



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPL. NO. 4 OF 2019

DORIS AWINO ABIRA.....RESPONDENT/ APPLICANT

-VERSUS-

M. I. WAFULA & CO. ADVOCATES...APPLICANT/RESPONDENT

RULING

The application dated 6th August 2020 was lodged by the Law Firm of **M. I. WAFULA & CO. ADVOCATES**, seeking an Order for stay of taxation proceedings.

1. The Law Firm also sought an Order for stay of;

“subsequent execution of the Party and Party Bill of Costs dated 03/06/2020 and a stay of execution of the Ruling on Reference delivered on the 15/04/2020 in the instant matter pending the hearing and eventual disposal and determination of the appeal.”

2. The Respondent, **DORIS AWINO ABIRA**, had previously instructed the Applicant to represent her in **SUCCESSION CAUSE NO. 3 OF 2017**, at the Principal Magistrate’s Court, Winam.

3. Having rendered services to the Respondent, the Law Firm lodged its Advocate/Client Bill of Costs for taxation.

4. The trial court taxed the said Advocate/Client Bill of Costs in the sum of Kshs 204,067.50.

5. However, the Respondent was dissatisfied with the Ruling of the taxing officer, and she therefore lodged a Reference to the High Court.

6. After due consideration of the Reference from Taxation, I reduced the Advocate/Client Costs to Kshs 102,592/=.

7. The Ruling on the said Reference was delivered on 15th April 2020.

8. According to the Applicant, the court ought to order that there be a stay of execution of that Ruling.

9. The Applicant noted that it had already filed a Notice of Appeal to challenge the Ruling.

10. At the same time, the Applicant pointed out that the Respondent had not made any effort to pay the reduced costs.

11. In my understanding, it is the Applicant who could take steps to recover the costs awarded to it. The Respondent could not take out execution proceedings against herself.

12. Therefore, I failed to understand why the Applicant sought an order to stop itself from taking steps to execute the Ruling dated 15th April 2020.

13. If the Respondent made a decision to remit payment of the costs to the Applicant, that process would not be termed as execution.

14. When a party makes payment in terms of an order that had been issued against him, he is said to be complying with the order in question.

15. In this case, the Applicant has chosen to lodge an appeal to challenge the Ruling on the Reference: that implies that the Applicant would not be content to receive the sum which this court awarded to it.

Precedent?

16. Through the Ruling delivered on 15th April 2020, the Court awarded to the Respondent herein, the costs of the Reference from taxation.

17. Pursuant to the award of costs, the Respondent filed a Bill of Costs, with a view to ascertaining the quantum of costs recoverable from the Applicant.

18. The Applicant has asked the court to stay the process of taxation. In the Applicant's view;

“..... the Honourable Court is setting a precedent, and a very bad one indeed, where litigants are encouraged to seek the services of Advocates, refuse to pay Counsel their Legal Fees, and when Counsel goes to Court for relief to have their Legal Fees paid, they are penalized by being condemned to pay costs for approaching Court for their fees in the first place.”

19. The Law Firm expressed the view that Advocates are likely to end up paying their defaulting clients, if the said Advocates dared to approach the Court for their legal fees.

20. Indeed, the Law Firm believes that defaulting clients will probably develop lucrative businesses, where it is they who end up receiving payments from honest professional advocates who had provided legal services to such clients.

21. There is absolutely no doubt whatsoever that every Advocate who has provided legal services to his/her client is entitled to receive payment for his services.

22. This court has, at no time, said that the Advocate who rendered professional services to a client should pay the client for such services.

23. Secondly, the Court did not order the Advocates to pay fees or costs to the Client

“because the Advocate had dared approach the Court for his fees.”

24. By its Ruling dated 15th April 2020, the Court effectively reiterated the Advocate's entitlement to be paid for the legal services that had been rendered to the client. It is only the quantum of the monies payable that was reduced.

25. This court did not condemn the Advocate to pay costs to his erstwhile client because the Advocate had come to court to ask for his legal fees.

26. The Ruling on the Reference from taxation was made when the Client had asked the court to have a second look at the decision which had been rendered by the taxing officer. The Ruling was not on an application lodged by the Advocate.

