



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 461 OF 2008

GOVERNORS BALOON SAFARI LIMITED.....PLAINTIFF

-VERSUS-

SKYSHIP COMPANY LIMITED.....1ST DEFENDANT

COUNTY GOVERNMENT OF NAROK.....2ND DEFENDANT

RULING

BACKGROUND

1. Following the ruling on taxation of the Plaintiff's Bills of Costs (BOC) delivered on 31st May 2019, the 2nd defendant made an oral application for stay for 14 days to enable it file its reference and for a further 30 days stay of execution.

2. The 2nd defendant's case is that its advocates were however unable to obtain a typed copy of the ruling on taxation until after the expiry of the stay period granted by the Taxing Master.

3. The taxation of the Bills of Costs gave rise to the filing of the two applications that are subject of this ruling namely:

a) The application dated 20th June 2019 (hereinafter "**the 1st application**") wherein the 2nd defendant seeks order that: -

a) That there be a stay of execution of the Taxing Officer's Order issued on 31st May, 2019 pending the hearing and determination of the application.

b) That there be a stay of execution of the Taxing Officer's Order issued on 31st May, 2019 pending the hearing and determination of the reference.

c) That this honourable court be pleased to enlarge the time within which to file a notice objecting to the decision of the taxing officer delivered on 31st May, 2019.

d) That this honourable court be pleased to enlarge the time within which to file a Reference against the decision of the taxing officer delivered on 31st May, 2019.

e) That the notice objecting to the decision of the taxing officer, expressed through the letter dated 20th June, 2019 and filed herewith be deemed to have been properly filed through out of time.

f) That the reference filed herewith be deemed to have been properly filed on time.

b) The application dated 12th September 2019 (hereinafter "**the 2nd application**") wherein the plaintiff seeks orders to be awarded interest on the taxed at costs 14% of the sum of kshs 20,165,806.00 and that the said interest accrues from 31st May 2019 until payment in full.

4. The 1st application is premised on the main ground that the absence of a copy of the ruling of the Taxing Master hampered the 2nd defendant's bid to file the requisite notice and subsequent Reference against the decision of the Taxing Master as required under Rule 11(1)

and (2) of the Advocates Remuneration Order (ARO).

5. The 2nd defendant further states that the decision/award by the Taxing Officer is manifestly excessive and contrary to the spirit and principle of the Advocates Remuneration Order and that the plaintiff will proceed with the execution unless the orders sought are granted.

6. The plaintiff opposed the 1st application through the replying affidavit of its Managing Director **Mr. Dominic Grammaticas** who avers that the application offends the constitutional principles on exercise of judicial authority as this will be the 2nd time that the 2nd defendant is challenging the ruling on taxation after its first challenge was accepted in the ruling delivered by this court (differently constituted) on 11th December 2018.

7. He states that the impugned ruling that is the subject of the 2nd defendant's current challenge complies with the earlier ruling of 11th December 2018 as it corrects the errors that had been identified in the earlier decision of the Taxing Officer.

8. He further states that no sufficient reasons have been advanced in the application to explain the 2nd defendant's failure/delay in filing the intended reference within the prescribed period.

9. The 2nd defendant opposed the 2nd application through the replying affidavit of the County Secretary **M/S Elizabeth Sanangoi Lolchoki** who avers that in view of the existence of the 1st application, the 2nd application is premature and ought to await the outcome of the 1st application that challenges the Taxing Officer's decision.

10. Parties canvassed the two applications by way of written submissions which I have considered.

11. The main issues for determination are as follows:-

a) Whether the 2nd defendant has made out a case for the granting of orders of stay of execution of the Taxing Masters orders of 31st May 2019.

b) Whether the 2nd defendant is entitled to orders for enlargement of time within which to file the Reference against the Taxing Master's said decision.

c) Whether the plaintiff is entitled to the award of interest on the taxed costs.

Interest on costs

12. The plaintiff sought interest on the costs of Kshs 20,165,806 awarded by the Taxing Officer. Section 27(2) of the Civil Procedure Act (CPA) stipulates as follows on the subject of interest on costs.

“(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

13. Going by the wording of the above section and considering use of the keyword, “**May**”, I find that the award of interest on costs falls on the discretion on the court and like all discretionary orders, to award or failure to make an interest by a trial court cannot be interfered with by this court. To my mind, Section 27(2) of the Civil Procedure Act grants the court the free hand to award or not to award interest on costs not exceeding 14% per annum.

14. The authority of a court to award interest on costs was aptly captured by Ngugi J. in **Jane Wanjiku Wambui v Anthony Kigambi Hato & 3 Others** [2018] eKLR wherein it was held: -

“The authority and discretion of a court to award interest on costs is provided for in Section 27(2) of the Civil Procedure Act. It is in the following terms: The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

15. The same position was adopted by Sitati J. in an earlier decision in **Re Estate of Nkubutu (deceased)** [2004] eKLR when she stated as follows: -

“.....The applicable principle is that where the court has made no order that interest is to be paid on the costs, then such interest cannot be claimed and therefore is not payable.

Under Section 27(2) of the Civil Procedure Act, the law provides:-

‘27(2) – the court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.’

The wording of this sub section makes a granting of interest on costs a matter of discretion for the judge, so that where there is no order as to the payment of interest of costs, then such interest is not payable. This position was well expounded in the case of

SANTANA FERNANDES V KARA ARJAN & SONS and others (1962) E. A. 473 (Mosdell J at page 476).....a case in which the judge followed the dictum in the earlier case of SHADI RAM MEHINDRA BC MOHINDRA 1957 Ex. 708 where it was held that costs do not carry interest without special order. In the present case, there is no evidence that the court made an order as to the payment of interest on the costs. In his grounds of opposition to the application, the respondent also rightly stated that the interest awarding on costs in a matter of discretion for the judge and/or court but I hasten to add that its inclusion without an order of the court is not a basis for charging interest and should not be honoured. In light of these findings the decretal sum due to the respondent shall accordingly be reduced by the sum of Kshs 81,200/- as shown on the warrant of attachment dated 17th May 2004.”

16. Njoki Mwangi J. weighed in on the issue of interest on costs in *Kombo Juma Mzee v Karisa Nzai Munyika* [2018] eKLR wherein she observed:

“In a matter such as this where the Judge did not award interest and bearing in mind that he had the discretion to either or not, award interest, it would be erroneous for an aggrieved party to approach this court for review. That would be akin to asking this court to sit on appeal in a Judgment that was rendered by a court of concurrent jurisdiction. The best avenue for such a litigant would be to appeal against the decision of the court that heard the case in the first instance, on the basis that interest had been prayed for in the plaint, but was not awarded. The appeal court would then resolve the issue of whether or not the Judge who heard the case exercised his discretion judiciously.

*This court in making the decision that an appeal should have been pursued is alive to the provisions of Section 80 of the Civil Procedure Act which give a litigant who is aggrieved the leeway to pursue a review in a case where no appeal has been instituted. The provisions of Section 26(1) of the Civil Procedure Act however leave no room for doubt that the award of interest is discretionary on the court that hears a suit. Therefore, in a situation where interest is not awarded, it cannot be interpreted to be as a result of an error on the face of the record which would be the subject of review. The authority cited by Counsel for the defendant of *Jane Wanjiru Gitau vs The Kenya Power & Lighting Company Limited* [2006] eKLR is right on point.”*

17. Taking a cue from the dictum in the above cited cases and noting that the court which heard the case in the first instance did not make any award for interest on costs, I find that the invitation made to this court to make orders for such interest is misconceived and tantamount to asking this court to sit on appeal in its own judgment. As aptly stated by Njoki Mwangi J. in *Kombo Juma Mzee* case (supra) the party aggrieved by the trial court’s failure to award interest on costs should have appealed against the said decision or sought its review. This is not the option taken by the plaintiff in this case. I therefore find that the 2nd application dated 12th September 2019 is not merited and I dismiss it with no orders as to costs.

