



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 433 OF 2018

IN THE MATTER OF : ARTICLES 22, 23, 258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010;

AND

IN THE MATTER OF: ARTICLE 50(1), 162, 169 OF THE CONSTITUTION;

AND

IN THE MATTER OF: THE LANDLORD AND TENANT (SHOP, HOTEL AND CATERING ESTABLISHMENTS) ACT CAP 301;

AND

IN THE MATTER OF: THE MAGISTRATE'S COURT ACT, 2015;

AND

IN THE MATTER OF: BUSSINESS PREMISES RENT TRIBUNAL (BPRT) CASE NO. 95 OF 2015

BETWEEN

SHADE MANUFACTURERS & HOTEL LIMITED.....APPLICANT/PETITIONER

AND

SERAH MWERU MATUU

GRACE GACIKU

VIRGINIA WANJIRU

LOUIS WAITHERA.....RESPONDENTS

RULING

APPLICATION

1. The Petitioner/Applicant through an application dated **11th March, 2020**, seeks the following **ORDERS:-**

a) Spent.

b) That pending the Inter Parte hearing of this application, there be a stay of execution of the decree and any consequential order issued by this Honourable Court.

c) That pending Inter Parte hearing of this application the warrants of attachment issued by the Honourable Court in favour of the Respondents be withdrawn or set aside.

d) That the cost of the application be borne by the Respondents.

2. The Application is premised on the grounds on the face of the application and is further supported by supporting affidavit of Lawrence Oigoro Nyangito, Advocate sworn on 11th March 2020.

CHAMBER SUMMONS DATED 31ST JANUARY 2020

3. The Petitioner /Applicant through the Chamber Summons dated 31st January 2020 seek the following orders:-

a) That the Ruling and/or decision delivered on 4th December 2019 by the Honourable Taxing Master, Honourable C. A. Muchoki, taxing the party to party Bill of Costs dated 1st July 2019 at Kshs.644,100/= be set aside and / or vacated.

b) That the Bill of costs dated 10th July 2019 be remitted back for re-taxation by a different Taxing Officer with appropriate directions.

c) That in alternative, the Honourable Court do tax the party to party Bill of Costs.

4. The Application is based on the following grounds:-

a) That the taxing Master erred in law and in facts for failing to properly subject the party to party Bill of Costs dated 10th July 2019.

b) That the Taxing Master erred in fact and by making a determination that the matter did not proceed for a hearing as the same was discontinued but against proceeded to award the Applicant a sum of Kshs.450,000/= as instructions fees.

c) That further the Taxing Master erred to award 1/3 pegged on instruction fee and the matter never proceeded for hearing.

d) That the Taxing Master erred in principle and reached an erroneous conclusion.

5. The Application is further supported by supporting Affidavit by Lawrence Oigoro Nyangito sworn on 31st January 2020.

6. On 4th March, 2021 the Court directed both applications dated 31/1/2020 and 11th March 2020 be heard together by way of written submissions.

THE PETITIONER'S/APPLICANT'S CASE

7. The Applicant's case is that pursuant to the bill of costs dated 1st July, 2019, the same was taxed and a Ruling delivered on the 4th December, 2019 by Honourable C.A. Muchoki (Taxing Master).

8. Aggrieved by this decision the applicant preferred a reference application dated 31st January, 2020, that sought the ruling delivered by the Taxing Master, be set aside and also that the Bill of Costs be remitted back for re-taxation by different taxing officers with appropriate directions and in the alternative, the Honourable Court do tax the party to party bill of costs.

9. It is urged that the reference application has overwhelming chances of success and that if execution proceeds, the same shall be rendered nugatory and the Applicant will be subjected to irreparable damage.

10. It is Applicant's position that the Respondents' irregularly and unprocedurally obtained warrants of attachment from the court and proceeded to issue proclamation notices without following the due process.

11. Further it is urged that through a letter dated 10th March, 2020, they contested the issuance of the warrants of attachment and also that the Respondents had not filed a formal application to have the ruling issued on the 4th December, 2019 by the Hon. C.A Muchoki taxing master adopted as a judgment of the court in order to enable them proceed with execution.

