



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW**

**MISC. APPLICATION NO. 13 OF 2009**

IN THE MATTER OF AN APPLICATION BY FRANCIS KIMANI KIIGE FOR LEAVE TO APPLY  
FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS

BETWEEN

FRANCIS KIMANI KIIGE .....APPLICANT

VERSUS

NATIONAL HOSPITAL INSURANCE FUND.....RESPONDENT

**RULING**

1. This ruling determines two applications namely, the chamber summons dated 6<sup>th</sup> December 2016 and the notice of motion dated 1<sup>st</sup> December 2016. In the notice of motion dated 1<sup>st</sup> December 2016, the decree holder Francis Kimani Kiige is the applicant whereas in the application dated 6<sup>th</sup> December, 2016 the Judgment debtor NHIF is the applicant.

2. The application dated 1<sup>st</sup> December, 2016 seeks orders:

*1. That the administrative ruling delivered by the Deputy Registrar on 29<sup>th</sup> November 2016 be reviewed, declared unconstitutional and set aside ex debite justitiae;*

*2. That the decree holder/ applicant be granted leave forthwith by the court to execute the decree of the court given on 27<sup>th</sup> March 2012 and recover the assessed costs on record from the judgment debtor;*

*3. That directors of the judgment debtor plus the law firm of Koskei Monda & Company Advocates be cited and committed to civil jail for a period not exceeding 6 months for disobeying the decree issued by the court herein on 27<sup>th</sup> March 2012 by deliberately refusing to pay the assessed or taxed costs of kshs 469,533 which remains undisputed and thereby eroding the dignity and authority of the court to the detriment of the decree holder.*

*4. That further on in the alternative, orders of mandamus be issued compelling the directors of the judgment debtor to honour and obey forthwith the decree of the court given on 27<sup>th</sup>*

March 2012.

5. That the judgment debtor be compelled to pay forthwith the assessed or taxed costs shs 469,523 with interest from the date of filing of the suit owing to the delaying tactics employed by the judgment debtor to evade and avoid or delay satisfaction of the assessed costs which remains undisputed by the judgment debtor by manipulating, from behind the scenes, the office of the Deputy Registrar.

6. That general damages be assessed for the decree holder and enforced against judgment debtor for subverting the alleged fundamental human rights of the applicant /decree –holder in collusion with the office of the Deputy Registrar.

7. That costs be borne by the judgment debtor respondent.

3. The grounds upon which the motion is predicated are that:

1. The Deputy Registrar subverted Articles 10,19,20,21,27,28,29,40,43,47 and 48 of the Constitution by deliberately blocking execution of the decree of the court to the detriment of the decree holder and his lawyers.

2. That by so deliberately blocking execution of the aforesaid decree, the Deputy Registrar sat on appeal against the judgment of the court delivered on 27<sup>th</sup> March 2012 without jurisdiction contrary to the constitutional provisions (named in (1) above) to the detriment of the decree holder.

3. That such deliberate action by the judgment debtor and the Deputy Registrar from the applicant enforcing his valid judgment yet it has not been appealed against, the Deputy Registrar is subjecting the decree holder and his lawyers to:

i. Selective application of the Rule of Law;

ii. Subverted the socio economic rights of the applicant

iii. Subjected the decree holder and his advocates to cruel and inhuman treatment and economic sanctions.

iv. Discrimination.

v. Denied the decree holder access to justice.

vi. Unlawfully deprived the decree holder of his judgment without jurisdiction contrary to Articles 10, 40, 47 and 48 of the Constitution meriting urgent intervention by the court.

4. The motion is supported by an affidavit sworn by Peter O. Ngoge on 1<sup>st</sup> December 2016 reiterating the grounds while averring that after judgment was delivered by Honourable Korir J on 27<sup>th</sup> March 2012, the decree holder was awarded costs which were taxed by the Deputy Registrar on 29<sup>th</sup> September 2016 at kshs 469,533 after interpartes hearing of the bill of costs, which costs have not been challenged. That the Deputy Registrar has refused to allow execution for the costs and has insisted that there be certificate of taxation issued under Order 29 Rule 3 of the Civil Procedure Rules thereby assisting the judgment debtor to evade paying the taxed costs contrary to the judgment of 27<sup>th</sup> March 2012.

5. That the requirements by the Deputy Registrar are unnecessary bottlenecks and extra costs because the assessed costs are mirrored in the unchallenged ruling delivered by the Deputy Registrar on 29<sup>th</sup> September 2016. That the provisions of Order 22 of the Civil Procedure Rules which deals with execution does not mandate that execution can only proceed after certificate of stated costs is issued by

the Deputy Registrar under Order 29 Rule 3 of the Civil Procedure Rules, provided the decree subject of execution is extracted and is on record as directed by this court hence a certificate of costs is unnecessary.

6. That no prejudice will be occasioned if execution proceeds on the basis of the decree and ruling on taxation since the respondent is aware of how much it should pay as costs and was even advised by its counsel to settle the said costs and that they even send to the decree holder's advocate an email forwarding some forms to be filled by Mr P. Ngoge for remittance of the taxed costs hence the Deputy Registrar is aiding the respondent to delay and evade settling costs which is in violation of the applicant's fundamental human rights.

7. To the affidavit of Mr P. Ngoge Advocate for the Applicant were annexures of decree issued on 23<sup>rd</sup> November 2016, ruling and reasons for taxation of costs delivered on 29<sup>th</sup> September 2016; letter of 3<sup>rd</sup> November 2016 by Koskei & Monda advocates for the respondent indicating that the notice to show cause could not be prosecuted before issuance of decree or certificate of costs, a certificate of urgency and supporting affidavit dated 18<sup>th</sup> November 2016 by Mr Peter O. Ngoge advocate.

8. In opposing the notice of motion, the respondent's counsel R.O Monda swore an affidavit on 6th December 2016. In the said replying affidavit, Mr Monda admits that costs were taxed on 29<sup>th</sup> September after which he informed his clients and sought reasons for the taxation. That there was delay in getting the client's instructions which they had now received to challenge the bill of costs.

9. That the application dated 18th November 2016 was never served on them and yet Honourable Odunga J had directed that it be served.

10. That they discovered that execution had commenced on 13<sup>th</sup> October 2016 before the decree was issued on 23<sup>rd</sup> November 2016.

11. That in the ruling for taxation, the Deputy Registrar had stated that costs be borne by an ***"unknown" interested party*** and not the respondent by stating ***"in conclusion, the exparte applicant's bill of costs dated 4<sup>th</sup> April 2016 is taxed at 469,533 all inclusive against the 1<sup>st</sup> interested party"*** and that the applicant acted deceptively by drawing hearing notice in a manner to deceive the respondent that what was due for hearing on 21<sup>st</sup> November 2016 and 22<sup>nd</sup> November 2016 was a notice to show cause application yet it was his application dated 18<sup>th</sup> November 2016 which he had not served.

12. That no certificate of costs has been made in the matter as per Order 21 Rule 9 of the Civil Procedure Rules hence the inclusion of the respondent's firm is mischievous and therefore the application should be dismissed to allow the respondent challenge the Deputy Registrar's ruling on taxation and that since there was no certificate of costs, there will be no prejudice to the applicant.

13. In response to the replying affidavit, Mr Peter Ngoge swore a further affidavit on 14th December contending that the replying affidavit sworn by R.O. Monda advocate was full of falsehoods.

14. That on 29<sup>th</sup> November 2016 Rose Nakhungu who introduced herself to Mr Ngoge as a legal officer of the respondent emailed him and persuaded him to execute bank details forms as annexed to his affidavit so that the respondent could process payment of the taxed costs of shs 469,533 but that Mr Ngoge declined to execute the afore stated forms as the request was by-passing the respondent's advocates on record which would be contrary to the Advocates' Professional Code of Ethics. That there is no evidence as to when the belated instructions to challenge the bill of costs were given.

15. That the application of 18th November 2016 was not filed hence it is not in the court file for reference.

16. That the manner in which the Deputy Registrar down-scaled the over 4 million bill of costs to less

than 0.5 million and directing that the costs be paid by an 'unknown' 1<sup>st</sup> interested party was a collusion and clever way of deliberately denying the applicant his costs.

17. That the Deputy Registrar ought to have corrected the error under Section 99 of the Civil Procedure Act instead of denying the applicant permission to proceed and execute the decree and taxed costs.

18. That no prejudice would be occasioned if the certificate of costs was by passed since the respondent has already been advised by their lawyers to settle the taxed costs and that nonetheless, a certificate of costs had already been applied for hence the Deputy Registrar should uphold the national values and amend her ruling to avoid the respondent shifting goal posts in a desperate bid aimed at subverting the rule of law.

19. That Mr Ngoge believes that the respondent may have given a settlement cheque to its counsel who is frustrating this legal process by colluding with the Deputy Registrar to insert in the ruling the nonexistent 1<sup>st</sup> interested party, among other despicable accusations leveled against the Honourable Deputy Registrar.

20. That the subsequent reference (chamber summons dated 6<sup>th</sup> December 2016 and replying affidavit of R.O. Monda advocate must have been filed without knowledge or express instructions of the respondent and with the intention of denying justice to the applicant hence this court should intervene.

21. The parties filed written submissions to canvass both applications but as the applications were heard together by way of written and oral submissions, I shall proceed to set out the application dated 6<sup>th</sup> June 2016 first before embarking on the joint written and oral submissions.

22. In the respondent's chamber of summons dated 6<sup>th</sup> June 2016 brought under Sections 3,5, 94 and 95 of the Civil Procedure Act Cap 21; Rule (2) and (4) of the Advocates Remuneration Order and all other enabling provisions and enactments of the law, the respondent seeks for orders.

*a) That there be stay of execution of the Ruling and reasons for taxation dated 29<sup>th</sup> September 2016 pending the hearing and determination of the reference herein.*

*b) That this Honourable court enlarges the time and grant leave to the applicant to file this reference against the decision of the taxing officer delivered on 29<sup>th</sup> September 2016 out of time.*

*c) That the ruling and order of the taxing master be set aside;*

*d) That the bill of costs be taxed a fresh.*

*e) That costs be in the cause.*

23. The application/chamber summons is premised on the grounds that:

1) The taxing officer rendered a ruling on the applicant's bill of costs on 29<sup>th</sup> September 2016;

2) The respondent's advocates duly notified the respondent of the said ruling and called for further instructions in the matter.

3) The respondent's advocate's also wrote a letter dated 30<sup>th</sup> September 2016 seeking the taxing officer's reasons in the belief that the same would act as a stay of any orders pending the delivery of the taxing officer's reasons;

4) That the respondent has instructed the advocates to challenge the said ruling which instructions

were obtained out of the time required by the Advocates Act;

5) That the reason for the delay was because of a breakdown in communication between the officials of the respondent and the advocates. That an official of the respondent handling the matter had travelled out of the country;

6) That there is no certificate of costs in the matter;

7) That the taxing officer failed in her assessment of costs to take into account the respondent's written submissions herein relating to instructions fees.

8) That the taxing officer ordered an interested party a stranger in the dispute to settle the costs. That being "the "1st interested party."

9) That the taxing officer has not given sufficient reasons for awarding over 10 times the recommended instructions fees.

10) That the taxing officer proceeded on wrong principles of law in taxing the bill of costs in the sum of kshs 469,533.00;

11) That it is in the interest of justice that the respondent be given a chance to challenge the taxation.

12) That the application will be rendered nugatory should the execution be allowed to proceed.

24. The chamber summons is supported by an affidavit sworn by R.O. Monda advocate on 29<sup>th</sup> September 2009, deposing that the bill of costs was taxed at shs 469,533 and he duly informed his clients of the said taxation.

25. That there was delay in getting his client's instructions which he had since received to challenge the bill of costs.

26. That on 30<sup>th</sup> September 2016 he wrote a letter to the taxing officer seeking for reasons for the taxation. That the taxing officer failed to take into account the respondent's written submissions and that she ordered a stranger an "interested party" who was not party to the proceedings to settle the costs; that she has not given sufficient reasons for awarding costs 10 times the recommended instructions fees even after acknowledging that there was nothing complex in the matter; that no certificate of costs has been issued. The other depositions minor the grounds on the face of the application.

27. The chamber summons was opposed by the applicant's counsel Mr P. Ngoge who swore an affidavit on 14<sup>th</sup> December 2016 contending that the chamber summons by the respondent is intended to block the applicant from getting justice in terms of taxed costs since no objection to taxation had been filed pursuant to Rule 11(1) of the Advocates Remuneration Order hence the court has no jurisdiction, to extend time for filing any reference and it must down its tools.

