



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

HCCC NO. 570 OF 2017

MICHAEL DAUD & ASSOCIATES.....ADVOCATES/RESPONDENTS

VERSUS

NATIONAL OIL CORPORATION OF KENYA.....CLIENT/APPLICANT

RULING

The Applicant filed application dated 25th may 2017 brought under section 1A & 1B of the Civil Procedure Act. Rule 11 of the Advocates Act(Remuneration) Order (Chapter 16) Laws of Kenya, order 22 Rule 22(1) of the Civil Procedure Rules, 2010 while the Advocate/Respondent filed preliminary objection dated 6th June 2017.written submissions were filed and highlighted on both the application and the preliminary objection .The application seeks to stay execution for costs awarded by taxing master on 18th May 2017 and bill of costs dated 15th December 2016 be remitted afresh for taxation by a different taxing master Grounds on the face of the application are as follows

1. That on 18th May 2017 Honorable Elizabeth Tanui awarded costs of kshs 46,163,374
2. That the client is dissatisfied and desires to pursue its statutory right of reference against the decision.
3. That the Advocate has threatened to execute within 7 days unless the above amount is paid
4. That the client will suffer irreparably and reference rendered nugatory if execution proceeds
5. That the Advocate will not suffer any prejudice in the event the appeal is unsuccessful as the client which a state corporation is financially sound
6. That the amount awarded is a colossal sum and there is no guarantee that the same will be recovered if paid to the Advocate
7. That the principle of proportionate and equitable justice enjoins this Court to place parties at equal footing pending the appeal by granting stay pending appeal.

The Respondent/Advocate application and preliminary objection both dated 6th June 2016.the preliminary seeks to strike out with costs application dated 25th may 2015 on the ground that this Court lacks jurisdiction to consider prayers sought as there is no valid objection under paragraph 11 of the Advocates Remuneration order nor entry of judgment on costs on the certificate of taxation.

The Advocates application dated 6th June 2016 seeks entry of judgment in favour of the Applicant and decree do issue for kshs 46,163,374 being the principal sum of costs taxed by the taxing master on 18th May 2017 and certified through certificate of taxation issued in 23rd May 2017 together with interest at 14% from 1st March 2017 until payment in full.

Submissions were filed in respect of the two applications and the preliminary objection.

The client's application is supported by affidavit sworn by its company secretary Pauline Kimotho on 25th May 2017. She averred that despite follow up by the client's Advocate no reasons for the decision nor copy of the ruling has been availed to them. She averred grounds set out on the face of the application and added that there has not been inordinate delay in filing this application. The Advocate filed replying affidavit sworn by Adan Mohamed Daud. That the deputy registrar delivered her ruling on 18th May 2017 after hearing rival submissions; thereafter the law firm made a formal demand for payment from the client. He attached a copy of ruling and copy of certificate of taxation issued on 23rd May 2017. He averred that reasons for taxing master's decision are on each of the disputed items. He added that the Advocates herein were surprised to be served with a letter dated 22nd May 2017 from the client's Advocates asking for reasons for decision. He stated that the stay application was filed prematurely because an order adopting certificate of costs as judgment and decree of this Court has not been made under section 51 of the Advocates Act; and therefore there is no competent reference before Court upon which stay application can be grounded. He referred to paragraph 11(1) of the Advocates Remuneration Order 2014 which provides that any party wishing to object to decision of taxing officer should do so within 14 days after the decision giving notice of the items which he objects. He averred that the letter did not give notice of any specific items and as such Rule 11 has not been complied and prayer for stay ought to be dismissed; that the client does not have any reference in law and application filed is an abuse of Court process.

He averred that the portion of taxation decision comprising disbursement should not be subject to reference & items no.2 to 16 were taxed as per client's computation, instruction fee were allowed at minimum scale sum of kshs 26,428,819 & that instruction fee could not be reduced to 65% as the suit was not disposed summarily. He added that should the Court be inclined to grant stay of execution, it should not do so before judgment on costs is entered. He stated that assuming instruction fee could possibly reduce to 65% then the undisputed sum of kshs 30,062,22.53 should be paid the Advocate immediately as the client has asserted in its affidavit that it is financially sound. He stated that stay of execution may be granted on the disputed sum of kshs 16,101,151.50 but should be deposited in an interest earning account.

I have considered rival submissions by Advocates herein. I first wish to consider whether the application dated 25th May 2017 filed by the client herein constitute a reference. Counsel for the Law firm herein has indicated that the application does not comply with paragraph 11 of the Advocates Remuneration Order.

Prayer 2 of the application seeks to set aside or vary decision by taxing master delivered on 18th May 2017 the bill of costs dated 15th December be remitted for taxation by a different taxing master. Prayer 3 seeks interim order of stay. Ground on the face of the application is stated as dissatisfaction of the decision to award of kshs 46,163,374 by the deputy registrar. There is no mention of specific items disputed on the face of the application nor in the supporting affidavit. On perusal of the ruling I note that the taxing master gave reason on taxation of each item. It was the duty of the client to state items they are disputing and why. What is the client objecting that is not brought out in the application? The Court cannot be left to imagine what the Applicant would have wanted to object. In my view this does not amount to a reference. I only see a letter dated 22nd May asking for reasons for the decision which reasons were already in the ruling as indicated by taxing master in her response. As concerning the second prayer for stay, there is no judgment to warrant orders for stay of execution; the application is therefore premature.

In respect of the Advocates application seeking entry of judgment on certified costs, I note that the deputy registrar did her assessment of costs as per paragraph 11(a) of Advocates Remuneration Order. She noted

that there was no defence filed. She failed to reduce the instruction cost to 65% as required under the paragraph 11(a).In the circumstances I do refer the matter back to Deputy Registrar to consider that before entry of judgment is done.

Dated and Delivered at Nairobi this 29th day of September 2017

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR CLIENT

.....COUNSEL FOR ADVOCATE

RACHEL NGETICH

JUDGE