



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC. CIVIL APPLICATION NO. 172 OF 2016

PROF. TOM OJIENDA & ASSOCIATESADVOCATE/APPLICANT

VERSUS

KSC INTERNATIONAL LIMITED.....CLIENT/RESPONDENT

RULING (2)

NOTICE OF MOTION

1.The Applicant filed a Notice of Motion Application dated **16th July 2020** for orders that; -

1. Judgment be entered for the Applicant against the Respondent for the sum of **Kshs.26, 206, 550** as it appears on the Certificate of Taxation dated **9th June 2020** with interest from the date of filing this Application until payment in full.

2. The Applicant be allowed to execute the judgment herein against the Respondent.

2.Which application is supported by the sworn Affidavit of **Prof. Tom Ojienda SC** dated **16th July 2020** on the grounds that; -

a) The Taxing Officer issued a certificate of taxation herein in favour of the Applicant against the Respondent for the sum of **Kshs.26, 206, 550** in respect of legal services rendered.

b) The Advocate sent his bill of costs to the Client on **23rd June 2016** and is therefore entitled to charge interest at 14% per annum as per the Advocate (Remuneration) Order from 23rd July 2016, one month from the date the Applicant/Advocate tendered his bill to the Client/Respondent until payment in full.

c) The Client/Respondent will/may not comply with the Advocate's/Applicant's demands for payment.

d) There was/is no outstanding issue(s) left for determination herein and it is fair just and equitable that the Application is granted.

3.The Applicant relied on Advocates-Client Bill of Costs arising from **Civil Case 446 of 2015, KSC Int'L Ltd (Under Receivership) & 3 Others vs Bank of Africa (Ky) Ltd & 6 Others** where the Applicant defended the 1st Plaintiff.

4.The Taxing Officer taxed Bill of Costs of Ksh 127,089,600/- to Ksh 26,206,550/- and taxed off Ksh 100,883,050/-Upon reference filed by Respondent, this Court on 22nd May 2020, upheld the taxation.

5.A Certificate of Taxation of Ksh 26,206,550.00/- was issued on 9th June 2020.Hence judgment is sought to be entered and execution granted.

REPLYING AFFIDAVIT

6.The Application was opposed vide the Replying Affidavit sworn by **Opkar Singh Ubhi** dated **2nd October 2020** as follows; -

1. The Respondent is aggrieved by the decision of the Court given in the Ruling delivered on 22nd May 2020 and intends to appeal to the Court of Appeal against the same.

2. In the circumstances, the Application is premature as the issue of the costs due or payable to the Applicant has not been finally determined and is the subject of the Respondent's intended Appeal.

3. Further, the Respondent company is still under receivership and the Applicant cannot therefore as a matter of law levy execution against it.

4. The Applicant has been duly paid Kshs.5, 000, 000 towards his fees, which must be deducted from the fees due. The Applicant was paid Kshs.950, 000 and Kshs.50, 000 vide cheque number 301 and 302 respectively by the Respondent's sister company Vista Windows Limited and **Kshs.4, 000, 000** by Real Time Gross Settlement in installments of **Kshs.2, 000, 000** on 9th April 2015 and 9th July 2015

5. The Application should therefore be dismissed.

APPLICANT'S SUPPLEMENTARY AFFIDAVIT

7. The Applicant filed a supplementary affidavit sworn by Prof. Tom Ojienda SC Dated **26th October 2020** in opposition to the Respondent's Replying Affidavit sworn on **2nd October 2020**. He stated as follows; -

a) The Notice of Appeal filed by the Respondent against the Ruling does not *ipso facto* act as a stay of proceedings against the ruling issued on 22nd May 2020 in which the Court upheld the Certificate of Taxation issued on 17th March 2017.

b) There being no stay of proceedings, the Applicant's application is in fact timely and justifiable as it seeks to have the Certificate of Taxation dated 9th June 2020 converted to a judgment.

c) The Applicant's application seeks to have the Certificate of Taxation dated 9th June 2020 converted to a judgment and is therefore in no way an execution against the Respondent. The Applicant is in fact and in law seeking to have the Certificate of Taxation made executable.

APPLICANT'S SUBMISSIONS

8. The Applicant submits that the Respondent lodged its Notice of Appeal which does not act as a Stay of Execution of the proceedings of the court. The Respondent has not yet successfully demonstrated to the court as to why they ought to be granted orders of stay of proceedings or execution against the Applicant.

9. Further, the Certificate of Taxation conclusively determines the issue of the value of certified costs and in reference to **Section 51(2) of the Advocates Act** as well the case of ***Nyamira County Government versus Local Authorities Provident Fund [2020] eKLR*** where the court held with approval the decision in ***Francis Kimani Kiige versus National Hospital Insurance Fund [2017] eKLR*** that:

"...if a decree means the formal expression of an adjudication, then the certificate of costs is the formal expression of the Ruling of the court on certified costs and the same can be enforced."

10. It is the Applicant's submission that it is entitled to interest at the rate of 14% pursuant to **Rule 7 of the Advocates (Remuneration) Order**. Having sent its bill of cost to the Respondent on 23rd June 2016, it is entitled to charge interest at 14% per annum from 23rd July 2016.

11. Further, the intention of the Applicant's prayers in the Application is to comply with the provision of **Section 560(1) of the Insolvency Act** by seeking leave of the court to allow it to execute against the Respondent bearing in mind that it is under receivership.

12. The Applicant sought interest at 14% as per Rule 7 Advocates Remuneration Order and that the instant application is not for execution as that would follow after judgment is entered. Costs should also be granted as costs follow the event.