Enlargement of time and stay of execution.

18. The 2nd defendant sought orders for enlargement of time within which to file the reference on the basis that there was delay, by the court, in supplying it with the Taxing Officer’s written ruling/decision.

19. On its part, the plaintiff argued that the reasons advanced, by the 2nd defendant, for failing to file the reference within the prescribed period are not plausible as it was clearly evident that as at 20th June 2019 the 2nd defendant had already drawn and filed a reference against the impugned decision of the Taxing Officer which reference it seeks the orders of this court to be deemed as properly filed.

20. According to the plaintiff, the peculiar facts of this case did not require the 2nd defendant to wait for the copy of the Taxing Officers ruling before it court file the reference. It was the plaintiff’s case that the 2nd defendant is not entitled to the discretionary orders sought. For this argument, reliance was placed on the decision in Civil Application No. 21 of 1999 *Samken Limited & 2 Others v Mercedes Sanchez Ran Tussel & Another* wherein the Court of Appeal stated:

“As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion. We are, accordingly entitled to interfere with the learned judge’s exercise of discretion and we do so on two grounds, namely-

1. That for the delay between 5th March, 1998 and October/November, 1998 the learned single judge failed to take into account the fact that the applicants had failed to produce before him the registrar’s certificate of delay required by the proviso to rule 81(1); and.

2. That for the delay between November 1998 and 26th January, 1999, the applicants failed to place before the judge any material upon which he could exercise his discretion in their favour.

In the event, we allow the reference by the first respondent, reverse the orders made by the learned single judge and substitute them with an order dismissing the applicant’s notice of motion lodges in this court on 26th January, 1999.”

21. Order 50 Rule 6 of the Civil Procedure Rules (CPR) stipulates as follows on the power of the court to enlarge time where limited time is fixed for doing any act or taking any proceedings.

“7. The time for delivering, amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court.”

22. Paragraph 11 of the Advocates Remuneration Order (ARO) stipulates as follows on the filing of reference objecting to the decision of the Taxing Officer:-

“11. Objection to decision on taxation and appeal to Court of Appeal.

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 which he objects.

2) The Taxing Officer shall forthwith record and forward to the objector the reasons or 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 subparagraph (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 expired.”

23. My understanding of the above provisions of paragraph 11 of Advocates Remuneration Order is that a party who desires to object to a taxation decision must give notice in writing of such objection specifying, the items of taxation objected to, within 14 days after the decision.

24. Upon receipt of the notice, in writing the Taxing Officer is required to record and forward to the objector, the reasons for his decision on those items after which the objector has 14 days, upon receipt of the reasons, to file a Reference to the Judge by chamber summons.

25. In the instant case, I note that the impugned decision of the Taxing Officer was rendered on 31st May 2019 in the presence of the 2nd defendant who then made an oral application for stay. On the same day, the 2nd defendant wrote a letter to the Deputy Registrar (2nd defendant’s annexure “JK-1”) requesting for a copy of the ruling of the Taxing Officer.

26. The 2nd defendant states that as at 20th June 2019 when he filed the instant application and the draft Reference, it had not been supplied with a copy of the Taxing Officers ruling and that it was therefore not possible for it to specifically list items of the taxation that it intended to object to.

27. From the undisputed facts regarding the efforts made by the 2nd defendant to obtain a copy of the Taxing Officers ruling and the fact that the said ruling was only availed to the 2nd defendant after 20th June 2019, when the 14 days period within which the Reference ought to have been filed had already lapsed, I find that the 2nd defendant cannot be blamed or penalized for the delay in filing of the Reference. My above findings on the issue of the delay by the court in supplying the ruling notwithstanding, I am still minded to comment on the issue of the delay in filing the Reference in view of the fact that the 2nd defendant’s counsel was present in court at the time the Taxing Officer delivered her ruling. In the circumstances of this case and considering that the 2nd defendant’s counsel was present in court at the time the ruling was made, one cannot say that the 2nd defendant was completely in the dark as regards the contents/terms of the said ruling such that that it was incapacitated in filing its Reference/objection to it unless a typed copy of the ruling was availed.

