



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS SUIT NO.299 OF 2017**

**PROF. TOM OJIENDA & ASSOCIATES.....APPLICANT/RESPONDENT**

**VERSUS**

**MUMIAS SUGAR COMPANY LIMITED.....RESPONDENT/APPLICANT**

**ARISING OUT OF THE ARBITRATION**

**BETWEEN**

**MUMIAS SUGAR COMPANY LIMITED.....APPLICANT**

**VERSUS**

**MUMIAS OUTGROWERS COMPANY LIMITED.....RESPONDENT**

**R U L I N G**

1. The Applicant **M/s MUMIAS SUGAR COMPANY LIMITED** through chamber summons brought pursuant to Article 50 (1) of the Constitution of Kenya, 2010, paragraphs 12, 13A of the Advocates (*Remuneration*) order, 2009, section 1A, 1B and 3A of Civil Procedure Act and all enabling provisions of the law seeks the following orders:

- a) **This Application be certified as urgent and be heard on a priority basis.**
- b) **This Honourable be pleased to issue a temporary stay of taxation of the Bill of Costs pending the hearing and determination of this Application.**
- c) **This Honourable court be pleased to declare that the Bill of Costs as presented is incompetent, bad in law, incurably defective, vexatious and an abuse of the court process and ought to be struck out.**
- d) **This Honourable court be pleased to declare that the Honourable Deputy Registrar lacks jurisdiction to tax the Bill of Costs.**
- e) **This Honourable Court be pleased to issue a stay of taxation of the Bill of Costs pending the hearing and determination of the Arbitration between Mumias Out- growers Company Limited and Mumias Sugar Company Limited.**
- f) **The Applicant be directed to file a new Bill of Costs based on the award made in the Arbitration between Mumias Outgrowers Company Limited and Mumias Sugar Company Limited when the Arbitration is determined.**
- g) **This Honourable court be pleased to make any such order and/or orders as it may deem just and appropriate in the circumstances.**
- h) **The costs of this Application be provided for.**

2. The application is premised on several grounds on the face of the application being *inter alia*:-

- a) **The Arbitration between Mumias Outgrowers Company Limited and Mumias Sugar Company Limited, from which the**

present Bill arises has not been determined.

b) The Applicant undertook in their letter of 02.06.2015 to accept Kenya Shillings Two Million (Kshs.2, 000,000/-) being their fees deposit request until the Arbitration is fully heard.

c) The Applicant in their Fee Note dated 04.05.2015 acknowledged having received a deposit of Kshs. 5,000,000/- in deposit.

d) The Applicant has been paid over Kshs. 8,392,000/- in relation to Mumias Outgrowers Company Limited ("Moco") account.

e) The present Bill of Costs as filed by the Applicant violates paragraph 62 of the Advocates (Remuneration) Order, 2009.

f) The Arbitration is at an advanced stage and the Applicant should await the determination of the Award which could form the basis of their claim.

g) The Applicant is still on record for the Respondent and has never ceased acting for the Respondent in the Arbitration.

h) The Advocate/Client Bill of Costs constituted in this Application is premature and inchoate.

i) The Advocate/Client Bill of Costs constituted in this Application is impermissible in law as it is filed in violation of the fiduciary Advocate-Client relationship and is an egregious conflict of interest.

j) Taxation of the costs will be prejudicial to the Respondent as the determination of the pending Arbitration will determine the scope of work undertaken by the Applicant.

k) The Applicant should not be permitted to tax in piecemeal and create a multiplicity of Advocate/Client Bills of Costs over the same matter granted he is still acting for the Respondent in the Arbitration that is yet to be determined and the subject of the present taxation.

l) The taxation of costs as presented by the Applicant at this stage on an Arbitration in which they are still representing the Respondent and after they have received a hefty deposit is untenable, vexatious and is likely to lead to unjust enrichment for the Applicant as the scope of work is indeterminate.