27. But more significantly, it is not just because the Reference had been brought by the Client that the court awarded costs thereof to the Client.

28. The Reference was successful. And because the Advocate had vigorously opposed the Reference, the Court awarded costs in accordance with the provisions of **Section 27** of the **Civil Procedure Act**. The said section stipulates that the costs of and incidental to all suits shall be in discretion of the Court or Judge. But it is also expressly recognized that;

“..... the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

29. Thus, by awarding costs of the Reference, to the successful party, the court was giving effect to the statutory provision.

30. If that is the precedent which the court has set, I hold the considered opinion that it is firmly grounded on the letter and the spirit of law.

Stay of proceedings of Taxation

31. The client was awarded costs of the Reference from taxation of the Advocate/Client Bill of Costs.

32. The process of ascertaining the quantum of the costs is taxation.

33. The fact that the Client had drawn up a Bill of Costs in the sum of Kshs 113,405/= does not mean that that is the amount she was entitled to.

34. The Bill of Costs constitutes the claim being made by the Client.

35. The only way that the Applicant and the Respondent would get to know the quantum awarded is when the taxing officer will deliver his/her ruling after carrying out the process of taxation.

36. And even after the taxing officer delivers the ruling, it would still be open to either of the parties thereto, to lodge a Reference.

37. In the absence of a ruling on taxation, I find that the Applicant has no basis upon which it could assert that the court had set a precedent wherein the costs payable on a Reference from taxation exceeds the initial costs awarded on the Advocate/Client Bill of Costs.

38. In my considered opinion, it is actually necessary that the alleged "*Party and Party Bill of Costs*" dated 3rd July 2020 be taxed, so that everybody would know whether or not the Client, (for whom services had been rendered), would be awarded more than the Advocate (who had rendered services).

39. Until the quantum of the costs were known, it was premature for the Advocate to presume that it is the Law Firm that would end up making payment to the Client.

40. I also find that the process of taxation would not be prejudicial to the Applicant in any manner whatsoever.

Substantial Loss

41. The Advocate was of the view that it would suffer substantial loss unless this court stays the execution of the order which is anticipated from the taxing officer.

42. The Advocate pointed out that the Respondent had failed to show evidence of her ability to refund the decretal sum in the event that the Advocate's appeal succeeded after the Advocate had already paid costs to the Respondent.

43. On its part, the Law Firm has indicated a willingness to deposit such security as the Court may deem fit.

44. It is well settled that unless an Applicant demonstrates that he would suffer substantial loss, the court ought not to grant an order for stay of execution.

45. The Applicant herein has stated that it would suffer substantial loss;

"..... the nature and to the extent of the costs pleaded and set down for taxation herein, in the event the stay order now sought is not granted, as execution shall proceed and the intended appeal later on succeeding."

46. That assertion falls short of intimating that the Respondent lacked financial ability to refund such money as may be paid to her as costs, pending the determination of the appeal.

47. However, I am also alive to the fact that;

".... while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has, since that is a matter which is peculiarly within his knowledge."

- per the Court of Appeal in NATIONAL INDUSTRIAL CREDIT BANK LTD. Vs AQUINAS FRANCIS WASIKE, CIVIL APPLICATION NO.238 OF 2005

48. In this case, the Applicant did not express a reasonable fear about the Respondent's inability to repay the costs. I so find because the Applicant did not make an assertion to that effect; and secondly, because the costs that would be payable by the Applicant have not yet been ascertained.

49. Before it is known that the Applicant would be required to pay a particular amount it would also be speculative for the court to specify the amount that would constitute the appropriate security for the due performance of the decree.

50. This is further affirmation that the Applicant has prematurely moved the court for orders of stay of execution.

51. Prior to taxation, or other ascertainment of the quantum of costs payable by the Law Firm to the Respondent, execution cannot be undertaken.

52. In the final result, I find no merit in the application seeking either the stay of taxation proceedings or the stay of execution. Accordingly, the application dated 6th August 2020 is dismissed, with costs to the Respondent.

DATED, SIGNED and DELIVERED at KISUMU This 25th day of January 2021

FRED A. OCHIENG

JUDGE