12. The Applicant sought that the Honourable Court do grant the orders sought.

THE RESPONDENTS' RESPONSE

13. The Respondents vide their Replying Affidavit dated 16th March, 2020 sworn by Rosemary Wangari Chege averred that the filing of a reference against the taxation of the bill of costs does not in law operate as a stay of execution.

14. It was their position that according to the law it was the mandate of the deputy registrar in the capacity of the taxing officer to tax party/party costs in the cause of the relevant proceedings and issue a certificate of costs and that there was no law requiring a judgment of a certificate of costs in a party/party bill of costs prior to execution.

15. It is Respondents averment that what is before the Court being a money decree, the applicant has not in law met conditions requisite for granting stay of execution since the money sought has not been executed.

16. The Respondent requested the court to dismiss the application for being frivolous and vexatious.

THE PETITIONER/APPLICANT'S SUBMISSION

17. In their submissions dated 11th June, 2021, the Applicant averred that the Respondents action of proceeding with the attachment, while knowing very well, that there was a reference application was illegal since it has been decided in many authorities including court of appeal that once a party has preferred a reference application before the superior court after the taxing master has passed a decision in a matter involving bill of costs, the reference itself has to be determined before the Superior Court where it has been instituted and finalized.

18. The Applicant also argued that a certificate of taxation issued by the taxing master must be adopted as a judgment of the court before proceeding to execution.

19. With respect to the chamber summons application dated 31st January, 2020, the applicants averred that the taxing master erred with respect to the *Joreth vs Kigano case* where he had failed to consider the matter in terms of the principles of the said case.

20. Further it is argued that even though the Advocates Remuneration order gave discretion to the taxing master, the petition had been withdrawn before hearing hence the costs awarded by the Honourable deputy registrar was not justified.

21. It is Applicants position that the notice to discontinue dated 6th June, 2019 was served upon the Respondent's advocate hence when the petition came up for hearing before the Honourable Judge on the 11th June, 2020, the respondents were all aware that the petitioner was to discontinue the petition hence were not entitled to the 1/3 waking up fees.

22. Reliance is placed in the case of *Premchand Raichand Ltd & Another vs Quarry Services of Es Ltd & Others (1972) EA*, and argued that the taxing master acted in an unfair and unjustified manner, hence sought the Court to allow the application.

THE RESPONDENT'S SUBMISSIONS

23. The Respondents vide their submissions dated 25th June, 2021, averred that an appeal does not operate as a stay of execution and there being no stay of the court's orders, it was within the respondent's right to execute for the taxed costs.

24. The Respondents further argued that matters of assessment of costs and execution of decrees and orders are for the deputy registrar and not the judge and that the deputy registrar has executed the duties of that office in the execution of the proceedings before the Court.

25. Additionally the Respondents argument is that the matter having been withdrawn, no issue of judgment arises and assumption by the applicant that the respondent ought to procure a judgment in order to execute is misconceived.

26. With respect to the application dated 31st January, 2020, the respondents argued that the applicant had failed to demonstrate in what respect the taxing officer is alleged to have failed in following the right procedure in taxing the bill of costs.

27. It is stated that during the conduct of the petition, the court had already issued directions for hearing and the respondent duly complied in readiness for hearing and it is only when the case came up to be heard that the applicant filed the notice referred to in the submissions.

28. It is Respondents position that the applicant has to take responsibility for consequences of the ill-advised serial litigation he engaged in, in abuse of the Court process with a bid to defeat the orders of eviction.

29. The Respondents averred the Applicant's pleadings in the petition dated 3rd December, 2018 prayed among other orders that an order directing the respondents to compensate the Petitioner 42 million being the value of improvements made in the premises and it is therefore unfounded that the value of the subject matter cannot be ascertained.

30. The Respondent proceeded to justify the fees ordered by the deputy registrar and quoted *Schedule 6 of the Advocates Remuneration Order* in support of their averments.

