



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.36 OF 2016

LEONARD MUNYUA MBUGUA

T/A MUNLEO HARDWARE & METAL FABRICATORS.....PLAINTIFF

VERSUS

JUSTLINE INVESTMENTS LIMITED.....DEFENDANT

AND

AMOCO CONSTRUCTION GROUP LIMITED.....THIRD PARTY

RULING

(1) Before this Court are three applications for consideration as follows: -

- 1. The Notice of Motion dated 28th January 2018.**
- 2. The Chamber Summons dated 28th February 2019**
- 3. The Notice of Motion dated 25th March 2019.**

(2) All these applications were canvassed by way of written submissions. The Plaintiff filed its written submissions on **20th June 2019**, whilst the Third Party filed its written submissions on **30th May 2019**.

BACKGROUND

(3) The Plaintiff **LEONARD MUNYUA MBUGUA, T/AMUNLEO HARDWARE & METAL FABRICATORS** herein filed a civil suit in the Magistrates Court being **CMCC NO.2233 OF 2012** seeking amongst others a Mandatory Injunction, General damages for breach of Contract, Costs of the suit and Interest. The Third party **JUSTLINE INVESTMENT LTD** filed a Counter claim against the Plaintiff in that case for **Kshs.1,765,000** damages, costs and interest.

(4) Subsequently the Plaintiff later filed in the High Court **HCCC NO.36 of 2012** against **Justline Investment Ltd** as Defendant in which suit the Plaintiff claimed a sum of **Kshs.27,549,520/=** with interest and costs. **JustlineInvestment Limited** then joined **AMOCO CONSTRUCTION GROUP** as a third party in the High Court matter.

(5) The two suits being **CMCC No.2233 of 2013** and **HCCC NO.36 of 2012** were consolidated and judgment in the consolidated suit was delivered by **Hon Lady Justice Olga Sewe** on **4th May 2018**. The Honourable Judge entered judgment in favour of the Plaintiff against the Defendant for **Kshs.27,549,520/=** with interest at 25% per annum from **6th January 2012**. However, the Plaintiff was not awarded costs against the Defendant or the third party. The Court also dismissed the third party's counterclaim against the Plaintiff with costs. Therefore, the costs awarded to the Plaintiff were limited only to the counterclaim. The Plaintiff then extracted the decree.

ANALYSIS AND DETERMINATION

I propose to deal with each application individually.

(i) Notice of Motion dated 28th January 2019

(6) By this application **JUSTLINE INVESTMENT LIMITED**, the third party seeks for Orders that:-

a) The funds held at Equity Bank Limited, Kenyatta Avenue Branch in account number [...] in the joint names of Hamilton Harrison & Mathews and Ondabu& company Advocates be released to the third Party through its advocate Hamilton Harrison & Mathews.

b) The decree issued on 17th May 2018 be rectified to include the dismissal of the Plaintiff's claim for mandatory injunction made against the third party in CMCC No.2233 of 2012 Leonard MunyuaMbugua T/A Munleo Hardware & Metal Fabricators Vs Amoco Construction Group Limited and Justine Investment Limited.

c) Costs of the Application be awarded to the third party.

(7) The application was premised upon **Order 21 Rules 7 and 8, Order 39 Rule 9 of the Civil Procedure Rules 2010, Section 91 of the Civil Procedure Act**, the inherent power of the Court and all other enabling provisions of the law. The application was founded on the following grounds :-

"1. This matter relates to CMCC 2233 OF 2012 Leonard MunyuaMbugua T/A Munleo Hardware & Metal Fabricators V Amoco Construction Group Limited and Justine Investment Limited (hereinafter referred to as the Lower Court matter) which was consolidated with HCCC36 of 2012 Leonard Munyua Mbugua T/a MunleoHardware & Metal Fabricators Amoco Construction Group Limited and Justine Investment Limited(hereinafter referred to as the Lower Court matter). The High Court matter is the primary file.

2. The Third Party deposited Kshs.1,000,000/= at Equity Bank Limited, Kenyatta Avenue Branch in account No.[...] in the joint names Hamilton Harrison & Mathews and Ondabu& Company Advocates (hereinafter referred to as "the joint account") in compliance with an order made on 17th May 2012 in the Lower Court matter in lieu of an earlier order made by the same court, for attachment before judgment.

