



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 122 OF 2013

FRANCIS MURIUKI MURAGURI T/A LUSOI STORES.....1ST APPELLANT

SAMUEL MUCHAI NJUGUNA T/A WAMU STORES.....2ND APPELLANT

RAHAB WAMBUI T/A WAMU STORES.....3RD APPELLANT

-VERSUS-

MILLING CORPORATION OF KENYA (2009)LIMITED.....RESPONDENT

(An Appeal from the Ruling of Hon. V. Ochanda, the Resident Magistrate Nakuru delivered on the 9th day of July 2013 while sitting as Deputy Registrar of the High Court in Nakuru High Court Civil Appeal No. 47 of 2012)

JUDGMENT

1. Brief Background

This appeal arose from the Resident Magistrate's ruling delivered on the 9th July 2013 while sitting as the Deputy Registrar of this court in **Nakuru High Court Civil Appeal No. 47 of 2012**, which was filed by Milling Corporation of Kenya (2009)Ltd against Samuel Muchai Njuguna T/A Wamu Stores the 2nd Appellant and two others which appeal arose from the primary suit **Nakuru HCC No.252 of 2011** and which was struck out with costs to the respondents. The appeal was against the order of striking out the suit with costs.

2. Upon filing the Appeal, the appellant sought an order of stay of execution pending hearing of the appeal.

3. Upon hearing the application interpartes, Hon. W. Ouko (as he then was) struck out the appeal No.47 of 2012 upon a preliminary objection mounted by the respondents. That was on the 5th February 2013.

4. The appellant then filed another appeal being **HCCA No.58 of 2013** emanating from the same primary suit HCCC No.252 of 2011 – all parties being the same as in the struck out appeal.

On the matter of stay of execution pending appeal, a consent order was recorded by the parties granting the stay orders upon the appellant depositing the decretal sum in court, which was done.

5. In the meantime, the Respondents in the struck out Appeal No. HCCA 47 of 2012 filed a Bill of costs dated 25th February 2013 upon which the appellant by its application dated 6th June 2013 objected to the taxation. Upon hearing the application interpartes the Deputy Registrar of the High Court, by a ruling dated **9th July 2013 ordered a stay of taxation of the respondents bill of costs pending the hearing and determination of HCCA No.58 of 2013**. The Respondents were aggrieved, and moved to file this appeal against that decision to stay taxation of the party and party costs on the struck out appeal.

6. Issues that arise for determination are thus,

1. Whether the Deputy Registrar misdirected himself in staying taxation of a bill of costs in a finalised appeal.

2. Whether there was nexus between HCCA No. 47 of 2012 and HCCA No.58 of 2013 and if so, whether it affected both appeals.

3. Whether the Deputy Registrar erred in law and fact in failing to appreciate that there was no appeal filed or pending from the ruling striking out HCCA No. 47 of 2012.

7. The issues raised are fairly straight forward.

I have stated the background of this appeal as it will be relevant for purposes of determining whether or not there was a nexus in the two appeals.

Other than that the two appeals arose from the same primary suit HCCC No.252 of 2011, and that both were filed by the same party as appellant – and probably the grounds of appeal been similar, I see no other connection. I say so because an appeal that is struck out is non-existent while the appeal filed thereafter is an independent appeal from the struck out appeal.

8. In his submissions, the appellants by their advocate Mr. Kanyi Ngure submitted that the decision of the Deputy Registrar to stay taxation of costs in a concluded appeal was plainly wrong, as it had its own decree capable of being executed on the award of costs.

He further submitted that the second appeal, HCCA No.58 of 2013 was a separate appeal and its existence could not cause the earlier appeals taxation of the bill of costs to be stayed, and to that extent, the Deputy Registrar was plainly wrong in law.

He urged the court to find that the appeal is merited.

9. The Respondent in its part, by its advocate Ms. Wanuna had nothing to add to its written submissions, save to state that the appellant had not sought leave of court to file appeal.

10. The above analysis shows clearly that the two appeals are complete separate suits save for the similarities I have highlighted above. HCCA No.47 of 2012 having been struck out with costs, it was proper for a bill of costs to be filed and taxed. There was no nexus with the subsequent appeal filed as HCCA No.53 of 2013.

11. A successful respondent cannot be barred from taxing its bill of costs arising from a dismissed appeal as costs follow the event – See **Section 27 of Civil Procedure Act** – unless there is an order to that effect.

12. I agree with the appellants submissions that there was no nexus between the two appeals as only one appeal was in existence, being HCCA No.53 of 2013. The Deputy Registrar therefore misdirected himself both in law and fact when he ordered a stay of taxation pending proceedings and out come in Appeal No.53 of 2013, these being separate appeals and not depended on each other.

13. On the matter of leave to file the appeal against the Deputy Registrar's ruling, **Order 49 Rule 7(2) Civil Procedure Rule** states:

“An appeal from a decision of the Registrar under orders referred to in Sub-rule(1) shall be to a Judge in chambers”

This appeal was filed six days after the Deputy Registrar's ruling, thus within the time stated in **rule 7(3) above**.

14. **Section 75(1) (h) of the Civil Procedure Act** lists orders from which appeals lie as of right, without leave of court.

The powers of a Deputy Registrar are stated under **Order 49 of Civil Procedure Rules**.

The Deputy Registrar is the taxing master of the High Court. Under this order, no leave is necessary, save for orders under Order 22 rule 28 and 75.

Rule 7 states the applications that the Deputy Registrar may hear. Among them is **execution proceedings under Order 22** – that deals with modes of execution.

15. Taxation of Bills of costs is part of execution proceedings without which a decree for execution may not be drawn.

Rule 7(2) of order 49 of Civil Procedure Rules states:

“that an appeal from a decision of the registrar under orders referred to in Sub-rule (1) shall be to a Judge in chambers.”

It does not state leave is necessary or is required by a party to file an appeal falling under **Rule 7 of Order 49 of Civil Procedure Rules**.

16. Having so rendered, I find that the Deputy Registrar's ruling dated the 9th July 2013 staying taxation of the appellant's bill of costs in HCCA No.49 of 2012 to have been a misdirection and misapprehension of the law. HCCA No.58 of 2013 once heard and finalised, the issue of costs will follow the event, and taxation of costs of the party who wins will ensue as it is a separate and independent appeal from the struck out appeal No. HCCA No.47 of 2012.

17. I find that the appeal is merited and proceed to set aside the ruling of the Deputy Registrar dated the 9th July 2013 and direct that the appellant's Bill of costs dated 25th February 2013 in HCCA No.47 of 2012 be placed before the Deputy Registrar of this court for taxation upon notice to the respondents hereof.

18. The appellants are awarded costs of this appeal.

Dated, signed and delivered this 31st Day of July 2018.

J.N. MULWA

JUDGE