



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. CIVIL APPLICATION NO. 88 OF 2014

MUSYOKA KIMEU&CO ADV.....APPLICANT/RESPONDENT

VERSUS

MAKATA SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LTD.....RESPONDENT/APPLICANT

RULING

1. By a Notice of Motion dated 29th November, 2017, that is brought under Section 1A, 1B of the Civil Procedure Act, Order 22 Rule 22 of the Civil Procedure Rules the respondent who objected to the taxation by the Taxing Officer of the Court given on 29th May, 2017 sought the following principal Orders:

1. That stay of execution and consequential orders be issued against the ruling dated and delivered on 29th May, 2017.

2. That the proclamation to attach the Respondent/Applicant's property dated 22nd November, 2017 be set aside.

2. The notice of motion is based on the grounds set out in the application as follows:

a. That costs have been certified and the applicant has engaged auctioneers to claim the sum assessed in the ruling delivered on 29th May, 2017.

b. The ruling dated 29th May, 2017 was appealed by way of chamber summons dated 7th June, 2017.

c. That the chamber summons dated 7th June 2017 was slated to be heard on 5th October, 2017 where the applicant sought time to file a response which they were duly accorded.

d. That the chamber summons is yet to be determined and heard.

e. The respondent/applicant would suffer great prejudice if the stay is not granted and the proclamation is allowed to stand.

3. Musyoka Kimeu, who is the advocate practicing with the applicant filed a replying affidavit and averred that the application is in contravention of Order 22 Rule 22 of the Civil Procedure Rules, is intended to frustrate the realization of the taxed costs because the certificate of taxed costs was issued on 10.10.2017 and the application for stay was filed on 29.11.2017. It was further averred that the respondent has failed to file a reference for an objection to taxation under Paragraph 11 of the Advocates (Remuneration) Order, has not given any notice in writing to the taxation master and has not legally challenged the quantum of the taxed costs and therefore lacks the capacity to seek the stay of execution.

4. The application was canvassed vide submissions. The respondent/applicant filed submissions dated 21st May, 2019 wherein counsel framed two issues for determination; Firstly, whether the applicant is entitled to an order of Stay of execution and secondly whether the action of proclamation is exercised in bad faith and should be set aside. On the first issue, learned counsel submitted that Order 42 Rule 6 governs the application for stay and argued that there was no inordinate delay because counsel wrote to the registrar on 30th May, 2017 detailing intent to appeal and requesting for certified copies of the ruling to enable them do so and once this was done, they filed a reference by way of chamber summons dated 7th June, 2017 which application is yet to be heard and the Respondent proclaimed on the property of the applicant. Learned counsel submitted that Order 11 of the Advocates Remuneration Order grants the court discretion to extent time to lodge a

reference and nevertheless the applicant's reference was filed within the 14 day frame. On the element of substantial loss, counsel submitted that the costs awarded are excessive and their tools of trade are the subject of the settlement.

5. There were no submissions filed by the Applicant/Respondent at the time of writing this ruling.

6. I have considered the application and the submissions by the parties, and the issues that arise for determination are-

a. *Whether the court may set aside the proclamation dated 22nd November, 2017 and*

b. *Whether the court may stay execution of certificate of taxation of costs pending the hearing of the reference.*

7. The application is brought under Order 22 Rule 22 of the Civil Procedure Rules which states;

22. "(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit."

8. The procedure for the challenge of a taxation of costs by way of a reference is provided for under paragraph 11 of the Advocates' Remuneration Order. I am satisfied that there was a reference and the applicant was diligent having the reference filed expeditiously. The applicant did challenge the taxing officer's decision vide the application dated 7th May, 2017 but the certificate of taxation of 10th October 2017 has not been set aside and there is no application to do the same. As fate would have it, the Respondent proclaimed the applicant's property and hence this application.

9. Counsel for the respondent has deponed that the application offends order 22 Rule 22 of the Civil Procedure Rules. However I am unable to agree with him because 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."

