



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 347 OF 2013**

**IN THE MATTER OF THE ESTATE OF ALICE KAHAKI NJOKA**

**JOHNSON KIBUNJA.....1<sup>ST</sup> PETITIONER**

**CHRISTINE NYAGITHA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**JOSEPH NJUGUNA.....1<sup>ST</sup> OBJECTOR**

**LUCY WANJIRU.....2<sup>ND</sup> OBJECTOR**

**TERESIA NJERI.....3<sup>RD</sup> OBJECTOR**

**MARGARET DAMAT.....4<sup>TH</sup> OBJECTOR**

**RULING**

**1. By the summons dated 5<sup>th</sup> February, 2016 brought under **Rule 49** of the **Probate and Administration Rules**, the applicants sought the following orders-**

**(a) that this honourable court be pleased to set aside the certificate of costs issued on 28<sup>th</sup> January, 2016;**

**(b) that this honourable court be pleased to suspend the certificate of costs issued on 28<sup>th</sup> January, 2016 until further orders of the court;**

**(c) that this court be pleased to set aside the order made for execution of the certificate of costs issued on 28<sup>th</sup> January, 2016;**

**(d) that the court be pleased to stay execution of the order of taxation until further orders; and**

**(e) that the costs of this application be in the cause.**

**2. By a ruling delivered on 6<sup>th</sup> June, 2014, this cause was struck out on the ground that there was in existence another succession cause in respect of the deceased in which a grant of letters of administration**

had already been issued. The court also annulled the grant of letters of administration that had been issued to the applicants. The Respondents' were awarded the costs of this cause and the summons for revocation of the grant.

3. The Respondents' filed their bills of costs which were taxed at a total of Kshs. 1,203,443/= by a ruling delivered on 17<sup>th</sup> December, 2015. The Certificate of Taxation was issued on 19<sup>th</sup> January, 2015. The application to execute the taxed costs by way of public auction was allowed on 28<sup>th</sup> January, 2016.

4. Aggrieved by the award of costs, the Respondents wrote to the Deputy Registrar by a letter dated 18<sup>th</sup> December, 2015, which was erroneously stamped by the court officials as having been filed on 20<sup>th</sup> December, 2015, asking for the written reasons of the taxing master's decision to enable them file their reference in this court. They have since filed a reference by way of the summons dated 5<sup>th</sup> February, 2016 by which they seek to set aside the Certificate of taxation.

5. The applicants argue that the Certificate of Taxation should be set aside as it was wrongly issued. They allege that the same can only be issued when an application for the reasons of the taxing master has not been made within 14 days, as required by Rule 11 of the Advocates Remuneration Order, or after a reference against the taxation has been heard and denied. They alleged that if the orders of stay are not granted, the intended reference will be rendered nugatory. There is imminent threat of attachment and execution of the applicants' properties.

6. The 4<sup>th</sup> Respondent swore a Replying Affidavit on 10<sup>th</sup> February, 2016 in opposition to the application. It was her contention that the Certificate of Taxation was properly issued, as there is no law that requires that the same should only be filed after the 14 days provided for in Rule 11 have expired or after a reference to this court has been determined.

7. She also contended that there is no competent notice of objection on record as the one that was filed by the applicants was in objection to a bill of costs dated 15<sup>th</sup> June, 2015 whereas there is no such application on record. The respondent also contended that there is no reason to stay execution because she has the means to refund the taxed costs should the reference succeed.

### **SUBMISSIONS**

8. The applicants relied on their submissions dated 17<sup>th</sup> February, 2016. They argued that the taxing officer did not have jurisdiction to file certificate of costs when there was a clear intimation on record of an intention to file a reference against the taxing officer's decision.

9. It was further submitted that execution of the costs will prejudice the applicants' right to appeal against the decision of the taxing officer. The court was urged to balance the interests of the different parties. The applicants are ready to furnish security in the form of a title deed should the court grant the prayers sought.

