



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC APPEAL 7 OF 2017**

**FORMERLY MACHAKOS MISC. APPLICATION NO. 148 OF 2011**

**FORMERLY MACHAKOS HCCA 217 OF 2014**

**1. MULI MUSEMBI.....1<sup>ST</sup> APPEALLANTS**

**2. MRS. PAULINA.....2<sup>ND</sup> APPEALLANTS**

**VERSUS**

**RUTH KATUNGA ISIKA.....RESPONDENT**

**RULING**

1) Before me is a chamber summons application expressed to be brought under sections 3,5,94 and 95 of the Civil Procedure Act, Rule 11(2) and (4) of the Advocates Remuneration Order for orders:-

**1. Spent**

**2. Spent**

**3. That there be stay of execution of the ruling and reasons for taxation dated 4/4/2018(exparte) pending the hearing and determination of the reference herein.**

**4. 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 4/4/2018 out of time.**

**5. That the reference filed herein be deemed as properly filed though filed out of time.**

2) The application is dated 4<sup>th</sup> May, 2018 and was filed in court on 8<sup>th</sup> May, 2018 and is predicated on grounds on its face and is supported by the supporting and supplementary affidavits of Musembi Muli, both sworn at Machakos on the 3<sup>rd</sup> May, 2018 and 22<sup>nd</sup> June, 2018 respectively.

3) It is opposed by Respondent vide his replying affidavit sworn at Machakos on the 25<sup>th</sup> May, 2018 and filed in court on the 29<sup>th</sup> May, 2018.

4) On the 29<sup>th</sup> May, 2018 the court directed the parties herein to dispose off the application by way of written submissions. The Applicant filed his submissions dated 22<sup>nd</sup> June, 2018 on even date while the Respondent filed his on the 28<sup>th</sup> June, 2018 the same being dated the 27<sup>th</sup> June, 2018.

5) The Applicant has deposed in paragraph 5 of his supporting affidavit that the principles applied by the taxing master in arriving at the figure indicated in the proclamation notice dated 11<sup>th</sup> April, 2018 were wrong. He went on to depose in paragraph 4 of his supporting affidavit that he has never been served with a notice to show cause. In paragraph 7 of his supporting affidavit, the Applicant has deposed that he has filed a preliminary objection against the taxation and that it is still pending. He went on to depose that it is only fair that the proclamation and execution be stayed pending the reference.

6) The Appellant/Applicant filed a supplementary affidavit sworn at Machakos on 22<sup>nd</sup> June, 2018. In paragraph 5, he has deposed that the purported taxation notice is for HCCA No. 303 of 2007 while the instant case is ELC No. 7 of 2017. The Applicant accuses the Respondent

of deliberately misleading in order to proceed exparte. He goes on to depose in paragraph 9 of the supplementary affidavit that the taxing master simply said, “ *the fee charged is reasonable*”

7) In Respondent’s replying affidavit sworn by Mr. Francis N. Sila , an advocate of the High Court of Kenya, at Machakos on the 25<sup>th</sup> May, 2018 the Respondent terms the Appellants’ application as an afterthought, frivolous , vexatious and an abuse of the court process. Mr. Sila has further deposed in paragraph 3 of his replying affidavit that there is no valid appeal on record as the notice of appeal was filed on the 2<sup>nd</sup> March, 2013 outside the 14 days as provided by the law. He goes on to depose in paragraph 4 that the Appellants’ advocate was duly served with taxation notice on 2<sup>nd</sup> March, 2018 and he duly accepted the same and that he did not attend court on the taxation date and so the court proceeded to tax the bill of costs exparte. Mr. Sila further deposed in paragraphs 6, 7 and 8 of his replying affidavit that no explanation has been given as to why the Appellants’ advocate did not attend court on the taxation date. That the Appellant’s advocate did not attend court to prosecute his preliminary objection which in any case was vague. That a litigant can elect to take out execution by warrant of attachment and sale or vide a notice to show cause when the judgement is more than one year old and in this instance, there was no need to serve Appellant with such notice. Mr. Sila has deposed in paragraph 9 that what is being executed are party and party costs and not advocate client taxed costs and, therefore, there was no need to extract a decree before executing the costs of appeal. Mr. Sila has also deposed in paragraph 10 that the purported reference enumerating the reasons or items they are opposed to in the taxed costs was not annexed and therefore, the court is left guessing as to what the Appellant is seeking stay of execution for.

8) In his submissions, the Applicants’ advocate submitted that the procedure adopted for execution is irregular contrary to the law. He **Rubo Kim Kimngelih Arap Cheruiyot Vs Peter Kiprop Rotich in Eldoret HCCC no 133 of 1993**, a copy which he did not supply to the court. The advocate further submitted that the court should not at this stage concern itself with the merit or otherwise of the reference but rather it should concern itself with the issues raised by the Applicant which require to be ventilated in a reference. The advocate further cited the case of **S.Gichuki Waigwa Vs Nina Manne Ltd [2005] eKLR**, a copy which he did not supply to court.

9) On the other hand, the Respondent’s advocate submitted that the Applicants’ advocate though served with a taxation notice, did not attend court on the date when the bill of costs was taxed. He pointed out that the advocate has not offered any explanation for his failure to attend court. He also submitted that the Applicant has not annexed a draft copy of the reference which he seeks leave to file.

10) I have read the application together with the supporting and the supplementary affidavits as well as the replying affidavit and the submissions filed by the parties herein and I do agree with the Respondent’s counsel that the main prayer herein is the one for the court to enlarge time and to grant leave to the Applicant to file a reference against the decision of the taxing master. No draft copy of the reference was annexed to the supporting affidavit. Had this been done, the court would have been in position to see the reasons or items on the taxed costs that the Applicants are opposed to. As the matter stands now, the court is left to guess on the issues that the Applicants intend to raise in the proposed reference. In addition, the Applicant’s advocate ought to have given explanation as to why he did not attend court on the day of taxation since he had already been served on the 3<sup>rd</sup> May, 2018 with a taxation notice. He had the chance to argue the preliminary objection but chose not to attend court.

11) The upshot of the foregoing is that the Applicant’s have not placed before this court sufficient reasons for it to grant them leave to file a reference out of time.

12) The application therefore lacks merit and same is dismissed with costs to the Respondent.

**SIGNED DATED AND DELIVERED AT MAKUENI THIS 14<sup>TH</sup> DAY OF DECEMBER, 2018**

**MBOGO C.G**

**JUDGE**

**IN THE PRESENCE OF:**

1<sup>st</sup> Applicant

2<sup>nd</sup> Applicant

Mr. Kwemboi

No appearance for the Applicants

No appearance for the Respondent

**MBOGO C.G, JUDGE**

**14/12/2018**