



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 396 OF 2014**

**CORRUGATED SHEETS LIMITED..... PLAINTIFF/APPLICANT**

**- V E R S U S -**

**MONICA HARDWARE LTD..... DEFENDANT**

**AND**

**DANIEL KAMAU MBUTHIA..... 1<sup>ST</sup> RESPONDENT**

**DAVID MUREITHI MBUTHIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Corrugated Sheets Limited, the plaintiff herein, filed an action against Monica Hardware Ltd, the defendant herein, before the High Court, Milimani Commercial Courts. In the aforesaid suit, the summons were erroneously addressed to the defendant as well as Daniel Kamau Mbuthia and David Mureithi Mbuthia, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein respectively. The respondents filed a notice of motion dated 19.05.2015 seeking for the striking out of the summons irregularly issued to them.

2. On 09.05.2016 this court made an order striking out the summons with costs the aforesaid Notice of Motion. The respondents then filed their Bill of costs dated 22.06.2016, pursuant to the above mentioned order. The bill of costs was taxed as indicated in the ruling and the reasons for taxation given on 02.11.2016.

3. The plaintiff/ applicant has now taken out the chamber summons dated 21.11.2016, the subject matter of this ruling, in which it sought for the following orders:

***1. Spent***

***2. That the Honourable court be pleased to issue an order of stay of execution pending the hearing and determination of this reference/application inter partes.***

***3. That the Honourable court be pleased to issue an order of stay of execution pending the hearing and determination of this Reference/application.***

***4. That this honourable court be pleased to set aside and/or review the determination by the Hon. Deputy Registrar F. Rashid dated the 2<sup>nd</sup> of November 2016 and either tax or refer the said item No.1 of the Bill of costs herein for taxation with appropriate directions to the Hon. Deputy Registrar to consider the same as thrown away cost of the Respondents Notice of Motion dated***

19<sup>th</sup> May, 2015.

**5. That the Honourable court be pleased to make such further orders and/or Directions as it deems fit and just to grant under the circumstances.**

**6. That the cost of this application be provided for.**

4. The application is supported by the affidavit of Cyprian Onyony.

The respondents filed the replying affidavit of Victoria Wambua to oppose the chamber summons. When the summons came up for inter partes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

5. I have considered the grounds stated on the face of the summons and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival submissions.

6. The application sought for inter alia two main orders namely: that for stay of execution and an order to set aside and/or review item No.1 in the taxed Bill of costs by Hon. F. Rashid dated 02.11.2016. I will first determine the prayer for stay of execution orders.

7. The applicant avers that the respondents have threatened to execute the decree therefore there is need to maintain the *status quo* by granting an order for stay. The respondents opposed the motion arguing that the application for stay was filed in bad faith and with the sole intention of preventing the respondent from enjoying the fruits of taxation of the bill of costs.

8. The principles to be considered in determining an application for stay are well stated under Order 42 of the Civil Procedure Rules. First, an applicant must show the substantial loss it would suffer if the order for stay is denied. Secondly, the application for stay should be filed without unreasonable delay. Thirdly that the court should consider the provision of security for the due performance of the decree.

9. On the first principle, the plaintiff/applicant is of the view that it would suffer substantial loss should the sums awarded at the taxation be executed before this reference is heard and determined as the applicant may not be able to recover the said amount from the Respondents whose financial means the applicant is not aware of. The respondent did not answer this issue in his reply to the application. With respect, I am convinced that the appellant has shown that it would suffer substantial loss if the order for stay of execution is denied.

10. The second principle is that the application should be filed without unreasonable delay. It is apparent on record, that the ruling on the bill of costs dated 22.06.2016 was taxed at Ksh.616,755/- and delivered on 02.11.2016, while the application was filed on 21.11.2016. I am satisfied that the application was timeously filed.

11. The third principle is the provision of security for the due performance of the decree. The applicant is saying that, it is willing to furnish security. The respondent on the other hand did not submit on this issue, however it is noted that the entire application is frivolous, vexatious, lacking in merit and should be dismissed with costs. On my part, I think a fair order on the issue touching on security, that the applicant should deposit the taxed costs in the sum of ksh.616,755/= in an interest earning account in the joint names of the advocates and or firms of advocates within 30 days from the date hereof.

12. In the end, the order for stay is granted on condition specified hereinabove. Each party to meet its own costs of the motion.

13. The second issue for determination is whether the taxing officer erred in law or in any other way to warrant the orders sought in the reference. The applicant avers that while Justice Sergon issued an order for costs, then the taxing master mis-directed herself in law when she proceeded to tax the bill as full instruction cost for the defendant as quoted, whereas it is the Respondents' Bill of Costs that was under

consideration. The case against the defendant has not been determined and the taxed costs should be thrown away costs. The applicant submits that resultant taxed costs is unconscionable, excessive and exaggerated and thus against the principles of practice and litigation and warrants the interference by this court. The respondents on the other hand aver that the applicant is raising objections to the taxed bill of costs through its application, this objection was not put before the taxing master before taxation, thus the applicant cannot say the taxing officer erred and there is no need to retax the Bill of costs.

14. It is trite law that this court only interferes with a taxing master's decision on the following grounds:

***Where the taxing master's decision is based on an error of principle; if the fee is manifestly excessive or where the taxing master considered irrelevant facts or omitted some relevant factors.***

15. Item 1 of the Bill of costs is the only item being contested by the applicant and it relates to instruction fees. The applicant submits that the amount awarded Ksh. 563,010/- to the respondents is full instruction fees, yet the respondents were never parties to the suit and they were never enjoined as defendants, that allowing the instruction fees at an interlocutory stage would prejudice the plaintiff because the suit has not been heard and determined to its finality since the suit still subsists. The applicants cited the case of **Kenya Pipeline Company Limited-vs-Gray Soil Investment Limited&3 others (2009)eKLR** where it was held inter alia that:

**“to allow instruction fees at an interlocutory stage would ,mean; prejudging the results of the case and; awarding instructions on a pleading which has not succeeded. A party is entitled to claim instruction fees to defend (or sue)when he succeeds in the action provided he secures the order for costs in his favour. There would therefore be no justification for a party to raise an item of instruction fee on an interlocutory application on the basis that the suit as originally framed was decided in his favour on an interlocutory application. This is so because instructions in a case do not end up with filing of the pleadings but they continue until the final disposal of the case.”**

16. The respondents on the other hand submit that the proceedings before the taxing master were defended and the applicant filed a reply to the bill of costs as such their opposition to the bill of costs ought to have been addressed and utilised at that opportunity. The respondents states that the applicant therefore cannot at this stage of reference allege that the bill of costs ought to have been taxed at 75%,because this is a totally new issue being raised and was never brought to the attention of the taxing master. The respondents cited the case of **HCC 843 OF 2013,Nyangito –vs- Doinyo Lessos Creameries Ltd**, where it was held inter alia that:

**“The judge ought not to interfere with the assessment of costs by the taxing officer unless the officer has misdirected himself on a matter of principle . In principle, the instruction fees is an independent and static item, it is charged once only and is not affected or determined by the stage the suit has reached”**

17. After a careful consideration of the matter on taxation, I am convinced that the applicant has made its case on why the bill of costs ought to be varied and therefore make the following orders.

18. The party to party bill of costs dated 22.06.2016 taxed on 02.11.2016 is sent back to taxing officer for retaxation to the same taxing master in relation to item No. 1.

19. All other items are left intact as taxed by the taxing officer, wherein there was no challenge.

20. Each party to bear their own costs of this reference.

Dated, Signed and Delivered in open court this 26<sup>th</sup> day of January, 2018.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent