



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 97 OF 1999**

**KENYA COMMERCIAL BANK LTD.....APPELLANT**

**VERSUS**

**JOHN BENJAMIN WANYAMA.....RESPONDENT**

**RULING**

1. The applicant brought an application by way of Notice of Motion dated 25<sup>th</sup> November, 2015 under certificate of urgency. The orders sought were:-
  - i. *Spent;*
  - ii. *Spent;*
  - iii. *That upon inter partes hearing hereof the Honourable Court be pleased to issue order (sic) of stay of execution of its order/decreed herein as purportedly presented vide warrants of attachment and sale of property in alleged execution of decree (sic) allegedly issued on 16/6/2015 pending the hearing and/or final determination of appeal arising herefrom and challenging the same;*
  - iv. *That further upon the inter partes hearing hereof the order on costs herein plus all subsequent orders thereafter be reviewed and or set aside altogether;*
  - v. *That the costs of the application be provided for.*
2. The said application was anchored on various grounds and supported by the affidavit of Wilson Kimeli Matikwony. The application was certified urgent on 25<sup>th</sup> November, 2015 and interim orders were granted pending service of the application on the respondent for interparties hearing on 7<sup>th</sup> December, 2015.
3. The respondent was served with the said application and court orders which prompted him to file a Notice of Preliminary Objection dated 1<sup>st</sup> December, 2015 which he brought under certificate of urgency.
4. This court at the first instance heard the preliminary objection which raised the following grounds for consideration by the court:-
  - i. *It is beyond the jurisdiction of this honourable court to grant stay of execution orders against its decree made on 16/6/2015 which is over a period of 5 ½ months (sic) when the appellant/applicant has no pending appeal in the court of appeal instituted in accordance with the provisions of the Appellate Jurisdiction Act Chapter 9 of the Laws of Kenya;*
  - ii. *It is beyond the jurisdiction of the honourable court to review the taxed costs by the Deputy Registrar as the law specifically provides that review can only be done by the court which made the order and this particular application should have been reviewed by the Deputy Registrar who*

- taxed the respondent/respondent's bill of costs and not this honourable court presided over by a judge;*
- iii. *The Notice of Motion is incompetent on the ground that it has not complied with the orders of this honourable court made by Honourable Justice her (sic) Ladyship Ruth N. Sitati, judge on 25<sup>th</sup> November, 2015 as it has intentionally omitted to insert (sic) 7<sup>th</sup> December, 2015 as the hearing date;*
  - iv. *By disobeying the decree of this court made on 16/6/2015 the appellant/applicant is in contempt of court and should not be heard by this honourable court;*
  - v. *This honourable court can only deal with the application when exercising its appellate jurisdiction functions and not reviewing orders made by the subordinate courts as provided by article 165 of the Constitution of Kenya of 2010.*

5. At the hearing of the application, the respondent submitted that:-

- i. *He filed a preliminary objection on 1<sup>st</sup> December, 2015 on points of law indicating that it is beyond the jurisdiction of this honourable court to grant stay of execution of a decree issued 5 and a half months ago when there is no pending appeal. Order 42, rule 6, sub rule 2, provides that an application for stay (of execution) must be done without unreasonable delay;*
- ii. *The application filed by the applicant was filed as a result of execution proceedings taken out in November, 2015.*

*The question of taxed costs is provided for in the Remuneration Order under General Matters No. 11 to the effect that where there is an objection, the objector within 14 days will write to the Taxing Master of the items that he is complaining about in the Taxation. The person complaining then gets a response from the Taxing Master. If not satisfied with the taxed costs, the said person is supposed to make a reference to the Judge within 14 days. It was submitted that there was no evidence that the applicant/appellant made an objection to the Taxing Master in accordance with the Remuneration Order. The Taxing Master is not aware of the objection as it was not brought to his attention;*

