessed the bill of costs is unqualified pursuant to section 27 and paragraph 47 of the Advocates Remuneration Order. It was also averred that the costs assessed were manifestly excessive and contrary to the law and principle and the same should be subjected to 50% partial contribution.
4. The application occasioned a response from the respondents who filed a statement of grounds of opposition and a replying affidavit on October 17, 2022. The respondent claimed that the bill of costs was assessed by the learned Hon Magistrate as confirmed in the certificate of costs. They also challenged the jurisdiction of this court to entertain a reference from an assessment of bill of costs by a magistrate court.
5. The respondent averred that the bill of costs was filed on October 13, 2021 and served upon the applicants. The applicants were served with a notice for taxation and that at no time did they file an objection to any of the items in the Bill of costs before the magistrate's court and therefore they did not oppose the same. The applicants were notified at all stages and when the decree was drawn the same was served upon the applicants.
6. In a rejoinder, the applicants filed a further affidavit and averred that this court has jurisdiction pursuant to Paragraph 11 (1) of the Advocates Remuneration Order. They explained that they filed submissions in opposition to the respondent's bill of costs in Bungoma CMCC No 29 of 2017.
7. The application was dispensed by way of written submissions. The only issues for determination is whether this court should exercise its discretion to extend the time for filing of a reference under the Advocates' Remuneration Order, if so whether or not execution should be stayed.
8. The applicants submitted that they were not served with the assessment or ruling notice. They only got to know of the bill of costs when they were served on October 1, 2022 via email. The respondent on the other hand submitted that the applicant were served with a notice of taxation and were notified at all stages of the taxation. The applicants filed their submissions in opposition to the bill of costs and were aware of the position of the taxation. The respondent submitted that they stand to suffer irreparable harm if stay of execution is granted.



9. The provisions that govern the extension of time for filing of a reference is contained in Rule 11 of the Advocates Remuneration Order which provides as follows:

11. Objection to decision on taxation and appeal to Court of Appeal

- (1) 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.
- (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 subsection (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) 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.

10. The power to enlarge time is one that is discretionary. The principles to consider when dealing with an application to extend time was discussed in *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others* [2015] eKLR where the Supreme Court stated:

' As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:

'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:

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 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. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents, if 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'.
11. It is not in dispute that the 14 days in which the applicants were required to have filed an objection to the decision of taxation have lapsed. The applicants were served with taxation notice dated January 13, 2022 which was to the effect that assessment of the bill of costs would be done on February 15, 2022. The parties were then directed to file submissions and the applicants complied. However when the matter came before court on April 5, 2022, the taxing master directed that the file be returned back to the registry. The applicants after April 5, 2022 did not receive any further notice on the matter.
12. The applicants only came to know of the certificate of cost dated June 28, 2022 via an email from the respondent that was sent to them on October 1, 2022. Upon the receipt of the email, the applicants wrote to the executive officer seeking to be supplied with reasons that informed the ruling on the taxation. The reasons for the decision of the taxing master were sought after the 14 days from the date the decision was made. On October 3, 2022 the applicants filed this instant application and it fair to say that the applicants acted with haste when they realised that there was a ruling entered on bill of costs in filing this instant application. I find that although there was delay, the same has been sufficiently explained as the bill of costs was not assessed when it came up before the taxing master, who made directions that the file be returned to the registry. There were no further notices furnished to the applicants concerning the bill of costs and they were not aware of the decision of the taxing master at the time it was given. Therefore, I am satisfied that the applicants have provided sufficient reasons for extension of time to file a Reference under rule 11 of the Advocates Remuneration Order.
13. Should this court therefore grant an order of stay of execution as sought in the application? I have carefully considered the prayer seeking stay of execution as worded in the application and must come to the conclusion that the prayer sought is spent.
14. In the end, I make the following orders:
- a. This court in exercise of its discretion grants leave to the applicants to file an objection to the decision of the taxing master.
 - b. The Applicants to pay filing fees and serve the reference within thirty (30) days from the date hereof.
 - c. Each party to bear its costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF FEBRUARY 2023

R.E. OUGO

JUDGE

In the presence of:

For the Applicant – Miss Ogato

For the Respondent: Absent

Wilkister: C/A