m) The Applicant was paid excessive fees by the Respondent during a time when those charged with the management of the Respondent enjoyed a cozy relationship with the Applicant and the ongoing taxations of other multiple Advocate/Client Bills of Costs filed by the Applicant against the Respondent and others will in due course require the Applicant to file, yield situations where the Applicant will have to refund substantial monies to the Respondent.

n) The firm of Hamilton, Harrison and Mathews Advocates acted as the lead firm with the Applicant and the Mohammed Muigai Advocates as assisting firms, it is incongruous and out of order for the Applicant to purport to file a Bill of Costs without the concurrence of the other firms and material disclosures.

o) To allow the taxation at this stage would result in allowing taxation at or even before the conclusion of the business for which the Applicant was retained. This would create a bad precedent whereby an Advocate could tax his bill at will before the business for which he was retained is concluded, and this could result to a multiplicity of taxations in the same retainer, which would be greatly prejudicial to the client.

p) It is the interest of justice that the taxation of the bill be stayed or in the alternative, the Bill of Costs be dismissed for being premature and in violation of the Applicant's own undertaking of 02.06.2015.

3. The application is further supported by an affidavit by Rachel Auta, a legal officer of the Applicant Company, in which she has attached documents in support as grounded on the face of the application.

4. The Respondent is opposed to the application and in doing so filed a Replying Affidavit deponed upon by Prof. Tom Ojienda dated 14<sup>th</sup> May 2018. The Respondent contends that he has on so many occasions written to the Applicant, informing them that they are not willing to represent it any longer, and indicated to it, to collect its files from the Respondent's offices and settle the amounts owed as legal fees, to which the Applicant, has not complied. The Respondent attached the letters dated 3/3/2017; 6/3/2017 and 17<sup>th</sup> July 2017 to the affidavit thereto. The Respondent urges that they informed the Applicant of that position in the arbitration matter, that they were entitled to file a Bill of costs to secure the amount owed, as legal fees, having not been paid by the Applicant. The Respondent further contended that the Applicant was served with a fee note dated 17<sup>th</sup> July 2017 and after 30 days, in compliance within the Advocates Act, the Respondent sought to tax the matter, that the applicant filed his Bill of Costs on 12<sup>th</sup> July 2017 requiring to be paid Kshs. 642,234,719.00.

5. The Respondent further contends the Applicant assertion that the Honourable Deputy Registrar lacks jurisdiction to handle the Bill of Costs filed herein are miscounted and misguided as the same is raised prematurely; that the question of jurisdiction can be raised before the Deputy Registrar for determination; that the Applicant is making this matter *res sub-judice* by filing this application before this court, while it has also put in a preliminary objection, Replying affidavit both dated 16<sup>th</sup> April 2016 raising similar issues for determination before the Deputy Registrar (*see attached documents*); that Applicant has already put in their submissions in opposition to the Registrar's Bill of Costs; objecting to the same and suggesting an amount of Kshs. 264,985/-.

6. At the hearing of the Application Mr. Kisaka, learned Advocate appeared for the Applicant while Miss Otieno learned Advocate, appeared for the Respondent.

7. Mr. Kisaka learned Advocate, for the Applicant relied on the contents of the application dated 16<sup>th</sup> April 2018; list of authorities dated 16/4/2018 and Applicant's submissions dated 18<sup>th</sup> April 2018 as well as bundles of authorities dated 18<sup>th</sup> May 2018 and supplementary submissions dated 20/6/2018. The gist of the Applicant's application dated 16<sup>th</sup> April 2018 is that it seeks a stay stopping the taxation of the Bill of Costs dated 11<sup>th</sup> July 2017 and that the court to find and hold that the taxing master lacks jurisdiction to tax the Bill of Costs as prescribed for being pre-mature and the same ought not to have been filed as the Respondent's firm of Advocates is the firm that is still representing or acting for the Applicant in the pending arbitration proceedings from which the Bill of Costs arises. The Applicant urges the Respondent is yet to cease acting for the Applicant as they are yet to comply with order 9 of the Civil Procedure Rules and order 13 of the Advocates (*Remuneration*) order 2009. The Applicant further contends the procedure for ceasing to act has not been complied with as the Respondent only issued letters to cease acting; urging ceasing to act cannot be by abandonment relying on the case of **Moses Wachira Vs. Niels Bruel & 2 others (2016) eKLR** where this court heard:-