3. The Plaintiff's interlocutory application for attachment of the Third Party's equipment before Judgment was anchored on the substantive claim for a mandatory injunction made against the third party to compel it to release the Plaintiff's equipment. The substantive claim was disallowed by the judgment delivered on 4th May 2018.

4. The Plaintiff has without lawful basis asserted that the funds held in the joint account should be released to the Plaintiff and has recently attempted to uplift the funds in the joint account without the Third Party's involvement.

5. An order of attachment before judgment does not survive the dismissal of the substantive claim. Any such order ends when the claim is dismissed after trial.

6. The court has power under Order 39 Rule 9 of the Civil Procedure Rules, to order the release of the funds in the joint account to the Third Party.

7. The decree issued on 17th May 2018 was extracted without the involvement of the Third Party's advocates contrary to the provisions of Order 21 Rule 8 of the Civil Procedure Rules. The decree omits the fact that the Plaintiff's claim for mandatory injunction was disallowed. It is therefore necessary that the decree be rectified so that it agrees with the judgment as required by Order 21 Rule 7 of the Civil Procedure Rules.

(8) The Plaintiff opposed the application by way of the Replying Affidavit dated **8th April 2019** sworn by **LEONARD MUNYUA MBUGUA** the Plaintiff/Respondent herein.

(9) The instant application relates to a deposit of **Kshs.1,000,000** made into **Account No.[..]**, held at **Equity Bank, Kenyatta Avenue Branch**. The deposit was made in the joint names of **Hamilton, Harrison & Mathews**, the Advocates for the third party and **Ondabu& Company Advocates** who represented the Plaintiff/Respondent. This deposit of **Kshs.1.0 Million** was made pursuant to an order made by **Hon R.A Oganyo**Magistrate on **25th May 2012** in the **CMCC 2233 of 2012** to secure a stay of an earlier order made in the same court for attachment before judgment. That the Plaintiff's interlocutory application over the third party's equipment before judgment was based on its substantive claim for a mandatory injunction made against the third party seeking to compel it to release the Plaintiffs equipment. That substantive claim was dismissed vide the judgment of the High Court delivered on **4th May 2018**.

(10) In his reply the Plaintiff argues that in her judgment **Lady Justice Sewe** did not address the issue of the **Kshs.1.0 Million** deposit. The Plaintiff contention is that the **Kshs.1.0 Million** held in the joint account opened at **Equity Bank** should be released to himself as the owner of the said funds given that the courts finding that the third party was still holding the Plaintiffs equipment in South Sudan. The Plaintiff thus made an attempt to uplift the said funds without the involvement of the third party.

(11) In this matter it is not disputed that the lower court made an order for attachment before judgment, whereupon the third party deposited **Kshs.1.0 Million** into a joint account opened in the name of both advocates. The position of the third party is that being the depositor of said funds the monies belong to him and he is entitled to the said funds. On the other hand, the Plaintiff seeks that part of the deposited funds be utilized to pay his costs and the balance be refunded to the third party.

(12) The position is that this **Kshs.1,000,000** was deposited as security for attachment and **not** as security for a bill of costs. The Plaintiff in the lower Court suit had sought to attach the third party's equipment before judgment anchored on the Plaintiffs substantive claim for a mandatory injunction to compel the third party to release the Plaintiff's equipment. The Plaintiffs prayer for a mandatory injunction was disallowed vide the court's judgment delivered on **4th May 2018**.

(13) It is manifest that from that Ruling that the condition for the deposit of this amount of **Kshs.1.0 Million** was that the money was to be held **"pending the hearing and determination of the suit or until further orders."** The suit having been finalized through the judgment delivered on **4th May 2018** the conditions for holding the funds has dissipated. There is therefore no reason for the **Kshs.1.0 Million** to continue to be held in that account.

