



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**MISC.(REFERENCE) APPL. NO. 38 OF 2021**  
**IN THE MATTER OF THE ADVOCATES ACT**

**AND**

**IN THE MATTER OF THE ADVOCATE-CLIENT BILL OF COSTS**  
**IN THE MATTER OF REFERENCE FROM THE RULING OF**  
**THE TAXING OFFICER OF THE HIGH COURT AT MOMBASA**

**BETWEEN**

**COUNTY GOVERNMENT OF TANA RIVER.....APPLICANT**

**VERSUS**

**MILLER AND COMPANY ADVOCATES .....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Miller & Company Advocates for the Respondent**

**John B & Co. Advocates for the Applicant**

**R U L I N G**

This is an application for the discretion of the Court to be exercised by way of a chamber summons dated 29<sup>th</sup> April, 2021 seeking the following orders; -

- 1. That the Applicant be granted leave to file an Objection and a Taxation Reference to this Honorable Court against the Ruling of the Honorable Court's Taxing Officer delivered on 14<sup>th</sup> April, 2021.***
- 2. That the leave granted in prayer (1) above do operate as stay of execution of the Ruling of the Taxing Officer aforesaid and any other consequential proceedings.***
- 3. That the Objection to the Taxing Officer and the Application for Reference annexed hereto be deemed as duly filed and served upon payment of requisite fees.***
- 4. That the costs of this application be in the cause.***

The Chamber summons is supported by the Affidavit of the applicant **Rachel M.Oruta** and the grounds on the face of the summons. In brief it deposes as follows; -

- a) On 14<sup>th</sup> April, 2021, the Taxing Officer delivered her Ruling wherein the Bill of Costs was taxed at Kshs. 3,578,936.25/=.***
- b) At the time the Ruling in respect of the Bill of Costs was being delivered, the Counsel with due conduct of this matter was indisposed and had been on official sick leave from the 7<sup>th</sup> April, 2021 to 28<sup>th</sup> April, 2021. She was therefore not able to file the***

reference within 14 days as specified under Paragraph 11(1) of the Advocates Remuneration Order, 2014.

- c) *That the Counsel with due conduct of this matter has recently resumed her duties, which unfortunately, is after the expiration of the time limits set out in the foregoing provisions of the law.*
- d) *There is a delay of only one day in filing of the reference herewith, which delay is not inordinate, and in any case the delay has been genuinely explained.*
- e) *It is a trite principle of the law that the mistakes of an Advocate should not be visited upon an innocent litigant, which in this case, such delay was caused by circumstances beyond the control of the Counsel that has due conduct of this matter.*
- f) *The Applicant wishes to file a Reference against the decision of the Taxing Officer to tax the Bill of Costs at Kshs. 3,578,936.25/=. This is because the amount in item 1 of the Bill of Costs, which was taxed and allowed at Kshs. 1,500,000/=, is manifestly excessive and contrary to the law and principle and should thus be reduced.*

On behalf of the Respondent Ann Kaguri filed a replying affidavit dated 11<sup>th</sup> June, 2021 opposing the application. The answering affidavit alleges as follows in brief; -

- a) *That the application is misconceived, bad in law and tainted with false statements and meant to deny the Respondent fair justice as the legal fees for representing the Applicant n Malindi H.C.Elc No. 55 of 2014 Abdullahi Haret Maalim & 3 Others V The County Government of Tana River and had the suit dismissed in favour of the Applicant on the 11<sup>th</sup> day of October, 2018.*
- b) *That I know that after various calls and reminders by the Respondent to the Applicant to pay their legal fees for services rendered, the Applicant refused to pay and as such the Respondent filed its bill of costs dated 11<sup>th</sup> November, 2020.*
- c) *That I know that parties submitted on the Bill of costs and on 14<sup>th</sup> April, 2021, the taxing master rightfully taxed the bill at Kshs. 3,578,936.25/=.*
- d) *That I do recall that we wrote to the Applicant's Counsel vide our letter dated 7<sup>th</sup> May, 2021, to forward the Certificate of costs and urged them to prevail their client.*
- e) *That in the foregoing I wish to categorically refute the averment contained in paragraphs 6,7,8 and 9 of the supporting affidavit by Racheal M. Oruta and state that the same is mere afterthought and in any case, the deponent has not averred and or demonstrated that she has instruction from the Applicant to file a reference on the taxed bill.*
- f) *That in response to the contents of paragraphs 10 and 11 of the supporting affidavit by Rachael M. Oruta the Applicant has not given notice in writing to the taxing officer of the items of taxation to which it objects and the taxing officer has not issued the reasons for her decision and as such the application as drafted by the Applicant to be granted leave to file objection and a taxation reference is premature. We shall rely on Rule 11 of the Advocates(Remuneration) Order.*
- g) *That further more your honour, the Taxing matters applicated herself to the provision of schedule 6A of the Advocates Remuneration Order 2014 and equally considered the nature of the prayers and the fact that the suit involved six (6) firms. Further that eviction orders were sought in the matter and ownership of the land was in dispute. The taxing master rightly held that given the nature of the suit and weight and magnitude of the matter that were being sought, it was just that the court exercises it discretion to increase the basic fee to Kshs. 1,500,000/= on instruction fees and taxed off 4,500,000/=.*

