



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**MISC. CIVIL APPLICATION NO. 198 OF 2014**

**IBRAHIM, ISSACK & CO. ADVOCATES...ADVOCATE/RESPONDENT**

**VERSUS**

**HANKOOL HOLDING LIMITED.....CLIENT/APPLICANT**

**RULING**

[1] The Notice of Motion dated **5 October 2016** was filed by **Hankool Holdings Limited**, (the Applicant), pursuant to **Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 10 Rule 11, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules, 2010**, for orders that:

[a] (spent)

[b] the Certificate of Costs issued by the Deputy Registrar on **14 September 2016** which entered judgment for the Respondent be set aside;

[c] the execution of the Certificate of Costs issued by the Deputy Registrar on **14 September 2016** and the warrants of attachment and sale both dated **28 September 2016** be stayed pending the hearing and determination of the application;

[d] the Court do make such other orders as it may deem just and expedient pending the hearing and determination of this application; and

[e] the costs of the application be provided for.

[2] The grounds relied on in support of the application are that, on the **20 June 2016**, the Taxing Officer, **Hon. Elizabeth Tanui**, taxed the Respondent's Bill of Costs dated **7 May 2014** in High Court Miscellaneous Applications No. **198 of 2014** and **199 of 2014** both at the all-inclusive sum of **Kshs. 2,500,000** pursuant to an agreement by the parties; and that on or about **5 July 2016**, the Applicant, through its Advocates, **M/s P. M. Kamaara and Associates**, settled the decretal amount by depositing the aforesaid sum in the Respondent's bank account. It was further averred that the Respondent has since instructed **M/s Zasha Auctioneers** to execute for the costs, pursuant to which instructions a Notice of Attachment was issued on **30 September 2016**. It was thus the contention of the Applicant that unless interim orders of stay of execution are granted, the Respondent would proceed to execute the Certificate of Costs as threatened in the Proclamation Notice; and therefore that there is sufficient cause for setting

aside the said Decree as prayed and the process of execution stayed.

[3] The application was supported by the affidavit of the Applicant's Director, **Mr. Ahmed Sheikh Abdullahi**, sworn on **5 October 2016**, in which the grounds aforesated were explicated. It was deposed that whereas the Respondent served the Applicant with separate Bills of Costs for **HCMA No. 198 of 2014** and **HCMA No. 199 of 2014**, on or about the **28 January 2016**, both applications came up before **Hon. Elizabeth Tanui, Deputy Registrar**, whereupon it was agreed by consent of both parties that the final orders in **HCMC No. 198/2014** would apply in **HCMC No. 199 of 2014**.

[4] According to the Applicant, on the **20 June 2016**, the Deputy Registrar delivered a ruling in which she taxed the two Bills of Costs at **Kshs. 2,500,000**, which sum was paid by the Applicant to its Advocates, as per the letter dated **8 July 2016** for onward transmission to the Respondent. It was thus the Applicant's posturing that the aforesated sum of **Kshs. 2,500,000** was an all inclusive sum for both Bills of Costs; yet the Respondent now claims that the sum is recoverable separately for each of the two Bills of Costs and has moved the Court toward the execution thereof, having obtained separate Certificates of Taxation in each case. The Applicant attached copies of the two Certificates of Costs, the Proclamation Notice issued by **Zasha Auctioneers** together with the Warrants of Attachment and Sale as exhibits in support of its averments.

[5] In response to the application, the Respondent filed Grounds of Opposition dated **7 October 2016** contending that the firm is entitled to **Kshs. 5,000,000** as per the separate Certificate of Costs issued by the Deputy Registrar in **HCMA No. 198 of 2014** and **HCMA No. 199 of 2014**; and that out of the sum of **Kshs. 5,000,000**, the Applicant had only paid a sum of **Kshs. 1,187,500**, hence their application for execution to recover the balance thereof. It was further the Respondent's contention that, there is no error on the face of the record; and that in any event the Applicant having failed to apply for review of the Ruling of **20 June 2016**, or annex a copy of the Order or Decree sought to be stayed, the application is misconceived. The Respondent further faulted the Applicant contending that the only proper application in the circumstances ought to have been a Taxation Reference pursuant to **Rule 11(2) of the Advocates Remuneration Order**; which the application herein is not. It was therefore urged that the application be dismissed with costs for being frivolous, vexatious and an abuse of the Court process.