31. The Respondents prayed that the Applicant's applications be dismissed with costs.

ANALYSIS AND DETERMINATION

32. Having carefully considered the Applicant's applications dated 11th March, 2020 and 31st January, 2020, the Respondent's Replying Affidavit, the rival submissions, I find that the following issues arise for determination:-

a) Whether a reference to a bill of costs can operate as a stay of execution;

b) Whether the Ruling by the Senior deputy registrar on the bill of costs is flawed;

c) *Whether the Applicant is entitled to the orders sought.*

A. WHETHER A REFERENCE TO A BILL OF COSTS CAN OPERATE AS A STAY OF EXECUTION

33. The issue on whether a reference application can operate as a stay of execution has been raised by the Applicant and is central to their application dated 11th March, 2020. It is noted that in the application four prayers are sought.

34. The Applicants have averred in their submissions that it has been decided in many authorities including the Court of Appeal that a reference should be determined first where there is a decision in a matter involving bill of costs by the superior court where it has been instituted.

35. I note keenly however that the applicant has not produced the alleged authorities in support of their claim nor has any provision of law been cited for consideration by this Court.

36. In the application dated 11th March 2020 under prayer no.1 I have noted that it is seeking stay of execution and in application dated 31st January 2020 is seeking setting aside taxation. The principles for setting aside a Court's decision has been well enumerated in the persuasive case of *Wachira Karani v Bildad Wachira [2016] eKLR*, where the High Court stated;

“The well-established principles of setting aside interlocutory judgements were laid out in the case of Patel vs East Africa Cargo Handling Services [12] where Duffus, V. P. stated;

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"

37. Further, **Order 42 Rule 6 of the Civil Procedure Rules** provides;

Stay in case of appeal [Order 42, rule 6.]

(1) 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.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

33. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in **Order 42 Rule 6(2) of Civil Procedure Rules**, aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

34. In the instant application herein, the applicant seeks orders to stay the execution of the decree and any consequential orders issued by this Honourable Court. However in the application it is not stated stay should issue pending what action. It is noted stay is only sought pending inter-partes hearing of the application which this Court has heard hence it appears in my mind the prayers sought were extinguished the moment this Court heard the applications.

35. For the Court to consider the granting of stay orders the court will have to examine the merits of the application and ascertain whether there is probability of substantial loss that may result to the applicant unless the orders sought granted.

36. In the Court of Appeal case of *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997*, Warsame J stated as follows:-

“It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion... For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its

discretion would be guided by adequate and proper evidence of substantial loss.”

37. The Court is aware of the warrants of attachment issued on the 27th February, 2020, and the proclamation notice dated 6th March, 2020, there is however no evidence of execution that has taken place, and therefore there is currently no substantial loss that has been occasioned to the Applicant. Similarly Prayer no.3 of the application dated 11th March 2020 seeks want of attachment withdrawn or set aside pending interpartes hearing of the application which has already been heard herein and orders may not issue.

38. It is also worth noting that it is the applicant who filed a petition against the respondent but proceeded to withdraw the same before the matter was heard and determined, therefore, the respondent having obtained a ruling on costs ought to enjoy the fruits of the judgment.

39. It is my view that it has not been demonstrated that the filing of a reference does operate as a stay. I decline to grant stay as the application has no merits and secondly the Application by now has been heard as sought and what is pending is this ruling.

B. WHETHER THE RULING BY THE SENIOR DEPUTY REGISTRAR ON THE BILL OF COSTS IS FLAWED

38. The Applicant by its chamber summons reference application prays that the ruling delivered on the 4th of December, by C.A. Muchoki, taxing party to party bill of costs dated 1st July, 2019 at Kshs. 644,100/= be set aside and/or vacated.

39. The Applicant's ground is that the taxing master erred in fact by making a determination that the matter did not proceed for a hearing as the same was discontinued but still proceeded to award the Applicant a sum of Kshs. 450,000/= as instruction fees.