**"In cases where the case is yet to be finally determined, the taxation of costs arising from interlocutory proceedings has the effect of interfering with the orderly conduct of litigation as the file has to be shuttled from the Taxing Master to the Judge... it would not constitute an optimum utilization of limited judicial time and contrary to the aims of the overriding objective to allow the taxation of costs to proceed piecemeal."**

8. M/s Otieno learned Advocate for the Respondent opposed the application relying on the Replying affidavit dated 14<sup>th</sup> May 2018 and on her submissions pointing out that in the Replying Affidavit they have contested the allegation by the Applicant; pointing out the issues raised in the application are similar to some issues pending before the Deputy Registrar. She denied the Bill of Costs is over the amount already paid but admitted what was paid was a deposit of the Respondent's fees. She urged the Respondent is no longer on record for the Applicant in the matter before the Arbitrator. She urged the Bill of Costs is properly before the Deputy Registrar who is yet to tax the same.

9. From the written submissions of the Advocates, pleadings and oral submissions the issues for consideration can be summed up as follows:-

- a) **Whether this court has jurisdiction to entertain the Application as presented by the Applicant before this court?**
- b) **Whether the Respondent has ceased acting for the Applicant in the Arbitration?**
- c) **Whether the court can stay the Taxation of the Bill of Costs?**

**A. Whether the court has jurisdiction to entertain the application as presented by the Applicant before this court?**

10. For any court to entertain any matter it must have jurisdiction to do so, as jurisdiction is everything as was held in the celebrated case of **carriers of the motor vessel "Lilians" Vs. Caltex Oil Kenya Ltd (1989) KLR 1** where Justice Nyarangi of Court of Appeal held as follows:-

**"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

11. Paragraph 10 of the Advocates (*Remuneration*) order 2009 provides:-

**"The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or Deputy Registrar of the High Court or, in the absence of a Registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 of the order the Taxing Officer shall be the Registrar of trade marks or any Deputy or Assistant Registrar of trade marks."**

12. The High Court jurisdiction to deal with a taxation related matter in my view is provided for under paragraph 11 (1) (2) (3) of the Advocates (*Remuneration*) order in which it is provided:-

**"Paragraph 11 (1) – Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects."**

**(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a Judge by chamber summons which shall be served on all the parties concerned, setting out the grounds of this objection.**

**(3) Any person aggrieved by the decision of the Judge upon any objection referred to such Judge under subsection (2) may, with the leave of the Judge but not otherwise, appeal to the Court of Appeal."**

13. The Applicant contends that the Deputy Registrar lacks jurisdiction to tax the Bill of Costs as presented because the Arbitration between **Mumias Outgrowers Company Limited and Mumias Sugar Company Limited**, from which the present Bill arises, has not been determined and that the Respondent is still on record in the matter; hence it is submitted the Bill of Costs is incurably incompetent and the

taxing master has no jurisdiction upon it, the condition precedent having not been met, thus the case from which the Bill of Costs arises not having been determined or the Advocate having not obtained an order of court to cease acting for his client. That as the arbitration out of which the Bill of Costs is stated to arise from is still pending, it is urged the present Bill of Costs is inchoate, incurably incompetent, premature hence the court has no jurisdiction to adjudicate upon it.