28. My position is bolstered by the fact that the 2nd defendant was able to file a draft notice of objection and Reference on 20th June 2019 which it now seeks this court’s orders to be deemed as duly filed. Considering that the 2nd defendant was able to file its notice of objection and Reference before obtaining the copy of ruling one can say that it was all along aware of the contents of the ruling.

29. On stay of execution for costs I note that courts have taken the position that there are instances where such stay of execution may be granted in the interest of justice. In *Labh Singh Harman Singh Ltd V Attorney General & 2 Others* [2016] e KLR it was held: -

“Jurisdiction to order stay of certificate of taxation of costs

8.. I am unable to agree with the submission by counsel for the respondent that the Court has no power to order stay in cases of taxation for costs as exists in the Civil Procedure Rules. It is clear to me that taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. Indeed, section 94 of the Civil Procedure Act provides as a general rule that execution of orders of the court should await the confirmation of the costs by taxation unless the Court grants leave for execution before taxation of costs.

9. Section 94 of the Civil Procedure Act is in the following terms:

94. Execution of decree of High Court before costs ascertained

Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

10. Moreover, section 89 of the Civil Procedure Act provides for the application of the Civil Procedure Rules in all cases of a civil nature such as the present application arising from taxation of costs. Section 89 of the Act is in terms as follows:

“89. Miscellaneous proceedings

The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.”

It follows, in my view, that the provisions of the Civil Procedure Act with regard to stay of execution will apply to proceedings, which are of a civil nature, for the reference of an objection to the Court from the taxation of a Bill of Cost by a Taxing Officer of the Court under the Advocates’ Remuneration Order.

11. This position accords with the interests of justice that a party against whom substantial sums of money have been adjudged in the nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates’ Remuneration Order, which is the procedure provided for such determination. Otherwise such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time.”

30. In the present case, having found that the 2nd defendant is entitled to orders for extension of time within which to file Reference, it logically follows that the execution for costs that are the subject of the objection and Reference should be stayed pending the outcome of the Reference. Needless to say, the execution levied before the Reference is determined will render the Reference nugatory.

31. This court notes that this is the second time that an objection on taxation is being made in this matter. The first ruling on taxation was made on 31st October 2016. Following the first ruling, the plaintiff filed a reference objecting to it and in a ruling delivered by Amin J. on 11th December 2018, the court ordered fresh taxation that is the subject of the current context.

32. The court further notes that the suit that is the subject of the current dispute was filed in 2008. Considering the background of this case and the mantra that *“litigation must come to an end”* I find that it will serve the interest of justice to allow the application dated 20th June 2019, in the following terms:

a. The execution of the Taxing Officer’s orders of 31st May 2019 is hereby stayed pending hearing and determination of the Reference.

b. Time within which to file Notice of Objection and Reference against the decision of the Taxing Officer delivered on 31st May 2019 is hereby extended.

c. The Notice of Objection and Reference filed on 20th June 2019 to be deemed to have been properly filed.

d. Orders (a), (b) and (c) above are granted on condition that deposits the taxed costs of Kshs 20,165,806.00 in a joint interest earning account to be held by counsel for the plaintiff and the 2nd defendant in a banking institution of repute within 30 days from the date of this order.

e. In default of compliance with order (d) above orders (a), (b) and (c) will stand vacated.

f. Each party to bear its own costs of the application.

Dated, signed and delivered via Microsoft Teams at Nairobi this 29th day of May 2020 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 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kere for the 2nd defendant

No appearance for Shapley Baret for plaintiff

Court Assistant: Sylvia