28. That the respondent's letter dated 30<sup>th</sup> September 2016 to the taxing officer seeking for reasons for taxation is not an objection to taxation and that it came after the advocate R.O. Monda had long advised his client the respondent to settle the taxed bill of costs and issued his client with a final fee note confirming that the matter ought to have been finalized hence this application does not lie.

29. That there is no evidence that Mr Monda advised his client to object to the bill of costs after taxation hence he is estopped by Advocates Professional Ethics and Article 10 of the Constitution from turning around and disowning his own legal advise given to his client to settle the taxed costs.

30. Further, that Mr R. Monda never advised his client that the bill of costs was not properly taxed or

that in the taxing officer's assessment she had failed to take into account the respondent's written submissions relating to instructions fees hence, his assertions are spurious and diversionary allegations which are new innovations meant to scuttle the decree holder's constitutional application.

31. It was further contended by Mr Ngoge that on 29<sup>th</sup> November 2016 Ms Rose Nakhungu a legal officer of the respondent called him asking him to execute bank detail forms annexed, to enable the respondent settle the taxed costs which clearly indicate that Mr R. Monda has not been given any instructions to challenge the taxed bill of costs; and that he must be on a frolic of his own by colluding with the Deputy Registrar to block execution proceedings and to scuttle the constitutional application by filing his chamber summons on 6<sup>th</sup> December 2012 belately without any clear instructions.

32. That Mr Ngoge refused to execute bank detail forms because he did not want to bypass the respondent's counsels on record as that would have been unprofessional of him.

33. That there is no reason why the respondent's officials have not sworn any affidavit indicating reasons for the delay or whether they indeed instructed Mr R. Monda to challenge the taxed bill of costs, however late hence Mr Ngoge believes that Mr R.O. Monda may have been paid the taxed costs to remit but is frustrating the applicant with technical issues such as strangers to the bill of costs being ordered to pay these costs.

34. Further, that absence of certificate of taxation does not prejudice the respondent and neither can it change the ruling of 29<sup>th</sup> September 2016 which binds the respondent to settle the taxed costs.

35. In addition, that the applicant has already paid for the said certificate of taxation which should not have taken more than 3 minutes to execute by the Deputy Registrar.

36. That decree and certificate of stated costs are only necessary at execution stages and not at the notice to show cause stage as to why the leave to execute decree should not be granted or issued against it.

37. The parties advocates also filed written submissions which they briefly highlighted on 15<sup>th</sup> February 2017 adopting them wholly and urging the court to consider their respective positions.

38. The submissions by the applicant filed on 9<sup>th</sup> January 2017 and by the respondent filed on 8<sup>th</sup> February 2017 are detailed enough and they all mirror their respective positions contained in their respective applications and affidavits in support of and in opposition to the respective parties' applications which I have replicated in my consideration herein, and which I need not reproduce herein save that I have carefully considered the said submissions.

### **Determination**

39. Having considered the twin applications, affidavits, annexures, and submissions of both parties' advocates both in writing and orally. In my humble view, it is first appropriate to determine the application **for stay of execution and for enlargement of time to file a reference out of time** dated 6<sup>th</sup> January 2016 before determining the applicant's application dated 1<sup>st</sup> June 2016 seeking to **declare the administrative ruling delivered by the Deputy Registrar on 29<sup>th</sup> November 2016 unconstitutional and that it be set aside ex debito justitiae and be reviewed**, among other orders sought in the notice of motion.

40. On whether the application dated 6<sup>th</sup> December 2016 is merited, the commencement point is the law relating to taxation of bill of costs and the challenge thereto.

41. The procedure by an aggrieved party to challenge a taxation ruling is set out in the Advocates Remuneration Order Paragraph 11 and is very specific on what an aggrieved party should do. ***A party who intends to challenge a ruling on taxation must first write to the taxing officer within 14 days from the date of ruling of taxation, giving a notice of objection specifying the items in the***

***bill of costs in respect of which he is aggrieved of and requesting the taxing master/officer to give reasons for allowing them as shown in the ruling.***

42. It would however be superfluous for the aggrieved party to request for reasons for taxation where such reasons are given in the ruling like the ruling of 29<sup>th</sup> November 2016 which is very detailed and which provides reasons for taxation of the bill of costs. Accordingly, it is my view that the letter of 30<sup>th</sup> September 2016 by the respondent's counsel to the Deputy Registrar asking for reasons why the bill of costs was taxed at shs 469,533.00 was but a mere formality and waste of judicial time which could not serve any useful purpose.