14. The Applicant relies on the case of **Gichuki Kin'gara & Co. Advocate Vs. Mugoya Contribution & Engineering Ltd (2010) e KLR** in which Justice Njagi, as then was, held:-

**"It is equally clear that all they are asking for is payment of the work done. Since the retainer lasts till the work is done, then the Respondent should patiently do the work to its completion and then tax the bill of costs. Their claim to be paid for the work done to date contradicts the principle that the retainer is one entire contract to be remunerated after completion, and amounts to seeking payment on a quantum meruit basis. To allow the taxation at this stage would result in allowing taxation at or even before the conclusion of the business for which the Respondents were retained. This would create a bad precedent whereby an Advocate could tax his bill at will before the business for which he was retained is concluded, and this could result to a multiplicity of taxations in the same retainer, which would be greatly prejudicial to the client."**

15. Further in **Commercial Bank of Africa Vs. Lalji Karsan Rabadi & 2 others (2012) eKLR**; Justice Odunga held:-

**"The overriding objective, in my view, is tailored to enable the court deal with cases justly and includes allotting cases their appropriate share of the court's resources, while taking into account the need to allot resources to other cases.**

**The rationale for taxing the costs at the end of the trial is to avoid multiplicity of proceedings in form of taxation which may lend themselves to references. The Court ought to avoid the possibility of entertaining multiplicity of similar legal proceedings since such multiplicity has the effect of allotting a case more judicial time and resources at the expense of other cases."**

16. Paragraph 62 of the **Advocates (Remuneration) order 2009** provides:-

**"Where the same advocate is employed for two or more plaintiffs or defendants, and separate pleadings are delivered or other proceedings had by or for two or more such plaintiffs or defendants separately, the taxing officer shall consider in the taxation of such advocate's bill of costs, either between party and party or between advocate and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed."**

17. Paragraph 13 of the **Advocates (Remuneration) order** clearly provides the taxing officer may tax costs as between advocate and client without any order for the purpose upon application of the advocate or upon the application of the client. The paragraph specifically states:-

**"13 (1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.**

**(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.**

**(3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof."**

In view of the above paragraph the taxing of Bill of Costs as between the advocate and clients vests with the Deputy Registrar. There are no condition precedent for either the Advocate or client to make the application for taxation under the said paragraph.

18. The Respondent has deponed that he has issued notice to the Applicant ceasing to act for it and is not willing to represent the Applicant in the matter anymore. In my view the Applicant has sufficient notice that the Respondent has ceased to represent him and that is enough notice. I have not seen nor drawn to any legal requirement to the format of withdrawal in an arbitration matter nor has any notice of appointment for the Respondent to represent the Applicant has been produced in respect of the arbitration matter. I have considered the myriads of objections raised before this court, and which are similar to the ones pending before the Deputy Registrar including the claim that the Deputy Registrar lacks jurisdiction to entertain the the Bill of Costs filed therein, the alleged prematurity of the Bill of Costs; the amount claimed having been paid, which are all matters that can be raised before and be dealt with by the Deputy Registrar. That the Applicant is further, in my view making the matter *res sub judice* by filing this application before the High Court while there is a preliminary objection before the Deputy Registrar raising similar issues for determination.

19. I have no doubt in my mind all issues raised in this matter falls squarely within the jurisdiction of the Deputy Registrar. The Deputy Registrar is yet to hear and determine the issues raised in this application. I therefore find this application to be premature and an abuse of the court process. Let the matter proceed before the Deputy Registrar as no party will be prejudiced as the aggrieved party will have an opportunity to file a reference before the High Court.

20. In **Republic Vs. Jubilee Party & Another Ex parte Wanjiku Muhia & another (2017) eKLR**, Hon. Justice Odunga held:-

**"Once jurisdiction has been conferred on a particular body, the said body should be allowed to handle and determine the matter before it being taken before any other forum."**

21. I therefore, having found that the Deputy Registrar has jurisdiction to entertain the taxation matter before her, find it reasonable and justified to let the Deputy Registrar have the opportunity to deal with all matters that have been presented before her by either taxing the bill of cost or struck it out or dismiss it. This court cannot interfere with the exercise of Deputy Registrar's jurisdiction for no apparent reason.