In addition to the affidavit evidence the Court also had the advantage of the oral submissions alluded to by both counsels in this respect.

#### **Determination**

Having considered the evidence in this matter and the oral submissions of both counsels, the issues for the Court's determination are; -

1. *Whether or not extension of time under paragraph 11 (1) and (2) and 4 of the Advocates Remuneration Order should be granted.*
2. *Whether or not execution should be stayed.*

The Court enjoys wide discretionary powers under the Civil Procedure Act and Rules more specifically as stipulated in section 1 (A), 1(B),3(A), section 79 (G) on overriding objective, the inherent jurisdiction and on account of sufficient cause to exercise jurisdiction in matters of this nature for the interest of justice. It is noted that paragraph 11 (1) (2) of the Advocates Remuneration Order do not speak to the relevant factors that the Court should consider when exercising its discretion on whether or not an extension of time should be granted. Guidance must therefore be solved from case law in **Paul Wanjohi Mathenge V Duncan Gichane Mathenge[2013]Eklr** the Court of Appeal while referring to other authorities observed;-

*“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in 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 and*

interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi V Charles Gichina Mwangi – Civil Application No. Nai 26 of 2004*, this Court held; -

**“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi V Kenya Airways Ltd [2003] KLR 486* in which this Court stated;-Over the years, the Court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi – Civil Application No Nai 255 of 1997(unreported)*, the Court expressed itself thus; -**

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reasons for delay; thirdly(possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”**

As stated in the above cases the length of the delay and reasons for non-compliance of the time lines are important factors to influence the exercise of discretion of the Court. In calculating the length of delay in making the application for an extension of time the period will start running from 14<sup>th</sup> day of April, 2021 when the bill of cost was taxed by the taxing master to the 7<sup>th</sup> day of May, 2021 which time the aggrieved applicant lodged the chambers summons for extension of time. The delay in filing the application was on or about an overreach of 8 days. In seeking to balance the interest of the respective parties the failure to comply was not inordinate. In addition, the applicant in his affidavit has explained the reasons which let time to lapse. That hurdle has therefore been satisfied as a sufficient cause for this Court to extend time in favor of the applicant to file a Reference under paragraph 11 (1) (2) of the Advocates Remuneration Order.

#### **Whether or not execution should be stayed.**

The Statutory anchorage of the discretion to consider stay of execution rests on order 42 rule 6 (1) of the Civil Procedure Rules. It is on the basis that the Reference is a path way for an aggrieved party from the Certificate of Cost of the taxing master it may be argued correctly that the principles shall apply *Mutatis Mutandis*.

The Court has considered numerous cases laid down for the exercise of judicial discretion. The guiding principles for determining whether or not to stay execution 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. See for example;- *Housing Finance Company of Kenya V Sharok Kher Mohamed Ali Hirji & another[2015]Eklr, Reliance Bank Ltd(In liquidation) V Noriaka Investments Ltd, Rep V kenya Anti-Corruption Commission & 2 Others[2009]KLR 31,Carter & Sons Ltd V Deposit Protection Fund Board & 2 others, Edward Kamau & another V Hannah Mukui Gichuki & another[2015]eKLR.***

The Court in *RWW V EKW [2019]* held that; -

**“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 judgement. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. 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.”**

That being the general principles. The question is whether the subject matter of the reference if successful will be rendered nugatory. It has also been stated that the applicant is likely to suffer substantial loss in the event the respondent is allowed to proceed with entry of judgment and subsequent execution.

For the reasons in the affidavit the Court accepts the submissions for counsel for the applicant which discloses material averments necessary for the court to exercise discretion to grant a stay of execution of the Certificate of Cost pending the determination of the reference.

#### **Decision**

The Chambers Summons dated 29<sup>th</sup> April, 2021 be and is hereby allowed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 1<sup>ST</sup> DAY OF JULY, 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of: -**

M/s Anne Kaguri for the respondent

([akaguri@milleradvocates.com](mailto:akaguri@milleradvocates.com),[info@jblaw.co.ke](mailto:info@jblaw.co.ke))