REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

MISC. P & A APPLICATION NO. 1 OF 2019

IN THE MATTER OF THE ESTATE OF MUTETEMA ITUMO

JOHN MUIA KIMENYE

SIMEON KIMONDIU NGALYUKA & 3 OTHERS.......APPLICANTS

VERSUS

KING'OO MUTETEMA..1st RESPONDENT

LABAN MASAI..2nd RESPONDENT

RULING

1. The application for determination is dated 15/05/2019 and was filed under certificate of urgency. It is brought under Sections 3A of the Civil Procedure Act, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010, paragraph 11(1), (4) & (5) of the Advocates *(Remuneration)* Order 2009 and all other enabling provisions of the law. It seeks.

> **a) THAT** there be a stay of execution of the certificate of costs dated 20th November 2018 pending the hearing and determination of this application.
>
> **b) THAT** there be a stay of execution of the certificate of costs dated 20th November 2018 pending the hearing and determination of the intended reference.
>
> **c) THAT** this court be pleased to enlarge the time within which to file a reference against the decision of the taxing master delivered on 15th November 2018.
>
> **d) That,** the Applicant herein do file and serve the reference within 14 days of this order or at any time as the court deems fit subject to the reasons and certified court proceedings in respect to the Respondent's party and party Bill of costs being provided by the taxing master.
>
> **e) That,** costs be in the cause.

2. The application is supported by the grounds on the face of it, the supporting affidavit of John Muia Kimenye and Simeon Kimondiu Ngalukya sworn on 15/05/2019 and their further affidavit sworn on 30/05/2019.

3. The principal grounds are that;

> ***a) The taxation proceeded ex parte despite receipt of the taxation notice under protest.***
>
> ***b) The bill of costs was never served on the Applicants' advocates on record.***
>
> ***c) The trial court had no jurisdiction to tax the bill of costs on instruction fees which was set at Kshs.200,000,000/= and should have based its assessment on the figure quoted in the petition for grant i.e Kshs.1,000,000/=.***
>
> ***d) The application to set aside the certificate of costs was dismissed by the trial court.***
>
> ***e) The bill of costs was taxed at a colossal sum of Kshs.1,778,825/= which is manifestly excessive.***

4. The application is opposed through a replying affidavit sworn on 20/02/2019 and a supplementary affidavit sworn on 20/05/2019 by the 2nd Respondent. He deposes that the application is a replica of the one which was dismissed by the trial court and that it has no legal bearing as some of the objectors have conceded and paid the costs. He deposes that the trial court embarked on taxation after ascertaining that service had been effected and that a notice of taxation, which the Applicant has acknowledged, is never served without the bill of costs. He has also deposed that the taxing master followed and adhered to the rules of taxation as provided in the Advocates Remuneration Order, 2009.

5. In rejoinder, the Applicants state that their only grievance is that taxation was done in their absence hence their prayer that they be granted leave to file reference out of time. They depose that the bill of costs was taxed as prayed and reasons were offered. They also depose that no explanation was offered as to why the certificate of taxation was issued 5 days after taxation. According to them, the reason for so doing was to defeat their right to file a notice of objection within 14 days.

6. The parties agreed to canvass the application by way of written submissions which they did.

The Applicants' submissions

7. The Applicant has identified 3 issues for determination as follows;

a) Whether this honorable court has jurisdiction to enlarge time.

b) Whether the honourable court has the power to order stay.

c) Whether the Applicants have met the threshold for the honorable court to enlarge time to file a reference.