[6] Having considered the application and the affidavit filed in support thereof as well as the Grounds of Opposition and the written submissions filed, within the backdrop of the proceedings herein, it is clear that this is not a Reference. The brief background of the matter is that the main application was filed by the Respondent on **8 May 2014** for the purpose of having the Advocate-Client Bill of Costs dated **7 May 2014** taxed. That Bill of Costs, for **Kshs. 6,443,910.00**, plus disbursements of **Kshs. 660.00**, was in respect of services rendered by the Respondent on behalf of the Applicant in **High Court Miscellaneous Civil Application No. 939 of 2011** and the ensuing arbitration. The record further shows that, in similar vein, the Respondent filed **HCMA No. 199 of 2014** for taxation of Advocate-Client's Bill of Costs in connection with services rendered by the Respondent in **Milimani Commercial Courts Civil Suit No. 220 of 2009**.

[7] The circumstances leading to the Ruling of **20 June 2016**, are that after the Bills of Costs were served on the Applicant, the Applicant intimated its willingness to settle the same amicably; whereupon negotiations on behalf of the parties yielded a sum of **Kshs. 2,500,000**. Consequently, the Applicant raised a Preliminary Objection to the taxation and required the Taxing Officer to adopt the agreed sum. The Taxing Officer upheld the Preliminary Objection and ruled thus:

**"...it is not disputed that the parties agreed on fees. The question of how and to whom the amount should actually be disbursed to cannot vitiate the agreement ... hence the applicant cannot proceed with the taxation. The upshot of the above is that the Respondent's Notice of Preliminary Objection is sustained. I hereby tax the applicant's bills of cost dated 7 May 2014 in Misc. Appl. No. 198 of 2014 and 199 of 2014 both at Kshs. 2,500,000/- as per the agreement of the parties."**

[8] Following the Ruling of the Taxing Officer, which was made when the Applicant's Advocates were

poised to pay the **Kshs. 2,500,000** less 5% withholding tax, on the basis that the said sum would be released to the partners on 50:50 basis, the Respondent proceeded to extract Certificates of Taxation for **Kshs. 2,500,000** in each case and moved the Court for execution thereof, notwithstanding the communication in writing by the Applicant's Counsel vide the letter dated **8 July 2016**, that the taxed costs of **Kshs. 2,500,000** had been paid in full and final settlement of the costs due.

[9] I note that the application was filed under **Order 10 Rule 11** as read with **Order 22 Rule 22** of the **Civil Procedure Rules**, in addition to the general enabling provisions of the law such **Sections 1A, 1B and 3A of the Civil Procedure Act** and **Order 51 Rule 1 of the Civil Procedure Rules**. **Order 10** of the **Civil Procedure Rules** stipulates the consequences of non-appearance, default of defence and failure to serve process. In particular, **Rule 11** thereof provides that:

**"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."** (Emphasis supplied)

[10] Thus, the consequential decree or order sought to be set aside must be such decree or order flowing from a default judgment as has been entered pursuant to **Order 11** of the Civil Procedure Rules. Clearly this is not the case herein. The Ruling of **20 June 2016** was not a default judgment but an adoption of a settlement reached by the parties. Indeed, at paragraph 15 of the Applicant's Written Submissions, it was expressly acknowledged that the Taxing Master was correct in upholding the validity and existence of the fees agreement between the parties and therefore that that the Applicant was not aggrieved by the decision of the Taxing Master. On the basis of the foregoing, I would be of the view that **Rule 11 of Order 10** aforesated is inapplicable to the facts hereof.