22. In **Dr. Kiama Wangai Vs. John Mugambi & Republic (2012)** eKLR the court stated the purpose of the *sub judice* principle as provided for in section 6 of Civil Procedure Act is that:-

**"A court shall not proceed with any proceedings in which the matter in issue is also directly and substantially in issue in previously instituted proceedings between the same parties where such proceedings are pending before the same or any other court having jurisdiction to grant the same relief claimed."**

23. I find that it would be a wastage of precious judicial time and illogical for a court to proceed with the trial of any suit where there is an existing similar suit, as that would go against the *res sub judice* principle.

24. **As regards the first issue I am satisfied that the court has no jurisdiction to entertain the applications presented by the Applicant before this court. The matter is a matter for Deputy Registrar who has jurisdiction by virtue of paragraph 10 of the Advocates (Remuneration) order 2009.**

#### **B. Whether the Respondent has ceased acting for the Applicant in the Arbitration?**

25. The Applicant position is that the Respondent has not ceased to act for the Applicant as he has not followed the established legal procedure for ceasing to act for the Applicant. The Respondent position is that he has given notice and is no longer willing to represent the Applicant. I agree that there is a laid down procedure for ceasing to act for a party in a matter. In the case of **Co-operative Insurance Company Ltd Vs. Secucentre Limited & another (2016)** the court underscored the procedure to be followed by the Advocate in order to cease acting. The Respondent in his submission agreed that all that was done was to give notice to the Applicant and there is notice before the Arbitration for the Respondent to cease acting. Indeed there is no dispute that the Applicant has received the Respondent's notice of intention to cease acting and cannot be heard to say the Respondent is actively representing him. Be as it may, the Respondent has done all he was supposed to, to notify the Applicant that he is not representing him and all what is remaining is a final determination by the Arbitration. Secondly, as I have already stated under paragraph 13 of the Advocates (*Remuneration*) order 2009 nothing bars the taxing officer from taxing costs as between Advocate and client upon an application being filed before Deputy Registrar. I find that even where an advocate has not ceased from acting a taxation of costs can be done on an application by either the advocate or the client in a miscellaneous cause. Nevertheless the issue as to whether the Respondent has ceased to act for the Applicant is one of the issues for determination by the Deputy Registrar before deciding on taxation of the Bill of Costs by the Respondent. I therefore leave the matter for determination by the Deputy Registrar.

#### **C. Whether the court can stay the Taxation of Bill of Costs?**

26. The applicant is seeking stay of taxation of Bill of Costs before Taxing master on the grounds; that arbitration from which the bill arises has not been concluded; that the Respondent still acts for the Applicant; that the applicant has paid substantial amount of money to the Respondent; that the Respondent undertook to accept a deposit of Kshs. 2,000,000/- being his fees deposit request until Arbitration is fully heard; that the Respondent did not comply with paragraph 62 of the Advocates (*Remuneration*) order 2009 and that it is in the interest of the overriding objective in relation to efficient disposal of the business of the court and proper use of judicial and administrative resources to grant stay. That stay of taxation of the Bill of Costs be granted.