10. The import of order 22 Rule 22 is that the court may stay execution of a decree that it passed and there is on record an application to challenge the taxing master's decision and it is a miscarriage of justice to allow the same decision to be executed without hearing the person who challenged the decision. I find that the certificate of taxation that was issued was erroneous and so was the proclamation because as noted earlier, the certificate had been issued after the application to challenge the taxing officers decision was lodged and should not be allowed to stand. It is fair and just to allow the respondent/applicant an opportunity to prosecute his pending application dated 7th May 2017 for to deny it would affect its right to a fair trial. The applicant/respondent's discomfiture would be catered for by the court giving certain conditions attendant to the quest for stay of execution.

11. On the 2nd issue, the Court has power to order stay in cases of taxation for costs as exists in the Civil Procedure Rules. Taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules.

12. It follows, in my view, that the Order 42 Rule 6 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.

13. This position accords with the interests of justice and my earlier observation 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 same 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.

14. Under Order 42 Rule 6 of the Civil Procedure Rules, a court will in granting stay of execution pending hearing and determination of a reference to a judge from taxation of costs be guided by presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the applicant.

15. The court will determine whether the applicant stands to suffer substantial loss if stay is not granted and whether the applicant has provided security.

16. Counsel for the respondent/ applicant has urged that the Respondent/applicant gave notice in writing to the taxing master that it intended to appeal against her decision, I note that the notice is general but not on the items in the Bill of Costs objected to. The Reference dated 7th May, 2017 and filed on 9th May, 2017 as Misc. Application No. 88 of 2014 that is on the court record may qualify as the notice in writing.

17. The applicable Rule 11 of the Advocates' Remuneration Order contemplates a notice in writing requesting for reasons of the Taxing Officer's decision on taxation of specified items of the Bill of Costs, and upon receipt thereof an application commonly referred as a reference to a judge, by way of Chambers Summons setting out the grounds of objection to the taxation. See paragraph 11 (2) of the Advocates' Remuneration Order. This is evidenced by the letter dated 31st May, 2017 alluded to by the applicant in its submissions.

18. The applicant has established that it will suffer substantial loss if the intended execution is not stayed because the amount taxed is colossal. It also follows that if the Respondent executes the decree and the Applicants' reference succeeds, then not only will the Applicant suffer substantial loss but the reference will also be rendered nugatory. On the other hand none of the parties have disclosed any source of income that they would use to refund or satisfy the decretal amount should the reference succeed.

19. Was the application filed without unreasonable delay? The application has been filed 6 months after the decision, and within one month of the issue of the proclamation. It is noted that the reference was filed on 9th June, 2017 quite within time after the delivery of the impugned decision thus signaling the Applicant's interest in pursuing the reference. It is only after the applicants were served with the proclamation that the intention to execute the decree dawned on them. Be that as it may, there is thus no inordinate delay on the part of the Applicant.

20. A perusal of the reference indicates that it challenges the decision of the taxing master and I find it arguable.

21. In the circumstances, I find that the application succeeds and grant *stay of execution against the ruling dated and delivered on 29th May, 2017* however this will be pending the hearing of the Applicant's reference.

22. Having found that the certificate of taxation ought not to stand and equally the proclamation, I also order *that the proclamation to attach the Respondent/Applicant's property dated 22nd November, 2017 be set aside.*

23. For avoidance of doubt the Court makes the following orders:

a) Stay of execution and consequential orders do be issued against the ruling dated and delivered on 29th May, 2017 be pending the hearing and determination of the Applicant's reference.

b) The proclamation to attach the Respondent/Applicant's property dated 22nd November, 2017 is hereby set aside.

c) The applicant shall within fourteen (14) days from the date hereof fix the reference for hearing.

d) There shall be a stay of execution of the Certificate of Costs dated the 20th November, 2017 pending the hearing and determination of the reference filed by Chamber Summons dated 7th May, 2017, subject to the applicant depositing in court half of the amount of taxed costs in the sum of Ksh.259,090.50/- or a Bank Guarantee therefor within fourteen (14) days hereof failing which the stay shall lapse.

e) Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 25th day of September, 2019.

D. K. Kemei

Judge