



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. APPL. NO. 11 OF 2021

MAGDALENA ALPHONCE CHEPOSOWOR.....APPLICANT

VERSUS

CHEPOSUPKO LONYARENG.....1ST RESPONDENT

DANIEL LONYARENG.....2ND RESPONDENT

JACOB LONYARENG.....3RD RESPONDENT

KANG'OLE SIMON LONYARENG.....4TH RESPONDENT

JONATHAN LONYARENG.....5TH RESPONDENT

PTIYOS LONYARENG.....6TH RESPONDENT

RULING

The Application

1. The Applicant herein, **Magdalena Alphonse Cheposowor**, came to this Court vide a Notice of Motion before this honourable court dated 17/6/2021 and filed on the 5/7/2021. In the Motion she sought the following orders, that:

(1) ...spent

(2) ...spent

(3) This Honourable court be pleased to enlarge time to allow the applicant to file the reference herein out of time

(4) This Honourable court be pleased to issue an order of stay of the order/ruling of the Honourable court delivered on 13/4/2021 pending the hearing and determination of the reference.

(5) The honourable court be pleased to order the defendant's bill of costs dated 8/10/2020 taxed after considering the several contested items.

(6) The costs of the application be provided for.

2. The Application is supported by the Affidavit of **Ms. Fancy Chebet Ngetich** - learned counsel for the Applicant. It is also grounded on a number of points stated on the face of the Application. The grounds are that the Plaintiff's counsel was served with the Defendant's bill of costs, she protested about the date but the taxation was done *ex-parte*. Counsel also relied on the ground that the Applicant was to be allowed (sic) to oppose several items to enable the court to arrive at the right decision and by not being allowed to do so, the bill of costs was taxed excessively. She also stated that both the nature of the case and value of the suit land did not warrant that high sum. Hence she stated that the respondents shall not suffer in any way if the application is granted.

3. In her supporting affidavit sworn on 17/6/2021, learned counsel **Chebet Fancy Ngetich**, admits to service of the hearing taxation notice which she received under protest. She deponed that the protest was that she had other prefixed matters elsewhere on that date. She swore that some time later, she visited the civil registry and learnt that the bill had been taxed and a ruling delivered on 13/4/2021 allowing it at **Kshs. 2,617,800/=**. After that, on the 20/4/2021 she wrote a letter which received in court on 22/4/2021, asking the taxing master to supply her with

the reasons for the taxation. On 9/6/2021 the applicant informed her that she had been served with a Notice to show cause why execution should not issue. The same to be heard on 22/6/2021. She was of the view that the bill was taxed at an excessive sum considering the value of the suit land. She deponed that there are various contested items in the bill which need to be considered hence her client should, in the interest of justice, be heard. She was apprehensive that her client faces committal to civil jail if the orders sought are not granted.

4. The application was strongly opposed through a replying affidavit filed by the Respondents' leaned counsel, **Peter Kiarie Ndarwa**. It was sworn on 5/7/2021. He deponed that the applicant's counsel did not raise any issue when the bill was taxed yet she had all the time to do so. He insisted that counsel was served with the taxation for two occasions, namely, 27/1/2021 and 16/3/2021 but on both, she received the notices under protest. His view was that the court was not obliged to adjourn a matter for the reason that notice was received under protest. He stated that the applicant ought to have filed submissions to in opposition to the bill, contesting the specific items but she never did so. He deponed further that on the two dates when the bill was for taxation the applicant was not represented. He informed the applicant's counsel that the bill had been taxed and a ruling delivered. It was after that the applicant's counsel served the Respondent's counsel with the letter delivered on 22/4/2021. He then deponed that that the applicant's counsel seeks for extension of time within which to file reference out of time whereas time had not run out. He then stated that the application offends **Order 11 (1) and (2)** of the **Advocates Remuneration Order** and that it was a delay tactic. His averment was that his clients being successful are entitled to the fruits judgment and granting stay would denying them the same. He then stated that the applicant was indolent and equity aids only the vigilant.

5. In a rejoinder, the Applicants' counsel filed a further affidavit sworn on 26/7/2021. She deponed that she was only aware of the matter being for ruling on the 20/4/2021 but not 13/4/2020. She repeated her statement of applying to the Deputy Registrar for the reasons of the ruling but these have never been availed by the taxing master to enable her file reference. She said she had made several follow ups at the registry to no avail. She averred that a reference cannot be filed in the absence of a ruling of the reasons for taxation and that any delay was not intentional. To her, the stipulated period within which to file reference is 14 days from the date of the ruling and that time had since lapsed hence the need for extension. She denied the allegations of delay tactics and repeated the idea of the taxed sum being exorbitant and that if left as it is, it would cause hardship of the Applicant who is from a humble background.

Submissions

6. This honourable court directed that the application be disposed by way of written submissions which the parties have filed. The applicant filed theirs on 26/7/2021 and the respondents on 27/7/2021.

Analysis and determination

7. This court has carefully considered the application, the affidavits in support and in opposition together with the further affidavit, the parties' submissions as well as the law and find that the pertinent issues that fall for determination herein are:

(a) Whether or not extension of time to file a reference should be issued?

