



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLICATION NO. 513 OF 2016

IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR THE TAXATION OF COSTS AS BETWEEN ADVOCATE AND CLIENT

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES.....APPLICANT

AND

THE NATIONAL LAND COMMISSION.....RESPONDENT

RULING

1. This court, by its Judgment dated **20th September 2018**, upheld the taxation of the **Bill of Costs** of Prof. Tom Ojienda & Associates (**the Advocate**) to the tune of Ksh 40 million. The Respondent, National Land Commission, being aggrieved by the decision filed a Notice of Appeal on 4th October 2018.

2. There are two applications before me for my consideration. The first in time is filed by the Advocate. It is dated 21st May 2019. By that application the Advocate seeks the entry of judgment for the taxed costs as provided under **section 5 1(2) of the Advocates Act, cap 16**. The second application is filed by the Respondent and it is dated 16th September 2019. By that Application the Respondent seeks to stay execution of the order made on 20th September 2018 pending appeal.

3. The obvious application that should be considered first is the application of stay pending appeal because, if indeed it is successful there will be no basis of considering the advocate's application for entry of judgment.

NOTICE OF MOTION DATED 16TH SEPTEMBER 2019

4. This Application is supported by an affidavit sworn by **Brian Ikol** the acting Director legal affairs of the Respondent. He deponed that the Respondent will suffer irreparable loss if stay is not granted. That the Respondent is a Constitutional Commission established under **Article 67(1)** of the Constitution and that it is a state organ. That as such, the Respondent being a government entity, the advocate cannot execute judgment against it.

5. The application is opposed by the advocate. Through his affidavit in reply, the advocate termed the application as baseless and an abuse of the court process because; stay can only be in respect of positive orders, which the advocate submitted was not the case in this matter; because the Respondent relied on provisions of the Law that do not refer to orders of stay pending appeal; and that this court is *functus officio*, and accordingly has no jurisdiction to entertain the Respondent's Application.

6. My take of the issues raised in the application are as follow.

7. On the argument that the Respondent relied on the wrong provisions of the law, I would respond by stating that the advocate failed to show what prejudice he suffered. The advocate should have shown that he was unable to understand the application because the wrong law had been cited. There was no such argument advanced by the advocate. It does indeed seem that the Respondent cited Rules of the **Civil Procedure**, which Rules have no application to what is before court. That however being so it is clear the prayer the Respondent seeks. The Respondent seeks to stay the order made by this Court on **20th September 2018**. It follows therefore that I reject that opposition raised by the

advocate because he was not prejudiced by the citing of the wrong Rules.

8. The advocate also argued that his court became *functus officio* when it delivered its judgment on 20th September 2018. Nothing, in my view, could be further from the truth. If that argument was to be accepted the advocate should equally not have filed an application for entry of judgment. The advocate erred to have cited decisions of the court of appeal when there was a pending appeal in the Supreme. Those decisions are not applicable to this matter. The court made an order on **20th September 2018** and it continues to be clothed with jurisdiction to determine whether to stay that order, or not, pending appeal. I equally reject the argument of the advocate on the issue of this court’s jurisdiction to entertain the application by the respondent.

9. Finally the advocate advanced an argument that there was no positive order to stay, as sought by the Respondent.

10. The **Black’s Law Dictionary Tenth Edition** defines stay as:

“The postponement or halting of a proceeding, judgment, or the like. An order to suspend all or part of a judicial proceedings or a judgment resulting from that proceedings.”

11. The same Dictionary defines execution as:

“The act of carrying out or putting into effect (as a court order or a securities transaction) execution of the court’s decree.”

12. The above definitions show that stay of execution can be a postponement of act or a decree.

13. In this case, as I understand it, the Respondent seeks to postpone the order made by this court on 20th September 2018. In view of that finding I reject the objection raised by the advocate.

14. Is there merit in the application by the Respondent? The Respondent is a state organ. If the appeal filed by the Respondent does not succeed there is no doubt that the advocate will be able to execute for his costs. What however is not clear is if stay is not granted and the appeal does succeed will the Respondent be able to recoup those costs from the advocate. The advocate did not respond to this in his affidavit in reply. It is because of that, that I find the application has merit. It is necessary to permit the Respondent to have the costs re-looked at by the Court of Appeal and in having the costs so re-considered it is important to ensure that the Respondent does not suffer loss if it succeeds in its appeal.

15. I will accede to the **Notice of Motion** dated **16th September 2019**. Having acceded I will not proceed to consider the advocate’s application dated **21st May 2019**. That application of the advocate will be held in abeyance pending the determination of the appeal.

16. In the end I make the following orders:

- a) *There shall be stay of the order issued on 20th September 2018 pending the hearing and determination of the appeal.*
- b) *The Notice of Motion dated 21st May 2019 is hereby held in abeyance pending the hearing and determination of the appeal.*
- c) *The costs of the Notice of Motion dated 16th September 2019 shall abide with the outcome of the appeal.*

17. Orders accordingly.

DATED and SIGNED at NAIROBI this 28th day of November 2019.

MARY KASANGO

JUDGE

Ruling Read in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE RESPONDENT**

..... **FOR THE APPLICANT**