



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

SUCC CAUSE NO. 5 OF 2019

(FORMERLY MACHAKOS HC SUCCESSION CAUSE NO. 78 OF 1992)

IN THE MATTER OF THE ESTATE OF MASILIA MWAVU (DECEASED)

ANGELINA MUKII MWAVU.....APPLICANT

-VERSUS-

PETRONILLA WANZA.....1ST RESPONDENT

JACINTA MUTIOND RESPONDENT

SIMON KYALO 3RD RESPONDENT

RULING

1. Before me is an application dated 29/03/2021 filed with a certificate of urgency dated 13/04/2021, but filed on 15th April 2021 brought by Angelina Mukii Mwavu through counsel Kalinga & Company.

2. The application was filed under paragraph 11 (1), (2) and (5) of the Advocates Remuneration Order, and section 1A, 1B and 3A of the Civil Procedure Act (Cap.21) and seeks the following orders –

1) That the matter be certified urgent and be given a hearing date on priority basis.

2) That the honourable court be pleased to order that there be a stay of execution of the certificate of taxation herein pending hearing and determination of the reference.

3) That the honourable court be pleased to enlarge time within which to file a reference against the decision of the Taxing Officer delivered on 5th January 2021.

4) That the reference filed herein be deemed as properly filed though filed out of time.

5) That the costs of the reference herein be awarded to the applicants.

3. The application has grounds on the face of the Chamber Summons that the bill of costs had already been taxed and a ruling delivered electronically on 05/11/2021 at KShs.775,995; that thereafter the applicant wrote to the Taxing Officer on 21/01/2021 objecting to the taxation and seeking an explanation as the bill was for a simple application to be enjoined as a party; that the e-mail letter seeking explanation was not placed before the Taxing Officer until 18/02/2021 when the applicant, in a follow up, learnt that same had not been printed; and that in a further follow up on 10/3/2021, the applicant found that the Taxing Officer had made comments in response to the letter, but which comments had not been communicated to the advocate for the applicant.

4. The application was filed with a supporting affidavit sworn on 29/03/2021 by Judith Nzula Mbindyo advocate which supports the grounds of the application.

5. The application is opposed through a replying affidavit sworn by EDWIN KIRUJA NJAGI advocate on 07/05/2021 for the respondents, in which it was deponed that the bill of costs had been taxed with the full participation of the parties, and that the advocates for the applicant only asked for reasons for the taxation 42 days later on 18/02/2021; and that the Taxing Officer delivered her prompt reasons, only for the applicant to come 4 months later with this application; and that the application was brought in bad faith.

6. The respondents counsel also filed grounds of opposition claiming that the application was vexatious, and brought in bad faith.
7. Counsel on both parties relied on documents filed and neither filed written submissions nor made oral submissions.
8. This is an application for extension of time to file a reference to challenge the taxation, and for stay of execution of the decision of the Taxing Officer, pending determination of the reference.
9. I note that the respondent's counsel has filed both a replying affidavit and grounds of opposition to the application. In my view, he should have relied on only one response not both. He cannot rely on the replying affidavit as well as the grounds of opposition at the same time.
10. Be that as it may, I am of the view that the request of extension of time is justified to file a reference. The first reason is that the ruling was delivered electronically, due to the Covid-19 situation. Secondly, though counsel for the respondent filed an affidavit deposing to what happened after the ruling, neither the Taxing Officer nor any officer from the court filed an affidavit, nor have I seen an official communication from the Judiciary regarding the alleged chronicle for events.
11. Thus, the averments of the respondent in the replying affidavit on what the Taxing Officer did after the taxation cannot be verified.
12. I will thus enlarge time to file a reference.
13. With regard to stay of execution, in my view, the provisions of Order 42 Rule 6 of the Civil Procedure Rules apply to the present situation. The matter appears to be an issue of party and party costs, and the written decision of the Taxing Officer dated 2/12/2020 annexed to the supporting affidavit to the application is very short. I have also not been availed the reasons for the taxation communicated afterwards by the Taxing Officer. For that reason, I hold that, if stay is not granted as requested, the applicant is likely to suffer substantial loss if the decision of the Taxing Officer is executed.
14. I thus allow the application and order as follows –

1) I grant prayer 2 of the application.

2) I hereby enlarge time for the applicant to file a reference, which will be filed within 14 days from today.

3) Costs will be in the course.

**DELIVERED, SIGNED & DATED THIS 7TH DAY OF OCTOBER 2021, IN OPEN COURT AT
MAKUENI**

GEORGE DULU

JUDGE