27. The Applicant relied on the case of **Moses Wachira Vs. Niels Bruel & 2 others (2016)** eKLR where Lady Justice Osewe stated:-

**"Hence, it can be rightly said that the case is yet to be "finally determined." Accordingly, to avoid piecemeal taxation, I would grant the order of stay of taxation as sought by the 1<sup>st</sup> Defendant in their three applications dated 20<sup>th</sup> April 2015, 11<sup>th</sup> August 2016 and 17<sup>th</sup> August 2016."**

28. The Applicant also referred to the case of **Gichuki Kingara & Co. Advocate Vs. Mugoya Construction & Engineering Ltd (2010)** eKLR where it was held as follows:-

**"To allow the taxation at this stage would result in allowing taxation at or even before the conclusion of the business for which the Respondents were retained. This would create a bad precedent whereby an Advocate could tax his bill at will before the business for which he was retained is concluded, and this could result to a multiplicity of taxations in the same retainer, which would be greatly prejudicial to the client."**

29. The Applicant relied on the several grounds listed in the application for stay of Taxation of the Bill of Costs which include the allegation of payment of substantial amount of money making a deposit of Kshs. 5,000,000/-; that there would be no payment till Arbitration is fully heard and urges in view of the aforesaid grounds the Respondent is estopped from filing the present bill of costs till the Arbitration is fully determined based on the principle of promissory estoppel.

30. The principle of promissory estoppel is urged is laid down as following:-

**"The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or**

assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though is not supported in point of law by any consideration but only by his word."

31. The court before granting orders of stay of taxation of Bill of Costs it has to be guided by laid down principles and more specifically has to consider whether it is just and equitable to grant an order of stay. The court in doing so is always called upon to weigh the competing interest of each party and make orders that meet, the ends of justice.

32. In **Governors Ballon Safaris Ltd Vs. Skyship Company Ltd & another [2015] eKLR** the Court of Appeal in dismissing an application for stay relied on the case of **Oraro and Rachier Advocates Vs. Co-operative Bank of Kenya EALR (1999) 1 EA 236** where it was held:-

**"We note that at no point did the applicant allege that should it pay the costs demanded by the respondents, then the money could not be refunded should the intended appeal succeed. In addition, the applicant has not described the hardship or loss that it would suffer if it were to be forced to settle the costs before the intended appeal is heard. The onus to demonstrate this principle also falls squarely on the applicant; it has not done so and in the premises, the application herein is devoid of merit and we hereby order it dismissed."**

33. In the instant application, it should be noted that there are several unrelated Bill of Costs filed by the Respondent which has nothing to do with the Bill of Costs in issue, and though do not affect present Bill of Costs. The same even if relating to Mumias Sugar Company should not be confused as raising irreparable harm as all cases were different and there is no evidence on record in respect of their co-relation with one to the other.

34. In application for stay the Applicant is always required to satisfy the conditions set out under Order 42 Rule 6 (a) and (b) of Civil Procedure Rules before he can be granted orders for stay. The Applicant has not demonstrated or shown what substantial loss that the Applicant stands to suffer nor shown consequences it is likely to suffer if orders for stay of taxation of the Bill of Costs is not granted.

35. In **Daniel Chebutul Rotich & 2 others Vs. Emirates Airlines Civil Case No. 368 of 2001** as cited in:-

**"Vista Holdings International Limited Vs. Span Image (K) Limited [2014] EKLR]"...substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted [emphasis added] and that applicant is therefore forced to pay the decretal sum."**

36. Having considered the submissions by the Applicant and the Respondent, I am not satisfied that the Applicant has proved the substantial loss that it stands to suffer if the application for stay is denied. The Applicant has recourse to file a reference to the High Court once all matters in issue are ventilated and Deputy Registrar makes her determination. The failure to prove the substantial loss that the Applicant stands to suffer, if stay of the Bill of Costs is not granted, in my view renders this application untenable. I do see any justifiable cause for granting stay of the Bill of Costs pending before the Deputy Registrar. This court cannot either dismiss a Bill of Costs as this is a duty of the Taxing master to evaluate all the issues before her after considering all the evidence and submissions before her and ensure that she decides the matter in accordance with the provisions of the law.

37. The upshot is that the application is without merits and is dismissed in its entirety with costs to the Respondent.

**Dated, signed and delivered at Nairobi this 26<sup>th</sup> day of July 2018.**

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**J .A. MAKAU**

**JUDGE**