



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E261 OF 2019**

**CROP HEALTH TECHNOLOGIES LIMITED.....APPLICANT/PLAINTIFF**

**VERSUS**

**AGRITECNO EAST AFRICA LIMITED.....1<sup>ST</sup> DEFENDANT**

**AGRITECNO FERTILIZANRES SL.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Through the application dated 26<sup>th</sup> October 2020 the applicant seeks the following orders; -

**1) Spent.**

**2) Spent.**

**3) THAT this honourable court be pleased to set aside the said judgment as prayed in the Memorandum of Appeal.**

**4) THAT this honourable court be pleased to stay the execution of the judgment and Ruling delivered by the Deputy Registrar Hon Claire Wanyama on the 29<sup>th</sup> day of September 2020 pending the hearing and determination of this Appeal inter parties.**

**5) THAT the cost of this application be in the cause.**

2. The application is supported by the affidavit of **Philip Tonde** and based on the following grounds: -

**1) THAT the Memorandum of appeal and notice of appeal have been duly filed.**

**2) THAT the appeal is merited in our humble view.**

**3) THAT the respondents have served us with the Taxation notice and execution notice that is due to lapse soon.**

**4) THAT the balance of convenience tilts towards the appellant.**

**5) THAT the appellant stands to lose irreparable damages if the injunction is not issued pending the hearing and determination of the application and the appeal.**

**6) That the respondent stands not to suffer any irreparable damages as the appellant is a company of means and compensate the respondents in the event of any loss.**

**7) THAT the appeal is arguable in all aspects of the law.**

**8) THAT the appeal will be rendered nugatory if the orders are not issued as the appellant is likely to suffer irreparable damages which cannot be compensated by money.**

3. The 1<sup>st</sup> defendant opposed the application through grounds of opposition dated 24<sup>th</sup> November 2020 wherein it lists the following grounds;

1) ***The applicant has not filed a Notice of Objection to taxation indicating the items which it was opposed to as provided for under Rule 11(2) of the Advocates (Remuneration) Order.***

2) ***The notice of Objection to Taxation ought to have been filed within 14 days of delivery of the ruling which was not done.***

3) ***Subsequently, the applicant ought to have filed a Chamber Summons Application instead of a Memorandum of appeal as provided for under rule 11(1) of the Advocates (Remuneration) Order.***

4) ***There is no provision in law for filing a Memorandum of appeal against a taxation ruling.***

5) ***Owing to the above, there is no appeal which would form the basis for the application seeking stay of execution.***

6) ***The application is incompetent as the 2<sup>nd</sup> applicant was not a party to the proceedings in the instant case which formed the basis of the taxation of Bill of costs.***

7) ***The application is an abuse of the court process and a waste of judicial time and it cannot be cured by way of amendment and therefore ought to be dismissed with costs.***

4. The application was canvassed by way of written submissions which were highlighted in court on 21<sup>st</sup> April 2021.

5. The applicant submitted that the Deputy Registrar erred in law as the amount awarded was not merited. He relied on Article 159 of the Constitution and Section 3A of the Civil Procedure Act to cure the procedural defects of the application.

6. The 1<sup>st</sup> respondent submitted that there was no provision in law for the filing of a Memorandum of Appeal against a taxation ruling. Counsel submitted that the application is misguided as the applicant had not filed a Notice of Objection to taxation indicating the items it is opposed to. It was submitted that the applicant ought to have filed a Chamber summons instead of the Memorandum of Appeal within 14 days of delivery of the notice. Counsel stated that the aim of the overriding objective is to enable the court achieve fair, just, speedy, proportionate justice but does not operate to uproot established principles and procedures.

7. I have considered the pleadings, the rival arguments made by the parties and the cited authorities. The main issue for determination is whether the application dated 26<sup>th</sup> October 2020 is merited. The application seeks orders to restrain the respondent from attaching or selling the applicants property, to set aside the judgment as sought in the Memorandum of Appeal and stay the execution of the judgment and ruling delivered by the Deputy Registrar on the 29<sup>th</sup> September 2020.