(b) Whether or not execution of the ruling dated 13/4/2021 should be stayed?

(c) What orders should issue?

8. I analyze the issues hereunder sequentially as below:

(a) Whether or not extension of time to file a reference should be issued?

9. The procedure of filing a reference to oppose a taxed bill of costs is set out in **Paragraph 11 (1) and (2)** of the Advocates Remuneration Order. It stipulates that:

“(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.”

10. From the provisions of the law cited above it is evident that a party to who is aggrieved by the decision of a taxing officer and wishes to lodge an objection to it is duty bound to give notice in writing to the taxing master. He should do so within 14 days of the decision of the taxing master. The notice should consist of what I would call an itemization of the items he or she objects to. That means he should list the specific items he has an issue with. Then the taxing master shall give him or her the reasons for the taxation. Thereafter, the aggrieved party may, within fourteen days of upon receipt of the reasons from the taxing officer, apply to a judge setting out the grounds of the objection. It means that a reference is to be filed before the judge after the reasons for the taxation have been given. Before then, there is no reference that can lie to the judge. This is because the judge shall have nothing to fault the taxing master on or approve him of.

11. In the case at hand, ruling on the bill of costs was delivered on the 13/4/2021. The applicants' counsel wrote a letter dated 20/4/2021 requesting the taxing officer to supply her with the reasons for the ruling to enable her file a reference. She submits that she has never been supplied with any reasons from the said date to enable her apply. In essence, the applicant's counsel should not have filed the reference before being supplied with the reasons by the taxing officer as required by **Paragraph 11 (1) and (2)** of the **Advocates Remuneration Order**. The issue has not crystallized in order for it to move to this Court.

12. Based on the finding, and admission by both counsel in their affidavits that the taxing master has not given reasons for his/her decision of 13/04/2021, this court is of the view then that the second issue as to **whether or this court has the discretion to extend time for filing of reference** is neither here nor there. The Court cannot extend that which has not even began or existed.

(b) Whether or not execution of the ruling dated 13/4/2021 should be stayed?

13. The principles governing stay of a court's order or decree are now well settled. The principles set out in **Order 42 (6)** of the **Civil Procedure Rules** shall apply to the present case. In the case of **County Government of Tana River vs Miller & Company Advocates (2012) eKLR (supra)** the court held that the guiding principles for determining whether or not to grant stay orders are:-

- “i. Where special circumstances of the case so requires**
- ii. There is proof of substantial loss that may otherwise result**
- iii. There is substantial question of law to be adjudicated upon by the appellant court**
- iv. Where if the stay is not granted, the appeal is successful, would be rendered nugatory.”**

14. The applicant submits that she will not only suffer substantial loss but also will be condemned to pay the sum of **Kshs. 2,617, 800/=** being the bill taxed whereas she comes from a humble background. A humble background of a party will not be used to deny the other the fruits of his or her judgment. This court takes into consideration the interests of both parties in balancing the interests of an aggrieved party whose appeal would be rendered nugatory if the appeal succeeds and that of a successful litigant from being barred from enjoying the fruits of judgment. But what is of importance herein is whether or not the matter has reached the stage it can move from the taxing master's hands to the judge, which level would be appellate. It has not.

15. In the case of **Governors Baloon Safari Limited vs Skyship Company Limited & Another (2020) eKLR** the court held that:

“.....having found that the 2nd defendant is entitled to orders for extension of time within which to file reference, it logically follows that the execution for costs that are the subject of the Objection and Reference should be stayed pending the outcome of the Reference.”

16. In that case, a stay of execution was given because the party who moved the Court at that level had done so by way of a reference which had been admitted out of time or for which extension had been sought. In the present case, reasons for the taxation have not been given by the taxing master. It therefore is this Court's view that even any execution that may have ensued as a result of the taxation was premature. A party, who has sought to reasons for the decision of the taxing master should be given a chance to be heard, as the Rules above cited require. To move to execute before that would amount to shutting the party out of the process of fair trial, which includes exhaustion of all remedies available to him or her within the law. For this reason, a stay of execution pending the issuance of the reasons for the taxation and exhaustion of the remedies available at that lower court level commend to me as the best order in the circumstances.

(c) What Orders should issue?

17. For the foregoing reasons, the Application dated 17/6/2021 is allowed in part. **Prayer 3** is declined because it is premature. **Prayers 4** and **5** are allowed only in part, as modified as follows:

(a) An order is hereby issued directing the Deputy Registrar- Kitale High Court to furnish the Applicant with reasons for the ruling dated 13/4/2021 within 14 days from the date of this ruling or within 14 days of such time as the Taxing Master shall within the station, if away at the time of the delivery of this ruling.

(b) The execution of the bill of costs dated 13/4/2021 is hereby stayed pending the giving of reasons on the decision of the taxing master and the 14 day's window of the giving of those reasons or such longer period as the taxing master may give upon issuance of her reasons.

(3) Costs shall abide by the intended reference.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 18TH DAY OF NOVEMBER, 2021.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

NB: A copy of this Ruling be sent by the Registry immediately to the Taxing Master for purposes of implementation of the order of this Court, given the timelines in them.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.