8. The Applicants have cited the provisions of paragraph 11(4) and (5) of the Advocates Remuneration Order, 2009 to answer the first issue in the affirmative. They proceed to add note that the power to enlarge time is discretionary and should be exercised judiciously after weighing the reasons for not filing the reference in time. They cite the case of **John Kiplangat Barbaret & 8 others –vs- Isaiah Kiplangat Arap Cheluget (2011) eKLR** where the Court of Appeal stated that;

> *"It is now settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant extension of time are first the length of the delay, secondly, the reason for the delay, thirdly 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."*

9. The Applicants submit that the taxation proceeded *ex parte* and that they were last contacted by the Respondent's lawyer on 02/07/2018 when he served a taxation notice intimating that taxation would proceed on 06/07/2018. They contend that subsequent taxation notices, which were relied on by the process server, were never served. Further, the submit that parties should not be condemned unheard and cite the case of **Patel –vs E.A Cargo Handling Services Ltd (1974) E.A 75** where the Court stated;

> *"The discretion to set aside is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is notdesigned to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."*

10. They submit that their attempts to seek audience with the taxing master were thwarted when their application to set aside the certificate of costs and ruling was dismissed. They contend that it would not have been necessary to file the reference if their application had succeeded. It's their case that the delay was not so great as to occasion any injustice to the Respondent. Further, that the question of delay should be looked at objectively in the sense that the court should consider the steps that an Applicant took to mitigate the delay. They submit that the reason for delay in this case was the attempt to seek audience with the trial court.

11. They contend that the taxed amount of Kshs.1,778,825/= related to an application and not main suit, and the same is manifestly excessive and meant to make justice expensive.

12. It's their contention that the principles which guide the taxation process were not followed in that, the trial magistrate being a Senior Resident Magistrate handled a matter whose value exceeded her pecuniary jurisdiction of 20 million shillings. Secondly, they submit that the value of the subject matter should be deduced from the pleadings and rely on **Joreth Ltd –vs- Kigano & Associate (2002) eKLR** where the Court of Appeal stated;

> *"We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any discretion by the trial judge and all other relevant circumstances."*

13. They also rely on **Priyit Shah & Anor –vs- Myenda Devchand Meghji (2019)** where the Court stated;

> *"In conclusion, I find that the taxing master made the correct finding of fact that the amount of the value of the subject matter ought to be discerned from the pleadings (affidavit of Priyat Shah) as 78,000.00/= so that after making this finding, she ought to have used this figure to determine the fees chargeable."*

14. They submit that a taxing master should only deviate when it is impossible to deduce the value from the pleadings and that for a person to deserve instruction fees which are above the amount set in the Advocates Remuneration Order (ARO), it must be shown that he undertook extraordinary research.

15. On the second issue, they submit that this court has unfettered jurisdiction to grant stay regardless of whether or not such an order had been sought from the lower court. They rely on **Machakos Civil Appeal No. 49,50 & 51 of 2018: Muli & 2 Others –vs- Hogla Mkando Omari & Anor** where the Court stated ;

> "*For the purpose of this case, the operational words are as underlined above. Thus whether an application for stay pending appeal has been allowed or rejected in the lower court, the High court "shall be at liberty" to "consider" an application for stay of execution made to it and to make any orders it deems fit. The High court in that capacity exercises what is termed as original jurisdiction."*

16. They also submit that taxation of costs is part of the execution process and since they have already been issued with a certificate of taxation, nothing will stop the Respondent from executing. They rely on **Labh Singh Harman Ltd –vs- AG & 2 others (2016) eKLR** where the Court stated;

> "*I am unable to agree with the submission by counsel for the Respondent that the court has no power to order stay in cases of taxation for costs as exists in the Civil Procedure Rules. It is clear to me that taxation of costs is part of the execution process, complete with its provisions of stay of execution, under the Civil Procedure Rules. Indeed, section 94 of the Civil Procedure Act provides as a general rule that execution of orders of the court should await the confirmation of the costs by taxation unless the court grants leave for execution before taxation of costs."*

17. They argue that in as much as a reference can be viewed as an appeal, the guidelines are different and the law applicable to references is paragraph 11(4) of the ARO and not Order 42 of the Civil Procedure Rules. They rely on **Machira & Co. Advocates -vs- Arthur Magugu & Anor (2012) eKLR** where the Court stated;

> "*Rule 11 thereof provides for ventilation of grievances from such decision through references to a Judge in chambers. The effect may be viewed as an appeal or review but these being legal terms in respect of which different considerations apply; they should not be loosely used. Appeals require the typing of proceedings, compiling records of appeal and hearing of the same in open court. Reviews however, would require provisions akin to those in section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the face of the record and so on. In our view, the rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocates' bills of costs through references under rule 11 to a Judge in chambers."*

18. On the third issue, they submit that no prejudice will be suffered by the Respondent because it is the Courts duty to do justice and they are pursuing that justice as provided by the law. They deny knowledge of the alleged payment by some of the Applicants and contend that each party has its own interests to protect.

