



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 7 OF 2018

KIMETO & ASSOCIATES ADVOCATES.....PETITIONERS

VERSUS

ALISAH MOHAMMED (suing through her father and next friend

PROF. DR. AMINMOHAMED MOHAMEDRESPONDENT

RULING

1. By a notice of motion dated 16th April 2018, the applicant herein, Kimeto & Associates Advocates, moved this court seeking orders, inter alia, *“that there be a stay of execution of the certified ruling of the Taxing Master dated 29th March 2018 pending the hearing of the objection and Reference filed herein or until further orders of the court.”*

2. The application was brought under Sections 1A, 1B, and 3A of the Civil Procedure Act, and Order 40 of the Civil Procedure Rules. It was supported by the affidavit of **Jackline Chepkemoi Kimeto** sworn on 10th April 2018 and further premised on the grounds that the respondent has threatened the applicant with execution yet the Reference dated 16th April filed at the Court of Appeal is still pending.

3. The applicant’s case is that following a ruling of the Taxing Master dated 29th March 2018 upon taxation of an Advocate/Client Bill of Costs, the applicant lodged a notice of objection in accordance with Rule 11(1) and (2) of the Advocates Remuneration Order, 1962 and Rule 111(3) of the Court of Appeal Rules 2010 and that the objection was duly served on the respondents who have now threatened to commence execution proceedings despite the pendency of the Reference which may be rendered nugatory if the execution is allowed to proceed.

Applicants submissions

4. At the hearing of the application, Miss Kimeto, learned counsel for the applicant submitted that the application was brought under Order 42 Rule 6 of the Civil Procedure Rules, Rule 111(3) of the Court of Appeal Rules and Rule 11 of the Advocates Remuneration Order.

5. Counsel submitted that this court has the discretion to issue the stay orders sought irrespective of whether the appeal is before this court or the Court of Appeal. Counsel relied on the case of **Butt vs Rent Tribunal** wherein the Court of Appeal outlined the guidelines on the exercise of discretion to grant stay. Counsel cited the case of **Housing Finance Corporation of Kenya vs-Sharok Kher Mohamed Ali Hirji & Another [2015] e KLR** wherein the Court of Appeal emphasized that in a case of involving a money decree, a stay may be issued to alleviate the difficulty that an applicant may suffer if stay is not granted.

Respondent’s case.

6. The respondent filed grounds, of objection to the application in which she stated that this court has no jurisdiction to entertain the instant application which should have been filed before the Court of Appeal in Civil Application No. 105 of 2017. The respondent also stated that the application is fatally defective as it offends the provisions of law as to the taxation in the Court of Appeal and added that the applicant should have distinguished the process of taxation before this court and the Court of Appeal.

7. At the hearing of the application, Mr. Kahuthu, learned counsel for the respondent, submitted that the prayers sought by the applicant were vague as the costs in question were taxed by the Registrar of the Court of Appeal in Application No. 105 of 2017 and that this court therefore lacks jurisdiction. Counsel referred to Rule 112 of the Court of Appeal Rules which provides that a party who is dissatisfied with the taxation by the Registrar of the Court of Appeal can file a reference to the said court and that Rules 1, 2, 3, 4 and 5 of the Court of Appeal Rules were specific on the procedure to be adopted for such a reference.

8. It was the respondent's case that the instant application was an abuse of the court by a party trying to avoid filing a reference before the Court of Appeal. Counsel submitted that the applicant had misapprehended the applicability of the provisions of Rule 111 and 112 and added that the authorities cited by the applicant were not applicable in this case.

Determination

9. I have considered the application dated 16th April 2018, the Grounds of Opposition filed by the respondent and the rival submissions made by the parties advocates. The first issue for determination in this matter is whether this court has jurisdiction to deal with the said application, and depending on the finding on this issue, whether the applicant has made out a case for the granting of orders of stay of execution. In the celebrated case of **Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Limited [1989] 1 KLR 1:-**

10. In the instant case, it was not in dispute that the Bill of Costs, the taxation of which is the subject of the present application was taxed by the Registrar of the Court of Appeal and a ruling delivered on 29th March 2018. I have perused the copy of the impugned ruling which was attached to the applicants affidavit as annexure "JCK1" and I note that indeed it is in respect to a taxation done by A. Nyoike Deputy Registrar of the Court of Appeal in Civil Application No. 105 of 2017.

