



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISCELLANEOUS APPLICATION NO. 135 OF 2014
IN THE MATTER OF MACHAKOS H.C.C.C. 60 & 66 BOTH OF 2008 (CONSOLIDATED)

AND

IN THE MATTER OF PARTY & PARTY BILL OF COSTS

BETWEEN

NYAMOGO & NYAMOGO ADVOCATESPLAINTIFF/RESPONDENT

AND

PAN AFRICA INSURANCE COMPANY LIMITED1ST DEFENDANT/APPLICANT

APA INSURANCE COMPANY LIMITED2ND DEFENDANT/APPLICANT

RULING OF THE COURT

1. The Defendant/Applicant has filed an Application dated 5th May, 2015 pursuant to the Provisions of Rule 11(2) of the Advocates Remuneration Order, Section 3A, 1A and 1B of the Civil Procedure Act and all other enabling provisions of the law. The Application seeks for the following reliefs namely:-

- (1) That this Honourable Court be pleased to stay the execution of its decree pending the hearing and determination of this Application.***
- (2) The execution and proclamation conducted on 27th April, 2015 be set aside for being an illegality.***
- (3) The Taxing Master's decision in respect of the taxation of the entire bill of Costs dated 27th August, 2014 be set aside.***
- (4) That this Honourable court be pleased to refer the matter to the Taxing Officer for re-taxation of the entire Bill of Costs herein and with proper directions thereof.***
- (5) That the costs of this Application be provided for.***

2. The said Application is supported by an Affidavit sworn by the Applicant's Counsel and further grounds.

3. The Application was opposed by the Respondent who filed a replying affidavit in addition to a

Preliminary Objection.

4. When this matter came up for hearing on 11/05/2017 Miss Gichuki learned Counsel holding brief for Mereka & Co. Advocates for the Applicant indicated to court that she had only been instructed to seek to have a recent Application dated 21/05/2015 by the Applicant withdrawn with no order as to costs but that she had no instructions as regards this Application dated 5/5/2015. The Application dated 21/05/2015 was duly marked as withdrawn with costs to the Plaintiff/Respondent.

5. Mr. Nyamogo for the Plaintiff/Respondent then urged this court to dismiss the Defendants Application dated 5/5/2015 for want of prosecution on the ground that the Applicants counsel had been served with a hearing notice and there was proof of service. Mr. Nyamogo sought for the dismissal of the Application with costs for want of prosecution. Just before Mr. Nyamogo wound up his oral submissions he did mention that the Applications herein had been overtaken by events since the taxed costs had been paid.

6. This Court then reserved this matter for ruling on the 12/07/2017 and ordered the Plaintiffs Counsel to serve notice of the ruling upon the Respondents.

7. Curiously, Counsel for the 2nd Defendant filed grounds of opposition dated 29/05/2017 in which they confirmed that indeed the Plaintiff/Respondent had been paid all the costs amounting to Kshs.662,558/= on the 21/05/2015 and that as far as the 2nd Defendant is concerned the matter stood settled and hence the Defendants Application dated 5/5/2015 for stay of execution became spent and thus there was no need for Counsel to fix a hearing date. It was further averred for the 2nd Defendant that the Plaintiff's Advocate attempt to re-open the matter two (2) years after settlement is a veiled attempt to extort further costs from the 2nd Defendant where there are none since party and party costs were settled long time ago. Finally it was contended for the 2nd Defendant that litigation must come to an end and that this court should not allow for costs on imaginary items and the claim for costs is non-existent and which was made Exparte.

8. I have considered the submission by Mr. Nyamogo learned Counsel for the Plaintiff which were made in the absence of the Counsel for the 2nd Defendant on the 11th May, 2017. As this is a Court of justice to all parties who appear before it and in line with the dictates of Article 159 of the Constitution, I am inclined to consider the grounds of opposition dated 29/05/2017 filed by Counsel for the 2nd Defendant. With the views of both learned Counsels for the Plaintiff and the 2nd Defendant having been represented before this Court, I take the following view of this matter. First and foremost it is not in dispute that the Plaintiff's party and party costs have since been settled as confirmed by the counsel for the Plaintiff. Secondly, it would appear that the 2nd Defendant's Application dated 5/5/2015 for stay of execution was left un-prosecuted for quite sometime and which paved way for a second Application dated 21/05/2015 which was marked as withdrawn on the 11/5/2017. Thirdly, the Plaintiffs Counsel seeks to have the Application dated 5/5/2015 dismissed with costs for want of prosecution which the 2nd Defendant is not opposed save for costs on the ground that they had been under the impression that upon the settlement of the party and party costs the Application stood spent upon the said settlement. I find the conduct of the counsel for the Plaintiff in seeking to fix the Application dated 5/5/2015 should not be seen in bad light since it is proper for all pending Applications to be disposed of one way or the other so that the court could then have the matter marked as finalized and close the file as the same will still be remaining as a back log in the courts list of unfinished matters. As the counsel for the Plaintiff has confirmed that indeed the Application had been overtaken by events since taxed costs had been paid and since Counsel for the 2nd Defendant does not intend to prosecute the same on the ground that the same is already settled, I find it is appropriate to have the said Application dated 5/5/2015 dismissed for want of prosecution. It is noteworthy to state that the 2nd Defendant has not opted to withdraw it even after it had been overtaken by events. Now that the Plaintiff has sought for its dismissal, I see no reason why it should not be dismissed so as to bring the litigation to an end. Thus the Application dated 5/5/2015 is hereby ordered dismissed for want of prosecution.

9. As regards the issue of costs, I note the same is a matter of the Court's discretion. I have looked at the record and pleadings herein and find that this matter had been quite protracted and tumultuous. I find it is

fair and just that there be no order as to costs.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **27th** day of **JULY**, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Mutinda for Nyamogo for Respondent

Ngotho for Mereka for Applicant

C/A: Kituva