10. It was argued for the Respondents that the court has no jurisdiction to grant a stay of execution pending the determination of a reference made under the Advocates Remuneration Order. It was also submitted that the notice of objection is defective and of no legal effect as it refers to a bill of costs dated 15<sup>th</sup> June, 2015. The respondents' bills of costs were dated 6<sup>th</sup> June, 2015 and 15<sup>th</sup> October, 2015.

11. The Respondents' also submitted that the orders sought cannot be granted. Prayers 1 and 2 have already been spent, and prayers 4-6 are ambiguous because they seek a stay of execution until further orders of the court.

12. That the taxing master did not have jurisdiction to issue a Certificate of Taxation until the reference was determined.

### **ANALYSIS AND DETERMINATION**

13. There first issue that was raised was whether the Certificate of Taxation should be set aside for being issued prematurely. According to counsel for the applicants, the respondents should not have applied for the Certificate of Taxation until after the expiry of the 14 days under Rule 11. Thereafter, if an objection is raised, the Certificate of Taxation cannot be issued until the reference is finally determined. According to counsel taxation is complete when this court has determined the reference.

14. In my view the validity or otherwise of the taxation is a matter that should be determined at the hearing of the reference now on record. It is that court that will be determining whether the decision of the taxing officer on the taxed costs was sound that should also determine whether the certificate of taxation that was issued subsequently was issued non-procedurally.

15. Section 51 (2) of the Advocates Act provides that the certificate of costs issued is valid and binding until it is set aside or altered by the court. It follows therefore, that an execution premised on this certificate, which has not been set aside or altered, is lawful. The filing of a reference or the written letter for reasons under **Order 11 (1)** of the **Advocates Remuneration Order** does not accord a party an automatic stay of execution.

16. At this juncture the issue that concerns this court is whether the impending execution for costs, should be stayed and not whether the certificate of costs should be set aside. The respondents argued that execution of costs cannot be stayed. There has not been consensus by the courts on this issue and courts have had divergent views.

17. The court of appeal in **Frances Kabaa V. Nancy Wambui and Jane Wanjiru**, civil application number Nairobi 298 of 1996 [1996] eKLR held as follows:

**“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.”**

18. This decision was followed by Kasango, J in **Nyamogo and Nyamogo Advocates V. Mwangi** (2008) 1 E.A 283 (CAK), A similar view was held by Musyoka, J **In re the Estate of Gerald Kamau** [2014] eKLR

19. The dissenting views are stated in **S. Gichuki Waigwa V. Nina Marie Ltd.** [2005] eKLR, where Kasango, J departing from her earlier views held:

**“Indeed it is correct to state that a certificate of taxation once issued is final and binding on the parties unless it is set aside or altered by the court. What that means is that if the advocate was to start execution for those costs the client would not have a defence. It therefore follows, that to afford the client measure of protection, it is necessary for stay of execution of those costs, to be granted.... The client has invoked, and correctly so, section 3A of Cap 21, and the court can on that basis grant a stay. Getting back to the merits, the client has raised issues, which I believe ought to be ventilated at a reference for a final decision. For the client to be able to ventilate those issues I find that a stay should be granted.”**

20. In **Edward Mwangi Macharia V. Registrar General**, [2009] eKLR, the court expounded on the decision of the Court of Appeal in Frances Kabaa (supra) as follows:

**“In my respectful view, the Court of Appeal stated that there was no stay for an order that someone should pay costs. It did not go to the extent of saying that there could be no stay of execution of an order from the taxation of costs. In my view a request for stay of an order to pay costs, is different from a stay of execution of the certificate issued following taxation of costs. I would agree with what was stated by Ochieng J. in the case of Kassam Khimji Ltd V. Meridian Properties Ltd. – Nairobi High Court Civil Case No. 757 of 1994, thus-**

**“In my considered opinion, a decree cannot strictor sensu, arise out of the taxation.**

**That which arises out of a process of taxation is a Certificate of Taxation. However, the court does recognize that execution can issue in respect of a Certificate of Taxation. Therefore, if the applicant were to *satisfy the requirements for the grant of an order for stay of execution, the court would grant it.*”**

**In my view therefore depending on circumstances, and also coming to court through the correct procedure, stay of execution of a certificate of taxation can be granted.”**

21. In **Kilonzo & Co. Advocates V. John Njenga Mututho**, [2012] eKLR, the court held that it can in appropriate cases exercise its inherent jurisdiction and grant stay of execution. It stated:

**“In my view courts of law should not readily give in to challenge on their jurisdiction unless it is clear that the same has been taken away especially where to accede to such challenge is likely to occasion a miscarriage of justice. The Court when properly moved may in the exercise of its inherent jurisdiction grant stay of execution notwithstanding the fact that the order sought to be stayed arises from taxation.”**

22. I agree that the court is vested with an inherent jurisdiction to grant a stay of execution in a taxation matter when it opines that this is necessary in order to preserve the rights of the parties pending the determination of a reference and also to prevent that reference from being rendered nugatory. I think that to hold otherwise would be prejudicial to the litigant who has filed the reference particularly when it has not been ascertained that the paid costs can be refunded should the reference be determined in his favour.

23. The Certificate of Costs which was issued on 28<sup>th</sup> January, 2016 was in respect of two applications, one dated 15<sup>th</sup> October, 2014 which was taxed at Kshs. 114,378/= and another dated 13<sup>th</sup> June, 2014 which was taxed at Kshs. 1,089,069/=. In the application for written reasons that is dated 18<sup>th</sup> December, 2015, the counsel for the applicant requested for the reasons of the taxing officer for the all the items in the bill of costs dated 15<sup>th</sup> June, 2015 against which he objected.

24. The reference to 15<sup>th</sup> June, 2015 was made in error as there is no such application on record. From the dating, it is possible that counsel was referring to either of the applications. However the applicant did not clarify which of the two applications for taxation was being referred to. What emanates from this letter is that the intention was to object to only one of the applications. Accordingly, the court cannot stay execution of all the applications when there is an intimation that only one is the subject of the intended reference.

25. I accordingly find that the prayer for stay of execution in respect of Kshs. 1,089, 069/= and Kshs. 114,378/= cannot be granted as it is not clear from the grounds in the face of the application or the affidavit sworn in support which of the two applications is being challenged. This difficulty is further aggravated by the letter to the taxing officer requesting her reasons for the taxed costs which is also not clear on the application in question.

26. The Respondents are entitled to execute that part of the order that has not been challenged. If the orders as are granted, and execution for costs which is not part of the appeal is stayed, they will suffer prejudice. Accordingly, on this ground alone, the prayer for stay cannot be granted.

27. Even if the applicants application was clear, they are required to satisfy the requirement for stay of execution under **Order 46 Rule 6 (2)** of the **Civil Procedure Rules** which provides that-

**“No order for stay of execution shall be made under subrule (1) unless—**

**a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**b) such security as the court orders for the due performance of such decree or order as**

may ultimately be binding on him has been given by the applicant”.

28. In James Wangalwa & Another V. Agnes Naliaka Cheseto [2012] eKLR it was held:-

**“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.**

**The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein V. Chesoni, .....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”**

29. And in Mukuma V. Abuoga, (1988) KLR 645 the court defined substantial loss as:

**“the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**

30. In the present case, the applicants merely pleaded that their movable properties have been attached and sale is imminent. They did not show that they stand to suffer irreparable harm if the execution is allowed to proceed. In addition, the contention of the respondent that she was a person of means who is capable of refunding the money should the appeal succeed was not contested.

31. In light of the above I find that the application dated 5<sup>th</sup> February, 2016 does not have merit and hereby dismiss it with costs.

**Dated, Signed and Delivered at Nakuru this 12th day of May, 2016**

**A. K. NDUNG'U**

**JUDGE**