43. In addition, the letter of 30<sup>th</sup> September 2016 by the respondent's counsel is not a notice of objection to the taxation as it does not specify any item(s) which the respondent considered objectionable.

44. Paragraph 11 of the Advocates Remuneration Order stipulates-

***11(1) should any party object to the decision of the taxing officer, he may within 14 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 14 days from the receipt of the reasons apply to the judge in chambers which shall be served on all 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 sub paragraph (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 enlarge the time fixed by subparagraph (1) or subparagraph (2) of the taking of any step.***

***5) Applications for such an order may be made by chamber summons upon giving every other interested party not less than 3 clear days notice in writing or as the court may direct, and may so made notwithstanding that the time sought to be enlarged may have already expired.***

45. In **Ahmednasir Abdikadir & Company Advocate vs National Bank of Kenya Ltd (2) [2006] 1 EA A5** the court held that:

***“ Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wished to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file a reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in, the ruling, there is no need to seek for further reasons simply because of the unfortunate wording of sub Rule (2) of Rule 11 of the Advocate Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”***

46. Odunga J in **Evans Thiga Gaturu Advocate V KCB Ltd [2012] e KLR** stated:

***“However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring the reference.”***

47. In the present case, the taxation ruling was delivered on 29<sup>th</sup> September 2016 by Honourable E. Mburu giving detailed reasons for the taxation, and in the presence of all parties' advocates. There was no prayer for stay. The ruling is headed **Ruling and reasons for taxation.**

48. The following day on 30<sup>th</sup> September 2016 the respondent's counsel filed a letter to court requesting reasons for taxation. He however never gave any notice of objection to any of the specific items as taxed. As the reasons were in the ruling, it is thereby not expected that the taxing officer would have given any reasons and there is no evidence that the respondent sought for such reasons subsequently, by way of a reminder to enable them file a reference.

49. No reference was filed and on 6<sup>th</sup> December 2016, after the applicant had filed his application dated 1<sup>st</sup> December 2016 after unsuccessfully trying to prosecute a notice to show cause why execution should not issue against the respondent is when the respondent filed the present application seeking for stay of execution and for enlargement of time to file on the ground that the delay was occasioned by lack of communication at the respondent's offices and which led to delay in furnishing instructions to file a challenge to the taxation. The respondents also claim that there was no sufficient reason for awarding item 1 of instructions fees 10 times more than what should have been awarded in a matter which was not complex. They also claim that the taxing officer ordered a stranger 1<sup>st</sup> interested party to pay costs as taxed.

50. However, the applicant has countered the respondent's assertions and contended that the respondent's intentions are to scuttle the constitutional application by the applicant and his intended execution for recovery of taxed costs and that it has done so in concert with the Deputy Registrar.

51. Attached to the respondent's counsel's supporting affidavit is a letter dated 30<sup>th</sup> September 2016 notifying his client, the respondent herein NHIF that:

***“ we attended court on the 29<sup>th</sup> day of September 2016 when the Deputy Registrar rendered her ruling on the applicant's bill of costs.***

***The bill was taxed at kshs 469,533. Kindly let us have your cheque settlement of the said amount or in the alternative your further instructions on the circumstances in the meantime please find enclosed our final fee note for the services rendered for your consideration and settlement.***

***Yours faithfully***

***For: Koskei Monda & Company Advocates***

***Signed by***

***R.O. Monda.”***

52. In the above letter, there is no contention by R.O. Monda Advocate expressed to his client that the Bill of costs as taxed was excessive in the circumstances or that there was need to challenge it and or that the taxing officer failed to take into consideration written submissions of the respondent on the instructions fees. There is no suggestion that the taxed costs ought to be challenged.

53. Nonetheless, as expected of any advocate, Mr R.O. Monda sought for his client's settlement cheque and or instructions in the matter.

54. To date, despite filing the application dated 6<sup>th</sup> December 2016, there is no evidence that the respondent did give Mr R.O. Monda instructions to challenge the taxation or that there was a miscommunication at the respondent's offices leading to delay in furnishing the advocate with instructions to challenge the taxed bill of costs.

55. It is for that reason that I agree with Mr Ngoge counsel for the applicant that the application for enlargement of time to file a reference is not only incompetent as no notice of objection to the specific items as required under Paragraph 11 of Advocates Remuneration Order, but that it is filed in bad faith and intended to frustrate the applicant's lawful entitlement to the costs decreed by the court and that practice must be abhorred and discouraged by the court.