40. I now turn to examine how the Taxing Officer arrived at the above figure. In her ruling dated 4th of December, 2019, the Deputy Registrar indicated that she was guided by *Schedule 6 (j) (ii) of the Advocates Remuneration Order, 2014* which provided a fee of Kshs. 100,000.00/= on instruction fees. The Deputy Registrar then proceeded to indicate she exercised her discretion against the figure provided which is Kshs. 4,700,000/= and found the sum of Kshs. 450,000/= as being reasonable.

41. According to the *Advocates Remuneration Order* under *Schedule 6, (j), of the Act* provides;-

“To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate

(i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000;

(ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may be reasonable but not less than Kshs.100,000;

42. The factors to be considered in ascertaining the value of the subject matter of a suit were set out by the Court of Appeal in the case of *Joreth vs. Kigano & Associates (supra)* as follows:-

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances”.

43. Upon perusal of the Court file, it is revealed that the Petitioner/Applicant filed a Petition dated 3rd December, 2018 and applications of even date. The Respondents filed responses to this Petition vide their Replying Affidavits dated 18th March, 2019 and 17th December, 2018 as well several other notices caused by the filing of the said Petition.

44. Upon consideration of the factors that were considered by the Taxing master, I found that the Taxing Master, correctly exercised her discretion in awarding a modest instruction fee of Kshs. 450,000.00 owing to the fact that in the petition, the applicant sought compensation from the respondent at a value of Kshs. 42 Million being the value of improvements made in the premises as per (prayer 2 of the Petition).

45. There was also an award of getting up fees which is 1/3 of the instruction fees awarded at Kshs. 150,000/=.

46. Getting up fees is provided in the *Advocates Remuneration Order* under *Schedule 6 (2)* which provides;-

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation: Provided that— (i) this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;”

47. Having perused the Court record, I find that the directions were issued fixing the Petition for hearing on the 11th June, 2019, while the notice of discontinuance was filed on the 10th May, 2018. The respondents have averred that they were served on the eve of the hearing date

which is 10th of June, 2019, when they had already prepared for the hearing of the matter. I find that the hearing date having been fixed the Respondents' Advocates, were ready to proceed with the hearing of the matter, on the hearing date; and as found, I find they are therefore entitled to the getting up fees as awarded by the Taxing Master which have been reasonably placed at Kshs. 150,000/=.

48. I therefore find that the whole ruling by the Taxing Master to be reasonable and that the respondents ought to enjoy the fruits of their judgment.

C. WHETHER THE APPLICANT IS ENTITLED TO THE ORDERS SOUGHT.

49. With regards to the orders sought, it is my view that stay of execution should only be granted to a certain extent which is arising out of the manner in which the decree was issued herein.

50. According to the Advocates Act under section 51, the same provides;

“51. General provisions as to taxation

(1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.

(2) The certificate of the taxing officer by whom any bill 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.” (Emphasis added)

51. I find that the Respondents did not make a formal application to the court for the certificate of costs to be converted to a judgment. The respondents vide their letter dated 6th November, 2019, just requested for a certificate of costs.

52. According to the above Section, the respondent ought to have made a formal application for the Ruling of the Taxing master to be adopted as a judgment by this Court.

53. It is my view that a stay of execution should only be granted to the extent that the Respondents make a proper application to adopt the certificate of taxation as a judgment upon which the stay would lapse and the respondent would be able to extract a decree from the said judgment and execute the same.

54. ***The upshot is that I proceed to make the following orders:-***

a) Application dated 31st January 2020 seeking to set aside or vacate Ruling delivered on 4th December 2019 by the Taxing Master and re-taxation by different Taxing master or in alternative this Court do tax the party to party Bill of Costs is without merits and is dismissed.

b) Application dated 11th March 2020 is partially allowed on conditions and to the extent that the Respondents do file and serve formal application to have certificate of costs adopted as judgment of this Court and upon granting the same the stay would lapse and upon which the Respondents will be able to drawn decree from the said Judgment and execute the same.

c) Each party to bear its own costs as regards the applications.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA