



**Ngomonge t/a Dollar Auctions v Rafiki Microfinance Bank
Limited (Miscellaneous Commercial Application E294 of 2022)
[2023] KEHC 1057 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS COMMERCIAL APPLICATION E294 OF 2022
DAS MAJANJA, J
FEBRUARY 17, 2023**

BETWEEN

SIMON NGOMONGE T/A DOLLAR AUCTIONS APPLICANT

AND

RAFIKI MICROFINANCE BANK LIMITED RESPONDENT

RULING

Introduction and Background

1. In the application before the court, the applicant seeks judgment for Kshs 3,206,999.19 being fees certified by the Deputy Registrar following taxation of his bill of costs dated April 14, 2022. The application is opposed by the respondent through the affidavit of its advocate, Prof Tom Ojienda, SC, sworn on November 4, 2022. The thrust of the opposition to the application is that at the time execution was effected by the applicant, the court had issued an order staying execution.
2. The facts leading to this matter are straightforward and are a matter of record. On October 5, 2020 the court, in HCCC No 384 of 2016 entered judgment for the plaintiff therein, Youth Enterprise Development Fund Board against the respondent for the sum of Kshs 100,342,693.00, costs and interest ("the judgment"). By an application dated March 16, 2021, the respondent sought stay of execution and review of the said judgment. On March 23, 2021, the court granted a temporary order staying execution pending hearing and determination of that application. On November 11, 2021, the court dismissed the respondent's application for review.



3. On the same day, the respondent filed an application seeking to stay execution of the judgment pending hearing and determination of an appeal that the respondent had proffered to the Court of Appeal. By a ruling dated February 3, 2022 the court allowed the application on the following terms:
 1. The execution of the judgment herein shall be stayed pending the hearing and bank determination of the appeal therefrom on condition that the defendant shall furnish a bank guarantee in favour of the plaintiff from reputable bank for the sum of Kes 103,000,000.00 in within 30 days from the date hereof.
4. In default of such compliance the stay order shall lapse automatically.
5. The order of stay shall remain in force for one year unless otherwise extended by this or the Court of Appeal.
6. The defendant shall pay the plaintiff Kes 40,000.00 being the costs of the application 7 days.
7. In the meantime, on May 3, 2021, the court taxed and certified costs in favour of Youth Enterprise Development Fund Board for the sum of Kshs 3,279,254.76. The court issued it with the certificate of taxation and decree on August 24, 2021 whereupon it applied for execution and through the letter dated August 25, 2021, it requested the court to issue and allocate warrants of attachment and sale to the applicant. The court issued the warrants of attachment on the same day.
8. The applicant issued a proclamation on August 31, 2021 and on September 10, 2021 he proceeded for attachment at the respondent's head office along Biashara street whereupon he was served with a stay order. On November 29, 2021, the applicant wrote to the respondent acknowledging that the respondent had obtained an order of stay on September 9, 2021 but that they were advised by the instructing advocates that the respondent had lost the application and thus, the applicant was to proceed with execution. The applicant also stated that the respondent did not serve it with the order of stay until the execution day in the respondent's offices when a copy was presented to it. Therefore, the applicant informed the respondent that to avoid execution, the respondent was to settle its fee note of Kshs 3,302,822.40.
9. The applicant now contends that stay order was only served upon him on the attachment date and after he had made all necessary arrangements to attach the proclaimed property. As a result, he incurred incidental costs which form part of the bill of costs which has not been taxed and which forms the basis of the application for judgment.
10. In opposing the application, the respondent takes the position that the applicant illegally extracted the warrants of attachment and sale despite the existence and knowledge of the order of stay of execution of judgment and that it illegally commenced the execution process against the respondent. It contends that the proclamation and attempt to execute the warrant of attachment issued on August 25, 2021 was in total disregard of the stay orders issued on March 23, 2021.
11. The respondent also states that it was not served with a copy of the notice of taxation as it was not received and acknowledged by any of the respondent's legal officers. It therefore urges that the certificate of taxation lacks legal basis and is in conflict with order 6 rule 6(2) of the [*Civil Procedure Rules*](#) on service of documents.
12. The respondent contends that the applicant filed this application while there was an order of stay of execution of the judgment in place as it has already furnished the Youth Enterprise Development Fund Board with security in form of a Bank Guarantee from SBM Bank dated November 10, 2021 for Kshs 103,000,000.00. The respondent therefore urges the court to reject the applicant's application.



Analysis and Determination

10. While the applicant seeks judgment for the costs he has incurred, the respondent asserts that it has been enjoying stay of execution orders since judgement was issued against it. It is also common ground that when the applicant proclaimed the respondent's moveable properties on August 31, 2021 and proceeded to attach on September 10, 2021, the orders staying execution of the judgment were still in force. These were the orders granted on March 31, 2021 pending hearing and determination of the application for stay which was then dismissed on November 11, 2021.
11. The applicant avers that he only knew of the stay orders on the day of proclamation and execution. However, in his letter of November 29, 2021 it would appear that the advocates for Youth Enterprise Development Fund Board, who were the applicant's instructing advocates, were always aware of the stay orders and that is why they were able to inform the applicant that the orders had lapsed after the respondent's application was dismissed. The applicant cannot claim that he did not know about the stay orders and yet his instructing advocates knew the orders were in force. With the stay orders in place, the applicant could not proceed with execution and therefore can only blame himself for the ensuing costs (See *Charles Ngare Karaya v Florence Muthoni & another* HCCA No 971 of 2005 [2007] eKLR).
12. For these reasons, I find that the respondent cannot be compelled to pay execution costs for an execution that was improper and against an order of the court. Since the applicant could not execute the judgment, the court cannot award costs incurred in execution. I therefore dismiss the applicant's application dated July 27, 2022 and strike out bill of costs dated April 14, 2022.
13. The respondent is awarded costs of the application assessed at Kshs 35,000.00 only.

DATED and DELIVERED at NAIROBI this 17th day of FEBRUARY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango

Mr Mugambi instructed by Morara Apiemi and Nyangito Advocates for the Applicant.

Ms Msando instructed by Prof. Tom Ojienda and Associates Advocates for the Respondent.

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