



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. CAUSE NO. 121 OF 2016

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

BETWEEN

GEORGE AMOS ODHIAMBO OBALLA.....APPLICANT

-VERSUS-

GEORGE MIYARE

T/A MIYARE & CO. ADVOCATES.....1ST RESPONDENT

MORAN AUCTIONEERS.....2ND RESPONDENT

RULING

1. The notice of motion dated 31st October 2020 by the applicant/client George Amos Odhiambo Oballa sought the following orders:-

“1. This application be certified urgent and service be dispensed of and it be heard *ex parte* in the 1st instance due to its urgency.

2. This honourable Court be pleased to issue orders of stay of execution of the judgment which was delivered by Hon. Mukabi Kimani on the 4th June 2019 and the resultant Decree of the Court pending the hearing and determination of this application.

3. This Honourable Court do issue any further orders it deems fit in the interest of justice.

4. The costs of this application be in the cause.”

2. On 6th November 2020 the application came before the court. It was ordered that the same be heard on 1st December 2020, there be stay of execution and the applicant deposits Kshs.150,000/= into court.

3. On the face of the application there was no prayer for leave to file any appeal out of time. There was no prayer for leave to challenge the taxation dated 4th June 2019 out of time.

4. Ideally, therefore, the application was spent when there was stay on the basis of the deposit of Kshs.150,000/= into court. There was nothing left of the application that should trouble the mind of the court.

5. Be it as it may, the facts of this case are as follows. The respondent George Miyare T/A Miyare & Co. Advocates was instructed to act for the applicant in filing High Court **Constitution Petition No. 39 of 2015** at Nairobi and obtained orders to stop his eviction from his

matrimonial home at Karen. The eviction orders had been obtained by his wife in the Children Court at Nairobi on 30th January 2015. When he did not pay the respondent's legal fees, the latter had his Bill of Costs taxed in a ruling delivered on 4th June 2019. The total Bill was taxed at Kshs.230,892/20. The respondent had asked for instructions fees of Kshs.10,000,000/= but the Taxing Officer reduced it to Kshs.75,000/=. The respondent came before this court to challenge the Taxation in regard to instruction fees. The reference was opposed by the applicant. On 7th May 2020 this court dismissed the reference with costs.

6. From the grounds and the affidavit supporting the present application, the applicant sought to challenge the ruling of 4th June 2019 by the Taxing Officer. His case was that the Bill of Costs and the hearing notice were not served on him and that was why he did not defend them. He was therefore seeking leave to appeal out of time. His case was that he was denied the right to be heard. Further, that the application dated 30th May 2020 seeking entry of judgment in respect of the certificate of taxation dated 19th May 2020 that was allowed on 25th June 2020 was not served on him, and neither was the hearing notice served. All these were not reflected in the prayers sought by the application.

7. The respondent's response was that the applicant was served on each occasion and that there was on each occasion evidence of service.

8. The applicant was represented at the time of the reference. It was the reference that resulted in the ruling of 7th May 2020. The reference was dismissed with costs. The reference had been filed on 18th June 2019. The dates are important because the applicant was served with the reference and therefore got to know that there had been a taxation which had been ruled on by the Taxing Officer on 4th June 2019. I reiterate that the applicant was represented. What did he do with this information? How long did it take him to file the present application? It was over one year. I determine that he slept on his rights, and this application was filed too late in the day.

9. It was known that after the dismissal of the reference, the respondent would proceed to get a judgment of the certificate of taxation and proceed to execute. This is what happened.

10. Stay is usually given on the basis that there is a pending appeal and that the applicant is asking that execution be ordered to freeze during the pendency of the appeal. The intention is that the appeal should not be rendered nugatory. The applicant is saying in the event stay is not allowed and the appeal ultimately succeeds he will suffer substantial loss. In the instant case, there is no appeal and the decree is a monetary one. The money is not substantial for a man whose residence is in Karen. There is no indication that the respondent cannot ultimately refund the money. It is further noted that, even as the court has to worry about the right of the applicant to appeal, there is the respondent who has a judgment of his taxed legal fees whose decree he is entitled to execute.

11. I do not find that the application has no merits, and dismiss it with costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2021.

A.O. MUCHELULE

JUDGE