11. The simple question which then arises is whether this court can entertain an application for stay in a matter arising out of proceedings that were conducted before the Court of Appeal. Under Rule 2 of the Rules, on Interpretation, "Court" is means the Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone, "Deputy Registrar" means the Deputy Registrar of the court while "Judge" means a judge of the court acting as such. Rules 111 and 112 of the Court of Appeal Rules stipulates as follows:-

Taxation

- (1) The Registrar shall be a taxing officer with power to tax the costs arising out any application or appeal to the Court as between party and party.**
- (2) Such costs shall be taxed in accordance with the rules and scale set out in the Third Schedule.**
- (3) The remuneration of an advocate by his clients in respect of application or appeal shall be governed by the rules and scales to proceedings in the High Court.**

Reference on taxation

112 (1) Any person who is dissatisfied with a decision of the Registrar in his capacity as taxing officer may require any matter of law or principle to be referred to a judge for his decision and the judge shall determine the matter as the justice of the case may require; and for the purpose of this sub rule, any decision extending or refusing to extend time for the lodging of a bill of costs or any exercise by the Registrar of the over-riding discretion given him by paragraph 12 of the Third Schedule shall be deemed to involve a matter of principle.

(2) Any person who contends that a bill of costs as taxed is, in all the circumstances, manifestly excessive or manifestly inadequate, may require the bill to be referred to a judge and the judge shall have power to make such deduction or addition as will render the bill reasonable and except as in this sub-rule provided, there shall be no reference on a question of quantum only.

(3) An application for a reference may be made to the Registrar informally at the time of taxation or by writing within seven days thereafter.

(4) A reference to a judge may be adjourned by him for the consideration of the Court.

(5) Any person dissatisfied by the decision of a judge given under sub-rule (1) or sub-rule (2) may apply to the Court to vary, discharge or reverse the same and such application, may be made either informally to the judge at the time of the decision or by writing to the Registrar within seven days of the time.

13. From the above definition and rules, I find that nowhere in the Court of Appeal Rules was it even contemplated that a matter filed or pending taxation or reference before the Court of Appeal could be determined by a judge of the High Court. Order 46 Rule 6 which the applicant cited and relied upon as the enabling provision for her application deals with stay of execution in case of an appeal. In the instant case, I find that not only is there no appeal filed or pending before any court in respect to the decision of the taxing master but that, even if it was to be assumed there is an appeal, the stay of execution such as appeal can only be sought before the Court of Appeal and not the High Court.

14. My further finding is that an objection or a reference filed against a ruling on taxation is not an appeal so as to qualify for grant of stay of execution pending an appeal. Be that as it may and, assuming for arguments sake, that I am wrong and that this court has jurisdiction to hear and determine the instant application and further, that a reference can be deemed to be an appeal, I find that present application does not meet the conditions set for the grant of orders of stay of execution pending an appeal, the said conditions are that:

- a. The application has been filed without undue delay.**

b. The applicant will suffer substantial loss.

c. Orders for security of costs.

15. While it is true that the instant application was filed timeously I find that it does not satisfy the second condition on substantial loss.

16. In this case, I note that the Bill of Costs was taxed at kshs 60,461.10. The applicant has not demonstrated that it will be unable to pay the amount taxed or that it will be unable to recover the same should its reference be successful.

17. For the above reasons I find that the instant application is unmerited and the order that commends itself to me is to dismiss the application with costs to the respondent.

Dated, signed and delivered in open court at Nairobi this 24th October 2018.

W.A. OKWANY

JUDGE

In the presence of:

Miss Kimeto for the applicant

Mr Kahuthu for the respondent

Court Assistant - Kombo