RESPONDENT'S SUBMISSIONS

13. Whether the application is premature and bad in law.

14. The Respondent submitted that it paid Counsel Ksh 5,000,000/- and that notwithstanding filed Bill of Costs that was taxed at Ksh 26,206,550/-

15. The Respondent submitted that the Application is premature as to the issue of costs payable to the Applicant has not been fully determined and is the subject of the intended appeal. In addition, the application is premature as the Respondent is still under receivership. **Section 560(1) of the Insolvency Act** states inter-alia; - ***"A person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the court"***

16. It is the Respondent's submission that the intended execution by the Applicant would go against the objects of placing the Respondent under receivership, which is to ensure that the body of creditors secure a better outcome than if the company went into liquidation. The Application is therefore bad in law and should not be allowed.

DETERMINATION

17. Having considered the pleadings and Submissions of parties through Counsel, the issues to be determined are as follows; -

1. Whether judgment should be entered for the Applicant.
2. Whether the Applicant should be allowed to execute the judgment herein against the Respondent.

1) Whether judgment should be entered for the Applicant.

18. The Applicant herein filed an Advocate-Client Bill of Cost which was taxed by the Deputy Registrar and a Certificate of Taxation dated 17th March 2017 was issued. The Respondent was dissatisfied the Ruling of the Deputy Registrar and filed a Notice of Objection and reference through Chamber Summons application dated 21st March 2017. This Court issued a Ruling dated 22nd May 2020 dismissing the reference and upholding the Certificate of Taxation. The Deputy Registrar further issued a Certificate of Taxation dated 9th June 2020.

Section 51(2) of the Advocates Act stipulates:

“The certificate of a Taxing Officer by whom it has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

19. The above -mentioned provision of the law allows for judgment to be entered for the Applicant in terms of the Certificate of Taxation.

3. Whether the Applicant should be allowed to execute the judgment herein against the Respondent.

20. The Respondent has raised concern that the application is premature on the ground that the Respondent company is still under receivership and the Applicant cannot therefore execute against it. This court will refer to Section 560(1)(d) of the **Insolvency Act** which provides as follows: -

d) A person may begin or continue legal proceedings (including execution and distress) against the company or the company’s property only with the consent of the administrator or with the approval of the Court.”

21. The Company is under Receivership and these proceedings are culmination of the Applicant’s Bill of Costs taxed by Taxing officer after proceedings where the Applicant represented the Respondent.

22. The Applicant submitted that these proceedings are not execution proceedings but proceedings to acknowledge debt and to be recognized as one of the Creditors in the receivership of the Respondent. Secondly, the matter has been in Court for 5 years since 2016, it is in the interest of justice the matter comes to an end.

23. The Applicant submitted that the Respondent did not file any application to stay proceedings. A Notice of Appeal and Memorandum of Appeal do not operate as stay of proceedings or execution. Under the Civil Procedure Rules Order 42, rule 6 -Stay of execution in case of appeal provides; -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

24. As it stands now the Certificate of Taxation has not been set aside or altered, there is no reason why judgment should not be entered as prayed by the advocate. Judgment is hereby entered for the Applicant in terms of the Certificate of Taxation.

25. The Respondent submitted that if execution is granted then it will render the intended appeal nugatory. Upon receivership of the Respondent, the assets of the Company are in the custody and ownership/possession is to/by Official Receiver.

Refer; ***Lochab Brothers vs Kenya Furfural Co Ltd [1983] e KLR***

Fintech Kenya Ltd vs Alliance Hotels Ltd [2006] e KLR

26. Where the Court held that once disclosure of a Company in Receivership was/is made vide Notice of Appointment of Receivers & Managers of the Company in Receivership, then the assets of the Company would be in the hands of the Receivers.

27. In light of the uncontested fact that the Respondent is in Receivership and the Assets of the Company are in the hands of Receivers; judgment is entered but execution stayed pending the judgment to be considered alongside

other debts of the Company by the Receivers(s). It is only when satisfaction of the debt or any payment plan or effort to recognize the debt and make provision for payment is not made by the respondent that the Court shall authorize execution.

28. With regard to Respondent's claim that the Applicant was paid Ksh.5,000,000/- as outlined in the Respondent's Affidavit, if confirmed by documents of payment, then the said amount shall be deducted from the Ksh 26,206,550.00/-.

DISPOSITION

- 1. Judgment is entered in favor of the Applicant for Ksh 26,206,550/- minus Ksh 5,000,000/- if proved by documents of said payment.**
- 2. Interest is hereby granted at Court Rates forthwith and Costs as per Rule 7 of Advocates Remuneration Order.**
- 3. Execution is withheld as assets of the Company in receivership are in the hands of Receivers and Managers.**
- 4. The Judgment is the debt acknowledged and to be served to Receiver to be considered alongside other debts of the Company.**
- 5. It is only in the absence of such consideration that the Court shall grant execution in line with Section 560 of Insolvency Act.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH JUNE 2021. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MS SEBASTIAN FOR THE RESPONDENT

MS OMINO H/B FOR PROF. OJIENDA FOR THE APPLICANT

COURT ASSISTANT: TUPET

MS SEBASTIAN: We seek to appeal and apply for typed proceedings and the court ruling.

COURT: The certified copies of the proceedings and ruling shall be released on payment of requisite fees.

MS OMINO HOLDING BRIEF FOR PROF. OJIENDA: We seek directions on proof of payment of Kshs. 5,000,000/=.

COURT: The same issue of proof of Kshs. 5,000,000/= shall be before Taxing Officer.

M.W. MUIGAI

JUDGE