



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 40 OF 2009**

**DHARMAGMA PATEL ..... 1<sup>ST</sup> APPELLANT/APPLICANT**

**AKSHAR AUTOSPARES LTD ..... 2<sup>ND</sup> APPELLANT/APPLICANT**

**-Versus-**

**T A (a minor suing through**

**the mother and next friend H H ..... RESPONDENT**

(Appeal from the Ruling of the Chief Magistrate dated 4<sup>th</sup> February 2008 in Nakuru Chief Magistrate's Court Civil Case No. 64 of 2008)

**RULING**

1. The issues raised in the appellants application dated 21<sup>st</sup> June 2016 is whether the Respondent's execution proceedings for his taxed costs are in order without a Notice to Show Cause being issued to the Applicants when such costs were taxed over a year before the execution, on the 11<sup>th</sup> March 2015 and execution commenced on the 15<sup>th</sup> April 2016.
2. There is also an issue as to the correct amount taxed, the applicant stating that it was Kshs.42,943/= and the Respondent saying it was Kshs.53,943/= a difference of Kshs.10,000/=. None of the parties exhibited the certificate of costs, if any was drawn.
3. The Application is brought under **Order 22 Rule 18(1) and 22 and Order 51 rule 1 of Civil Procedure Rules**.

**“18 (1) where an application for execution is made**

**(a) more than one year after the date of the decree**

**(b) -----**

**(c) -----**

***The court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him---*”**

4. The applicant contends that since an objection to the taxation was filed against the taxation on the 18<sup>th</sup> March 2015 no execution ought to have been taken out until the objection is heard and determined – **Paragraph 11 of the Advocates Remuneration Order** – as it is its right to be heard on the objection.
5. However the main prayer by the applicant is for an order to set aside the execution proceedings as it did not comply with **Order 22 Rule 18** as no notice to show cause was issued in compliance with the said order. It is stated that the execution was commenced one year four days after the costs were taxed. It is also acknowledged that the notice to execute was notified to the applicants by letter.
6. Under **Order 22 rule 18(2) of Civil Procedure Rules**, it is the court that ought to issue the notice, but in practice, it is the decreeholder who moves the to Deputy Registrar to issue such notice.

I am minded that under **Rule 18 (2)** the court may issue execution proceedings of a decree without issuing the notice if, upon application, it is

satisfied and considers the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

7. The Respondent in its submissions states that the issuance of a Notice to show cause would have caused unreasonable delay but which delay is not explained further.

Citing the case **Vishisht Talwar -vs- Anthony Thuo Kanai t/a AA Thuo Kanai Advocates (2014) e KLR**, the Respondent submitted that under the Advocates Act and Advocates Remuneration order, the court has no power to order a stay of execution for costs pending appeal, and urged that the court should not grant such stay.

8. The above position was reiterated in the case of **Sande Investment Ltd t/a Westlands Cottage Hospital & 3 Others -vs- Kenya Commercial Finance Corporation & 5 Others (2007) e KLR** that:

*“---the court has no jurisdiction in the Civil Procedure Rules of the Advocates Act to stay execution or taxed costs – indeed the Advocates Act does not provide for stay of taxed costs.”*

9. I agree that the appellant's right to be heard on their objection subsists. However, it has not been explained why it has taken over a year before taking steps to get the objection heard. It cannot be said to be just and fair to keep an advocate out of reach of his hard earned legal fees due to indolence of a party.

10. Perhaps the only issue I have to make a decision on is what was the taxed costs. Is it Kshs.42,943 or Kshs.52,943? That is a matter that either party ought to have moved the court **Under Section 99 of the Civil Procedure Act** for clarification – by the Taxing Officer, as it appears to be either a typographical error or an arithmetical error. The filing of an objection in itself cannot be construed to be a stay order. The court was not moved towards that end.

11. The matter of Notice to Show Cause as provided under Civil Procedure Rules is not applicable to Advocates Act nor the Advocates Remuneration Order. - See **Sande Investment Ltd** and the **Vishisht Talwar** cases above.

For the above reasons, I find no merit in the appellants application dated 25<sup>th</sup> October 2016. However, pending clarification as to the correct taxed costs by either party moving the taxing officer in the correct manner as provided under **Section 99 of Civil Procedure Act**, the execution proceedings may proceed for a sum of Kshs.42,943/=, plus all other attendant costs and interest. Upon compliance with Paragraph II above, the balance of costs, if any, may be paid or executed for.

The temporary order of stay of execution dated 21<sup>st</sup> June 2016 and extended to the date of this ruling is lifted, subject to the amount stated, Kshs.42,943/= plus costs and interest.

12. Costs in the cause.

**Dated, signed and delivered this 31<sup>st</sup> Day of May 2018.**

**J.N. MULWA**

**JUDGE**