56. Court orders are meant for enforcement without being frustrated or evaded. If Mr Monda believed that the taxing officer did order for a stranger to pay the taxed costs, did he seek clarification from the court or taxing officer? He did not. And further, when he was advising his client to settle the taxed costs, did he believe that his client was the stranger who was ordered to settle costs?

57. In addition, what does the decree given on 27<sup>th</sup> March 2012 say and or against whom was the decree issued? In other words, who was decreed to pay costs to the applicant by the decree of 27<sup>th</sup> March 2012?

58. To my mind, it is the judgment of the court given on 27<sup>th</sup> March 2012 which determined who was to pay costs and not the taxing officer. The latter's duty which is a special power donated by statute to act on behalf of the judge to tax the bill of costs and give reasons for the taxation and not to declare or pronounce 'who' was to pay those costs. This is so because the judgment of 27<sup>th</sup> March 2012 was clear that it was the respondent herein NHIF to pay costs of the proceedings, and the respondent, from that point onwards, having accepted the judgment of the court by **NOT** appealing against it knew that it was only a matter of time for it to be called upon to pay off the costs awarded to the applicant against the respondent, and which costs, unless agreed between the parties, was to be taxed by the taxing officer.

59. It therefore follows that the Deputy Registrar/taxing officer's pronouncement that the taxed costs were to be paid by the 1<sup>st</sup> interested party was in error which error did not prejudice any party or at all and which error was a technical one curable by Article 159(2) (d) of the Constitution which stipulates that justice shall be administered without undue regard to procedural technicalities.

60. Furthermore, the taxing officer's misdescription of the respondent as an 1<sup>st</sup> interested party is a mere misdescription of a party which is a procedural technicality and which does not go to the root or substance of the matter hence it is curable under Article 159(2) (d) of the Constitution.

61. In the absence of any evidence that the client (respondent) disagreed with the advocate's ( Mr R.O. Monda's advise that the taxed bill of costs be settled, and in view of the uncontroverted deposition by Mr Ngoge that infact, the respondent's legal officer Ms Rose Nakhungu called him and even send him bank detail forms by email on 29<sup>th</sup> November 2016 asking him to fill them and submit for payment of the taxed costs to be effected to him, this court is left with no other inference to make but that the respondent's counsels are abusing this court's process by filing a frivolous chamber summons seeking stay of execution of taxed costs and or seeking for enlargement of time to challenge the taxation.

62. In my humble view, the belated application is without merit, is an afterthought and is intended to delay justice. Article 159(2) (c) of the Constitution abhors delayed justice.

63. On the assertion that there is no certificate of stated costs or of taxation, in my humble view, that is no ground for seeking to challenge the taxed costs or for failure to settle costs but a good reason to advise the client that there is need for an endorsement of the certificate of taxed or stated costs for their records, as an accountability instrument.

64. An order of the court made in the presence of both parties or their advocates must be obeyed by the parties without conditions unless there is stay order granted by the court and not to be circumvented in the name of technicalities which are merely meant to delay justice and thereby subject successful parties to mere pious explorers in the judicial process and that is exactly what Mr R.O. Monda advocate has done to the applicant in this case.

65. I however do not find any merit in Mr Ngoge's contentions that Mr R.O. Monda has colluded with the taxing officer/Deputy Registrar to deny the applicant his just dues.

66. The taxing officer performed her duties as stipulated in the law by taxing the bill of costs which taxation none of the parties has successfully challenged. She is expected to tax or assess costs and administer the execution process where parties commence such process by moving the court and there is nothing on record to suggest that the Deputy Registrar descended into the arena of this dispute to attempt to assist the respondent or their counsel to obstruct the course of justice.

67. The fact that the Deputy Registrar demanded for a decree and certificate of stated costs to be extracted first before notice to show cause why execution should not issue does not mean that she was breaching the Constitution or colluding with the respondent's counsel.

68. I do not find any illegality in the functions of the Deputy Registrar, Mrs E. Mburu in the manner that she handled this matter for; procedure is a handmaiden to substantive law.

69. In the end, I find that the respondent's application dated 6<sup>th</sup> December 2016 is devoid of any merit. I decline to grant it and I dismiss it. As the respondent has taken the court and the applicant in circles since the costs were assessed without any good reason, I order that it pays costs of their application to the applicant in these proceedings, FRANCIS KIMANI KIIGE.

70. I then proceed to consider the applicant's notice of motion dated 1<sup>st</sup> December 2016 which seeks to review or declare unconstitutional the administrative ruling delivered by the Deputy Registrar of 29<sup>th</sup> November 2016; leave to be granted to the applicant to forthwith execute the decree given on 27<sup>th</sup> March 2012 to recover costs on record from the judgment debtor; citation and committal to prison of the firm of Koskei Monda & Company and directors of the judgment debtor for deliberately refusing to pay the assessed costs; mandamus to compel directors of the respondent to pay the assessed costs and; damages to be assessed and paid by the judgment debtor for subverting the alleged fundamental human rights of the applicant/deGREE holder in collusion with the office of the Deputy Registrar; and costs of the application.

71. The applicant claims that the refusal of the Deputy Registrar by her ruling of 29<sup>th</sup> November 2016 to allow him to prosecute his notice to show cause why execution should not issue against the respondent for unpaid taxed costs is unconstitutional and intended to assist the respondent evade settling costs which it is aware of.

72. I have examined that ruling by the Honourable Deputy Registrar. In her assessment of the application for notice to show cause why execution to show cause should not issue, she gave reasons among them is that although the decree was drawn after this court gave directions, if the amount of costs taxed was not in the decree, then a certificate of costs is required before the process of execution starts. She relied on order 21 Rule 9 Subrule 2 of the Civil Procedure Rules. The learned Deputy Registrar found that the notice to show cause was premature and directed the applicant to follow due process/procedure before making an application for execution.

73. According to the applicant, the Civil Procedure Rules do not apply to these Judicial Review proceedings hence the execution should be allowed.

74. The court notes that the Law Reform Act, the Fair Administrative Action Act and even the Constitution do not make provision for taxation of costs and or for execution of court decrees. It follows that the court must lean on the established practice in execution proceedings.

75. For execution proceedings to commence there must be an order or decree or certificate of taxation of taxed costs, where the decree is not a money decree, then in the event that costs are awarded, then they must be assessed and a certificate to that effect issued for enforcement.

76. The applicant does acknowledge the significance of a decree or certificate of taxed costs that is why he adhered to the directive of this court to extract the decree. He has also extracted a certificate of costs stated/taxation which is due for signature and sealing by the Deputy Registrar.

77. On the other hand, it is also the mandate of the Deputy Registrar to issue certificate of taxed costs before execution for their recovery. The certificate is a formal expression of the ruling of the court on certified costs and there is no prejudice if the same is issued before execution for recovery.

78. In the premise, I find that the Deputy Registrar's orders of 29<sup>th</sup> November 2016 are not unconstitutional and neither do I find any evidence of collusion between the respondent's counsel and the Deputy Registrar to delay and deny justice to the applicant, in as much as the respondent has not been willing to settle the costs as taxed based on the ruling.

79. In the end, I do not find merit in the serious allegations leveled against the Deputy Registrar by the applicant's counsel. Had the applicant extracted decree and certificate of stated costs, the execution process would have commenced since there was no stay. I add that in execution proceedings, the procedure to be adopted is that which is established in the Civil procedure Rules. There is no other procedure available and execution without due process that is orderly would breed chaos. Accordingly, I decline to make a finding of fault on the Deputy Registrar's part.

80. On the other hand, I have already stated in this ruling that the respondent's counsels are not candid in this matter as they have been using technicalities to assist their clients avoid settlement of costs as taxed since they knew against whom the costs were taxed and they also advised their client to settle the same hence there is absolutely no reason why they would claim that the taxing officer ordered a "stranger" to these proceedings to pay costs. I find their allegation mischievous and intended to defeat the cause of justice.

81. I decline the applicant's application and make no orders as to costs.

82. However, in the interest of justice and expedition, I direct the Deputy Registrar to issue certificate of costs as taxed to enable the applicant proceed to set in motion an appropriate process for execution for recovery of costs as assessed by the taxing officer.

**Dated, signed and delivered in open court at Nairobi this 7<sup>th</sup> day of March 2017.**

**R.E. ABURILI**

**JUDGE**

In the presence of:

Mr Kasim h/b for Monda for respondent

N/A for applicant

CA George