(14) In the case of **EAST LAND HOTEL LIMITED –VS- WAFULA SIMIYU & CO. ADVOCATES [2015] eKLR**, the Court of Appeal held that:-

"It is our considered view that when an appeal is heard and determined, the effect of the judgment is to lapse any interlocutory orders that were made prior to the delivery of the final judgment. We find that the conditional stay of execution and the order directing the deposit of Kshs.5,000,000/= in a joint account lapsed with the delivery of the judgment of this Court on 24th October 2014; a conditional deposit is discharged and becomes due and repayable upon fulfilment of the condition."

(15) I wish to rely on the above Court of Appeal decision and find that when judgment in the instant case was delivered on **4th May 2018**, all other interlocutory orders lapsed. In line with the above decision, I find that once the judgment of **4th May 2018** was delivered all interlocutory orders lapsed. Accordingly, the third party is entitled to the monies in question which were deposited by the third party pending the determination of the suit. Accordingly, I allow the Notice of Motion dated **28th January 2019** in terms of prayers (a) and (b). Costs of this application are awarded to the third party.

(2) **Chamber Summons dated 28th February 2019**

(16) This Chamber summons was filed by **AMOCO CONSTRUCTION GROUP LIMITED** (the third party) seeking for Orders **THAT:-**

"1. The Ruling on the taxation dated 14th February 2019 with regard to the instruction fees (Item) and the getting Up fee (Item 2) of the Plaintiff's Bill of Costs dated 17th August 2018 to be set aside and the matter be remitted for re-taxation.

2. The costs of this application be provided for."

The summons was premised upon **Rule 11** of the **Advocates (Remuneration) Order**.

(17) The Hon Taxing Master dealt with the Party and Party Bill of Costs dated **17th August 2018** and rendered her Ruling on **14th February 2019** in which she taxed the Bill at **Kshs.780,642**. The third party objects to the Taxing Officers assessment in respect of Item Numbers 1 and 2 of the Bill of Costs.

(18) The Third Party/Applicant contends that the taxing master erred in failing to distinguish the value of the subject matter of the claim by the Plaintiff against the Defendant with the value of the subject matter of the counterclaim instituted by the Third party against the Plaintiff.

(19) The Plaintiff/Respondent objected to this Reference through the Replying Affidavit dated **8th April 2019** sworn by **LEONARD MUNYUA MBUGUA**. The Plaintiff contends that the Ruling of the Taxing Master was in line with the applicable Advocates (Remuneration) Order.

(20) The Plaintiff submitted that costs always follow the event and there being no dispute that the Plaintiff succeeded in its suit, it is entitled to the costs of said suit. The Plaintiff suggested that if the third party had failed to comprehend the import of the judgment it ought to have sought a review or filed an application for interpretation of the same.

(21) In her judgment dated **4th May 2018** Hon Lady Justice Sewe held as follows:-

"47 thus in the result, the judgment is hereby entered for the Plaintiff against the Defendant for the sum of Kshs.27,549,520/= together with interest thereon at 25% per annum from 6th January 2012 until payment in full. The other aspects of this claim are hereby dismissed with costs. Similarly, the third party's counterclaim against the Plaintiff is hereby dismissed with costs."

(22) The Taxing maser calculated the Instruction Fees (Item 1) as follows:-

"Subject matter from the Pleadings and Judgment is Kshs.27,549,520/=

1st Million Kshs.77,000/=

Next 19 million @1.5% Kshs.285,000/=

Balance Kshs.7,549,520 @1.25% Kshs.94,369/=

Total **Kshs.456,369/=**

The costs for the counterclaim is calculated with the subject matter being **Kshs.1,765,500** as follows:-

1st Million Kshs.77,000/=

Balance Kshs.765,000 @1.5% Kshs.11,482/=

Total **Kshs.88,482/=**

The total cost for instruction is taxed at **Kshs.544,851/=**

(23) The third party contends that the Taxing Master erred in principle as she calculated the instruction fee on the basis of the subject matter of the claim by the Plaintiff against the Defendant instead of on the value of the subject matter in the separate counterclaim by the Third Party against the Plaintiff.

(24) The grounds upon which the court will interfere with the decision of a Taxing Master were clearly set out in the case of **FIRST AMERICAN BANK OF KENYA –VS- SHAH & OTHERS [2002] I E.A** where it was held as follows:-

“I find that on authorities this court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision on taxation was based on an error of principle, or the fee awarded was so manifestly excessive as to justify interference that it was based on an error of principle.”