8. The applicant contends that the Memorandum of Appeal has merit and that it would suffer irreparable damage if the order of injunction is not issued. The applicant submitted that Article 159 of the Constitution and Section 3A of the Civil Procedure Act can cure the procedural defects of the application.

9. In a rejoinder, the respondent stated that the application is misconceived as there was no provision in law for the filing of a Memorandum of Appeal against a ruling on taxation instead of a Chamber Summons application. The respondent also faulted the applicant for failing to file a Notice of Objection.

10. In *Giella vs Cassman Brown and Company Limited (1973) E.A 385*, it was held that: -

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

11. *Mrao Limited vs. First American Bank of Kenya and 2 Others (2003) KLR 125*, where the Court of Appeal in determining what amounts to a prima facie case stated; -

***“A prima facie case in a Civil Case includes but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court; a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”***

12. The procedure for challenging the results of a taxation is provided under Paragraph 11 of the *Advocates Remuneration Order* which provides as follows: -

***1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.***

***2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the***

objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

13. In the case of *Machira & Company Advocate vs Arthur K. Magugu (2012) e KLR* and quoted in *Hezekiah Oira T/A H. Oira Advocate vs Kenya Broadcasting Corporation (2015)* held that; -

*“The appellate jurisdiction of any court is a creature of the statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to the advocates bills of costs, we agree with the decision of Ringera J (as he then was) in Machira vs Magugu (1) that the Advocates Remuneration Order is a complete code which does not provide for appeals from the taxing master’s decisions. Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used ...”*

14. In *Kamau Kinga & Company Advocates vs Grace Wanjiku Kabiaru [2017] eKLR* the court observed that: -

*“However, the law governing the matter is the Advocates Remuneration Order. According to it, an aggrieved party writes to the court asking for reasons for the taxation of certain items in a particular way. Once the reasons are given the aggrieved party then moves the court by reference according to Rule 11 of the Order. An appeal flows from the reference and not directly from the decision of the taxing master. In any event that appeal lies at the Court of Appeal with leave of court. It was not demonstrated that that was not done. There is therefore no proof that the procedure prescribed in the provisions of the Advocates Remuneration Order was complied with.”*

15. In *Matiri Mburu & Chepkemboi Advocates vs Occidental Insurance Company Limited [2017] eKLR*, the court held as follows: -

*“the provisions of Paragraph 11 of the Remuneration Order serve several purposes. Firstly, the requirement that a party seeking reasons gives a notice of items objected to, serves to narrow down the issues, and secondly, give notice to the adverse party and the taxing master of his objection. Thus the taxing master, adverse party and ultimately the reference court in their respective roles can focus on the specific matter objected to rather than entire bills of costs, which often run into several pages. The objective is obvious: the expeditious disposal of taxation disputes. Thus compliances with the requirements of paragraph 11 of the Remuneration Order is not a mere technicality that can be pushed aside peremptorily as the Applicant appears to suggest. The provisions of Article 159 (2) (d) of the Constitution were not intended to overthrow procedural or technical requirements, but to guard against “undue regard “to procedural technicalities in the administration of justice. “*

16. Guided by the above cited cases, I find that the applicant ought to have come to court through the provisions of the Advocates Remuneration Order as it is trite law that the decision of the Taxing Master can only be ventilated through a reference to a judge. I however note that the applicant filed a Memorandum of Appeal instead of Chamber Summons application. This court’s jurisdiction can only stem from Paragraph 11 of the Advocates Remuneration Order. I am guided by the decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 others [2013] eKLR* where Kiage, JA states: -

*“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”*

17. From the dictum in the above cited case, it is clear that the present appeal is not what is contemplated by the Advocates Remuneration Order as it clearly goes against the laid down procedure. The applicant has also not been demonstrated that the applicant will suffer irreparable harm or that the balance of convenience tilts in its favour as the respondent has a valid taxation in its favour.

18. In the upshot, I find that the application dated 26<sup>th</sup> October 2020 is not merited and I therefore dismiss it with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 5<sup>TH</sup> DAY OF AUGUST 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Muhatia Pala for the Applicant.

Mr. Karani for Wandabwa for 1<sup>st</sup> defendant.

Court Assistant: Sylvia