19. They add that they were ready and willing to proceed with the taxation as at 04/12/2018 as is evidenced by their draft notice of objection.

The Respondents' submissions

20. The Respondents submits that the bill of costs was initially slated for taxation on 06/07/2018 but was not taxed until 08/11/2018. They contend that the Applicants were just having their sweet time despite having been served. They submit that a taxation notice for 08/11/2018 was served on the then advocates for the Applicants who declined to acknowledge but nevertheless, the process server filed a return of service and the trial court was satisfied that service was proper. They contend that the process server did his work as per the law. They rely on the case of **Justus Mungumbu Omiti –vs- Walter Nyambati Osebe & 2 others (2010) eKLR** where the Court stated;

> "*there is a qualified presumption in favour of the process server recognized in MB Automobile –vs- Kampala Bus Service (1966) EA 480 AT p 484 as having been the view taken by the Indian Courts in constructing similar legislation on Chitaley and Annaji Rao: the code of civil procedure Vol II page 1670, the learned commentators say "3. Presumption as to server-there is a presumption of service as stated in the process servers report, and the burden lies on the party questioning it to show that the return is correct. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the facts of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service."*

21. They submit that the firm currently representing the Applicants came on record after issuance of the certificate of taxation and service of the notice to execute upon the 41 Applicants. They contend that no law requires service upon a party who is duly represented by an advocate.

22. On the issue of stay, they have cited **Nairobi Civil Application No. 298 of 1996 (113/96 UR)** where the Court of Appeal expressed itself as follows;

> "*Before us the Applicant says that what he wants is a stay of an order that he should pay costs. But this is not really what the order of Amin J was all about. In any case, even if that were so, the Appellant if he succeeds in his appeal would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs."*

23. They also submit that instead of the Applicants appealing against the dismissal order by the trial court, they have replicated the

application in this court and as such, it is frivolous and should be dismissed. They state that only 5 out of 41 objectors are appearing and contend that such reduction can only be done by consent of the parties and as such, there is non-compliance with Order 1 Rule 12(2) which is mandatory in nature. They further submit that in as much as the court has discretion to enlarge time, the delay of more than 6 months has not been explained.

24. On the issue of jurisdiction, they submit that it should have been raised at the earliest opportunity and the Applicants failed to do so as they were not on record then. They submit that the taxing master applied her mind and discretion in taxing the bill of costs and committed no error as she was seized of the matter from inception.

25. Having considered the application and supporting affidavits thereto, the replying affidavits and the rival submissions, it is my considered view that the following issues arise for determination;

> ***a) Whether the taxing master had jurisdiction to tax the bill of costs.***
>
> ***b) Whether this court should enlarge time within which to file a reference.***
>
> ***c) Whether stay orders should be granted.***

Issue no. (a) whether the taxing master had jurisdiction to tax the bill of costs

26. Item one on the bill of costs dated 06/06/2018 (JK3) indicates that the value of the subject matter is over 200,000,000/=. This value is highly contested by the Applicants who go on to say that even if they were agreeable to it, the taxing master should not have entertained the bill of costs owing to lack of pecuniary jurisdiction.

27. The Applicants are obviously basing their argument on the provisions of the Magistrates Court Act, 2015. Section 7(1)(d) thereof caps the pecuniary jurisdiction of a Senior Resident Magistrate at Kshs.7 million. It is however trite that jurisdiction of a taxing officer is provided for in the ARO and taxation should be done in accordance with the applicable schedule. Paragraphs 2, 10 and 13 thereof are instructive on this issue.