[11] **Order 22 of the Civil Procedure Rules**, on the other hand, provides for the execution of decrees and orders; and **Rule 22** thereof provides that:

**"The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto."**

[12] Again, the facts do not fit the strictures of the provision of **Rule 22** aforesated in that there is no application pending or intended to be filed before the Taxing Master by the Applicant, in respect of which a stay should be granted. Similarly, there is no Reference or proposed appeal against the decision of the Taxing Master, as indeed the taxation was by consent. In the premises, there is absolutely no basis for staying the execution under **Order 22 Rule 22 of the Civil Procedure Rules**. Even assuming that the stay sought was a temporary measure pending the decision of this court, the question would still remain, as to whether it can be said that this is a Court to which the order of the Taxing Master has been sent for execution; and the answer, again, is that the application is, for the reasons aforesated, misconceived from the standpoint of **Order 22 Rule 22 of the Civil Procedure Rules**.

[13] Nevertheless, bearing in mind the provisions of **Order 51 Rule 10(2)** that no application should be defeated on a technicality or for want of form that does not affect the substance of the application, the question that would be posed is whether the Applicant's grievance is a genuine and deserving one to warrant the Courts intervention under **Sections 1A, 1B or 3A of the Civil Procedure Act**.

[14] It is not altogether clear whether the settlement on costs was reduced to writing as no copy thereof was annexed to the Supporting Affidavit. What is however clear from the Ruling of the Deputy Registrar dated **20 June 2016** is that there indeed was such a settlement in the sum of **Kshs. 2,500,000**, which settlement was validated by the Ruling of **20 June 2016**. As to whether this amount was payable in each case is a question of interpretation of that Ruling; and whereas the Applicant was of the view that the sum

of **Kshs. 2,500,000** was in respect of both Bills of Costs, the Respondent was of the contrary posturing, which posturing found favour with the Deputy Registrar who signed the two Certificates of Costs dated **14 September 2016**.

[15] A careful consideration of the Ruling dated **20 June 2016** does show that the Applicant's concern is not without justification, for at page 2 thereof, the Taxing Officer stated thus:

**"The uncontested facts leading to the raising of the preliminary objection are that after the bills of costs were served upon the respondent, the respondent through its advocates informed the applicant that they were agreeable to settle the taxation amicably out of court. The parties met through their representatives and agreed on a sum of Kshs. 2,500,000/- being full and final settlement of the applicant's fees in Miscellaneous Application Nos. 199 and 198 of 2014."** (Emphasis added)

[16] In arriving at the aforesaid conclusion, the Deputy Registrar made reference to a letter dated **24 October 2014** by the Respondent to the Applicant's Advocates, an excerpt of which reads:

**"We also refer to the meeting between our mutual client and ourselves in our office on 24th October 2014 wherein on the issue of fees we agreed on the sum of Kenya shillings Two Million Five Hundred Thousand (Kshs 2,500,000) in full and final settlement of our fee herein."**

[17] It is instructive that the letter aforementioned was in reference, not just to **HCMA No. 199 of 2014**, but also to **HCMA No. 198 of 2014**. In response thereto, **M/s Kamaara & Associates** confirmed, on behalf of the Applicant, that **Kshs. 2,500,000** had been deposited by the Applicant in payment thereof. In the result, the Deputy Registrar ruled thus:

**"...I hereby tax the applicant's bills of cost dated 7th May 2014 in Misc. Appl. No. 198 of 2014 and 199 of 2014 both at Kshs. 2,500,000 as per the agreement of the parties. "**

[18] Thus the employment of the word **"both"** as opposed to **"each"** would tend to suggest that the sum aforesaid was all-inclusive for both **HCMA Nos. 198 and 199 of 2014**, as is the posturing of the Applicant. In the premises, whereas there appears to be no error on the face of the record; this ambiguity, to my mind, would have constituted **"sufficient reason"** to warrant a review under **Order 45 Rule 1 of the Civil Procedure Rules**, to enable the Taxing Officer, clarify whether in her determination, she intended the sum of **Kshs. 2,500,000** to be payable in each case or not.

[19] In the result, my considered finding would be that the instant application is misconceived and the same lends itself to dismissal with costs.

It is so ordered.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2017**

**OLGA SEWE**

**JUDGE**