(25) Similarly in the case of **Kipkorir, Titoo&Kiara Advocates V Deposit Protection fund Board [2005] eKLR**, the Court of Appeal held that:-

“On reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs.”

(26) In **AMON –VS- BOBB T[19889] 22Q.B.O 543** it was held:-

“That for purposes of taxation the claim and counter-claim must be treated as independent action; that the costs of the counter-claim followed the ordinary rule as to costs and that the Plaintiff was entitled to have the costs of his defence to Counter-claim taxed on the High Court scale.”

(27) In situations where taxation takes place after the determination of a suit by way of judgment or by a consent, then the instruction fee is to be calculated on the basis of the amount awarded by the court in its judgment or on the basis of the sum agreed upon by the parties in cases of a judgment by consent. In this instance the Plaintiff won the case and was awarded the sum of **Kshs.27,549,520/=**. In her Ruling on the Bill of costs it is noted that the taxing master calculated the instruction fees on the basis of the amount awarded in the judgment being **Kshs.27,549,520/=**. I therefore find that there was no error on the part of the taxing officer in calculating the instruction fees.

(28) The Third Party did not in its written submissions address the Court regarding Item No.2 **“Getting Up Fees”**. In her Ruling dated **14th February 2019** the Taxing Master allowed Getting Up Fees at 1/3 of **Kshs.544,851** being **Kshs.181,617/=**. I will not interfere with this finding by the Taxing master. Accordingly, I find no merit in this reference and the same is hereby dismissed with costs to the Plaintiff/Respondent.

4. Notice of Motion dated 25th March 2019

(29) By this application **LEONARD MUNYUA T/A MUNLED HARDWARE & METAL FABRICATORS** (the Plaintiff/Applicant) seeks the following orders:-

1. That a sum of Kenya shillings Seven Hundred and Eighty Thousand Six Hundred and Forty Two Shillings (Kshs.780,642/=) held at Equity Bank Limited, Kenyatta Avenue branch in account number [...] in the joint names of Hamilton Harrison & Mathews Advocates and Ondabu& Co. Advocates be released to the Plaintiff through its Advocates Ondabu& co. Advocates.

2. That a sum of Kenya Shillings Two Hundred and Nineteen thousand Three Hundred and fifty Eight Shillings (Kshs.219,358/=) held at Equity Bank Limited, Kenyatta Avenue branch in account number [...]in the joint names of Hamilton Harrison & Mathews Advocates and Ondabu& co. Advocates be released to the third Party through its Advocates on record Hamilton Harrison & Mathews Advocates.

3. That the costs of this application be provided for.”

(30) The application which is premised upon **Order 21 Rules 8(7) and 9(d), Order 39 Rule 2** of the **Civil Procedure Rules 2010, Section**

91 of the Civil Procedure Act and all other enabling Provisions of the law, was supported by the Affidavit of even date sworn by the Plaintiff.

(31) I have analyzed this application earlier in this Ruling. The Plaintiff effectively seeks to be paid his costs out of the **Kshs.1.0 Million** deposited by the Third party a joint account held at Equity bank. I reiterate my finding that there exists no legal basis for the monies deposited by the third party to be deducted to enable the Plaintiff to recover the costs awarded to him at taxation.

(32) Accordingly, I find no merit in this application. The Notice of Motion dated **25th March 2019** is hereby dismissed with costs to the Third Party.

CONCLUSION

Finally in regard to the three applications under consideration this court orders are as follows:-

(i) The Notice of Motion dated **28th January 2018** is hereby allowed in terms of prayer (1) and (2) thereof with costs being awarded to the third Party.

(ii) The Chamber summons dated **28th January 2019** is dismissed in its entirety with costs being awarded to the Plaintiff/Respondent.

(iii) The Notice of Motion dated **15th March 2019** is hereby dismissed in its entirety with costs thereof being awarded to the Third Party.

Dated in Nairobi this 30th day of June, 2020.

.....

Justice Maureen A. Odero