28. Paragraph 51 of the ARO clearly gives the applicable scale to be used in subordinate courts as schedule VII. Paragraph 1 of this schedule provides as follows;

> "*Subject as hereinafter provided the fees for instructions shall be as follows;*
>
> *i. To sue in an ordinary suit in which no appearance is entered under Order IX A of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% where the value of the subject matter is in excess of 2,000,000*
>
> *ii. To sue or defend…….. shall be 75% where the value of the subject matter is in excess of 2,000,000*
>
> *iii. …………………………..*"

29. Evidently, this schedule acknowledges that the value of a subject matter can be in excess of 2 million and does not put a cap on it. It is therefore my considered view that the taxing master had the requisite jurisdiction to tax the bill of costs.

Issue no. (b) whether this court should enlarge the time within which to file a reference.

30. The Applicants and Respondents have engaged in a back and forth on whether the bill of costs was served and whether indeed taxation proceeded *ex parte*. It is not in dispute that the Applicants were aware of the first taxation date as can be seen from the notice of taxation(JK2) which was received by the advocate albeit under protest. They were however not present when taxation was done on 08/11/2018 and have faulted the taxing master for relying on the affidavit of service filed by the Respondent's process server. The said affidavit was not attached to the application for the benefit of this court. The taxing master expressed herself as follows on the issue of service;

> "*From the record, it is clear that the bill of costs was filed in court on 11/06/2018. The Respondent fixed the matter for taxation on 20/07/2018. An affidavit of service was filed on record to show that the notice was served upon the firm of Kitindo Musembi who were on record for the objectors. On the said 20/07/2018, the court gave directions that the taxation to await the ruling on the pending application on record which was an application by the other objector Joseph Makusa Mathoka. The said application was finally determined on 11/10/2018. Subsequently, the Respondent fixed the matter for taxation on 08/11/2018. An affidavit of service was filed once again to illustrate that the firm on record for the objectors had been served.*"

31. I have no reason to doubt the observation of the taxing master and therefore not convinced that the Applicants were unaware of the taxation date. I am however of the view that the Applicants' concern about the value of the subject matter is not idle and should be canvassed with the participation of all parties.

32. As correctly submitted by the Applicants, paragraph 11 of the ARO empowers this court to enlarge time. It provides as follows;

> *(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.

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. "

33. Accordingly, this court has power to enlarge time within which an aggrieved party can notify the taxing master about the items under objection. It also has the power to enlarge time within which an aggrieved party can file a reference after receiving the reasons from the taxing master.

34. The Applicants had sought leave from the taxing master to file a notice of objection out of time *vide* an application dated 30/11/2018. In my view, the time between the date of taxation (15/11/2018) and the date of the said application is what should guide this court in determining whether there was inordinate delay. The applicants were only late with one day and in my view, they legitimately expected their application to be allowed.

35. The ruling dismissing their application was delivered on 12/04/2019 and approximately one month after, they moved this court. I do not find the delay to be inordinate and therefore enlarge time for the Applicants to obtain reasons from the taxing master and file a reference within the prescribed time if need be.

Issue no. (c) whether stay orders should be granted

36. The Respondents are in possession of a certificate of taxation and can proceed to execute at anytime as long as there are no stay orders. As stated above, the dispute on the value of the subject matter is not idle and makes the intended reference arguable. In my view, the legitimate costs owing to the Applicants should be determined before execution can be done. I agree with the Applicants that if execution is allowed to proceed, the intended reference will be rendered nugatory.

37. The result is that the application has merit and is allowed in terms of the following orders:-

i. The Applicants to file a notice with the taxing master in terms of paragraph (11) (1) Advocates Remuneration Order within three (3) days.

ii. The taxing master to give reasons in terms of Order 11 (2) Advocates Remuneration Order within fourteen (14) days.

iii. The Applicants to file their reference if any within 14 days upon service of the reasons by the taxing master.

iv. There shall be stay of execution of the certificate of costs dated 20th November, 2018 pending the filing of the intended reference.

v. The given timelines MUST be adhered to.

vi. These orders to be applied in P&A Misc. Application No. 2 of 2019.

vii. Costs to be in cause.

Orders accordingly.

Delivered, Signed & Dated this 5th day of November, 2019 in open court at Makueni.

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Hon. H. I. Ong'udi

Judge