



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 12 OF 2014

AMUGA & COMPANY ADVOCATES.....APPLICANT

-VERSUS-

JOYCE NZISA.....1ST RESPONDENT
MONICA NDUNGE MWONGELA.....2ND RESPONDENT
CONNIE MBITHE MUIA.....3RD RESPONDENT
MARY MUSUKI MUDACHI.....4TH RESPONDENT
JOSEPH LOMBA MWONGELA.....5TH RESPONDENT

RULING

[1] The application that is the subject of this Ruling is dated **8 December 2016**. It was filed by the 1st Respondent, **Joyce Nziza Muthama** pursuant to **Sections 1A, 3A and Section 63(e)** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**, and **Order 40 Rule 1 and 2** as well as **Order 51 Rule 1 of the Civil Procedure Rules** for the following orders:

[a] spent

[b] That the Court be pleased to **urgently grant a stay of the current taxation proceedings before the Deputy Registrar pending the hearing and determination of the reference preferred to the High Court;**

[c] That on the **15 January 2016**, the Deputy Registrar, **Hon. Elizabeth Tanui**, delivered a ruling from which the 1st Respondent has preferred an appeal; and that the said appeal has not yet been heard and determined and yet there are ongoing proceedings for taxation before the Deputy Registrar;

[d] That the Court be pleased to make such further orders or other orders as it may deem just and expedient in the circumstances of this case;

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

[2] The brief background to the application is that following a fall-out over fees between the Applicant as Counsel for the Respondents, the Applicant filed his Advocate-Client Bill of Costs herein for taxation. That Bill was, on **30 July 2014**, taxed and allowed in the sum of **Kshs. 11,894,926**; whereupon judgment was entered by the Court in favour of the Applicant together with interest as per the Ruling of the Court dated **23 February 2015**.

[3] The Respondents attempted to have the Certificate of Taxation set aside and the Bill of Costs referred for fresh taxation, but the application in that respect dated **17 October 2014**, was also dismissed by the Court on **23 February 2015**. That dismissal paved way for the Applicant's application dated **27 May 2015** for execution of the decree herein by way of attachment and sale of the Respondents' interest in the property known as **LR No. 209/7196/113, Harambee Estate, Nairobi**; which application was heard and determined by the Deputy Registrar on **21 September 2015**. The Deputy Registrar allowed the application and directed that the aforesaid property be sold by public auction in satisfaction of the decree herein.

[4] The Applicant thereafter moved the Court for settlement of the terms of sale vide the Notice of Motion dated **5 October 2015**. In its Ruling dated **15 January 2016**, the Deputy Registrar allowed the application, thus prompting the 1st Respondent to file the application for stay which was replaced by the Amended Notice of Motion dated **4 February 2016**. That application was granted on **29 June 2016** and stay of sale of the suit property granted as prayed on condition that the Respondents pay the costs of the Auctioneers, including advertisement charges, within 30 days of the dated of the Court's Ruling.

[5] Needless to say that the Respondents did not pay the Auctioneers' charges as ordered and have not paid the same to date. The reason proffered for this situation is that the parties could not agree on the charges payable. Accordingly, on **18 October 2016**, the Court directed that the Auctioneer's charges be filed in court for assessment by the Deputy Registrar. As the assessment was ongoing before the Deputy Registrar, the 1st Respondent filed the instant application on **8 December 2016**, seeking stay of the assessment of the Auctioneers charges.

[6] On behalf of the Auctioneer, Grounds of Opposition were filed herein on **22 December 2016** by **Ongegu & Associates**, contending that the application is an abuse of the court process as it seeks orders which are contrary to the orders given on **29 June 2016** and **30 October 2016**; and that the Deputy Registrar has already taken submissions and a Ruling had been scheduled for **12 January 2016**. The Plaintiff as well as Learned Counsel for both the Applicant and the Auctioneer thereafter made oral submissions in respect of the application on **7 February 2017**, which I have carefully considered.

[7] The application, like the 1st Respondent's earlier application for stay dated **4 February 2016**, has been brought under **Sections 1A, 3A** and **Section 63(e)** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**, and **Order 40 Rule 1 and 2** as well as **Order 51 Rule 1 of the Civil Procedure Rules**, in respect of which I observed thus:

"The application has been filed pursuant to Sections 1A, 1B, 3, 3A & 63(e) Civil Procedure Act and Order 40 Rules 1 & 2, Order 10 Rule 11, Order 22 Rule 25, Order 51 Rule 1 Civil Procedure Rule. It is therefore easy to see that from its very nature, the application is ill suited for any of those provisions of the law. It is not an application for injunction for purposes of Order 40 Rules 1 & 2... Sections 1A, 1B, 3, 3A of the Civil Procedure Act and Order 51 Rule 1 Civil Procedure Rules are generic in terms and speak to the general administration of justice. As for Section 63 (e) Civil Procedure Act, it is a provision intended for such interlocutory orders as would be necessary in order to prevent the ends of justice from being defeated and therefore, to my mind, would only come into play as a last ditch measure..."

[8] I would be of the same view in respect of the instant application and find that the application is misconceived. Moreover, it seeks stay of an assessment that has, for all practical purposes, been finalized.

But more importantly, the assessment that the 1st Respondent seeks to stay was ordered for by the Court at the 1st Respondent's instance, after the parties disagreed on the quantum of Auctioneer's charges, which charges, the 1st Respondent was to pay as a condition for the order of stay of sale of the suit property which the Respondents continue to enjoy to date. In the case of **Patrick Mukiri Kabundu vs Miliki Limited [2016] eKLR** the Court of Appeal pronounced itself thus:

"This Court must also be alive to the nature of the orders sought by the applicant. Stay of execution and or injunctive orders are by their very nature discretionary and equitable. For this Court to grant the applicant those reliefs, it must be satisfied that the applicant has come to equity with clean hands in line with the maxim that he who comes to equity must come with clean hands."

[9] The same principle would apply to stay of proceedings including taxation, being as they are, provided for under **Order 42 of the Civil Procedure Rules**. The 1st Respondent cannot pick and choose in this instance what to obey and what not to obey. The order of stay of execution was conditional on the payment of the Auctioneers charges; failing which the stay would lapse. She did not comply within the 30 day window given by the Court on the ground that the amount sought by the Auctioneer as his charges was excessive. The Court then ordered that the same be assessed and a fair amount ascertained by the Deputy Registrar. There is therefore absolutely no justification for staying that assessment. Accordingly, it is my finding that the 1st Respondent's application dated **8 December 2016** is totally lacking in merit. The same is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2017

OLGA SEWE

JUDGE