- iii. *An order of costs is per se not judicial as defined in section 2 of the Civil Procedure Act. It is not executable. The application filed by the applicant/appellant is seeking a review of the judgment dated 16/6/2015. A review can only be done where an order ought to have been appealed against and no appeal was preferred, or where an appeal is not allowed by the rules.*
- iv. *The appellant filed a Notice of Appeal but has not instituted an appeal to date. The orders issued by Hon. Sitati J on 25/11/2015 were for the Notice of Motion filed by the appellant to be moved on 7/12/2015. The Notice of Motion application had no hearing date, thus rendering it incompetent.*
- v. *It was further submitted that the applicant/appellant is in contempt of the court orders issued on 16/6/2015. The respondent referred to paragraph 26 of his replying affidavit to expound on this argument. He relied on the case of Hadkinson vs. Hadkinson [1952] ALL ER, 567. The said decision shows that where an order of the court has been disobeyed, the court can refuse to give a hearing to a party who is in disobedience of court orders.*
- vi. *The respondent also submitted that as far as costs are concerned this court cannot review taxed costs as that can only be done on appeal. He prayed for the Notice of Motion application dated 25/11/2015 to be dismissed with costs and for the temporary stay to be set aside.*

6. In response, Mr. Osango, learned counsel for the applicant opposed the preliminary objection and submitted thus:-

- i. *The preliminary objection raised matters of facts and not law hence rendering it frivolous, vexatious and an abuse of the court process. The applicant's application dated 25/11/2015 seeks several prayers. The respondent has only addressed the 4<sup>th</sup> prayer in which the applicant is seeking that the costs assessed on 12/11/2015 and subsequent orders in the process of execution for a non-existing decree and certificate of costs that is exaggerated to a figure that does not exist in court proceedings, to be set aside.*

- ii. *The respondent seeks to recover **Ksh. 2,636,760.00** against the applicant yet on 12/11/2015, the Deputy Registrar assessed the costs at **Ksh. 322, 500.00** only. The warrants of execution show that the recoverable sum is **Ksh. 2,654,877.20** which was never awarded to the respondent. Mr. Osango submitted that the said figure is not justified and the applicant was properly before the court seeking to review an order that was never granted for execution.*
  - iii. *He further submitted that the High Court under article 165 of the Constitution has supervisory powers over subordinate courts and can call for records of such courts and that this court has powers to review any orders made by the Deputy Registrar. He relied on the case of **R. Vs. Otieno Kajwang' Minister for Immigration and Registration of persons & Another, Exparte Muhammed Muhumed Sirat, H.C. Misc. application No. 316 of 2008**. It was submitted that the applicant was trying to review the orders of execution by the auctioneers for a non existing decree and certificate of and that the respondent should not gain from where he has not sown. It was submitted that the preliminary objection was calculated to defeat the ends of justice.*
  - iv. *Mr. Osango also submitted that under article 159 (2) (d) of the Constitution, courts should not entertain technicalities but give parties an opportunity to be heard on merit. The respondent filed a replying affidavit dated 1/12/2014. At paragraph 18, 21 and 22, he deposed that costs were assessed at **Ksh. 322,500/=**. He submitted that the respondent applied 14% interest yet the judgment did not award the respondent 14% interest on costs. The applicant relied on the case of **Jackson Kiangi vs. Kasikwa Mukuna & Others Machakos HCCC No. 232 of 1995** where it was held at page 2, that costs will not normally attract interest unless the judge orders that interest is chargeable on costs. It was submitted for the applicant that the costs now being claimed include interest which is wrong in this case and that was the reason why they were seeking a review of the orders and challenging the warrants of execution.*
  - v. *It was also submitted that there are no contempt proceedings before court to show that the applicant has disobeyed court orders.*
  - vi. *The order served on the respondent bore the hearing date of 7/12/2015 for interparties hearing of the Notice of Motion dated 25/11/2015. The respondent attended court.*
  - vii. *Taxation was done on 12/11/2015 without notice to the applicant. It proceeded exparte. The proceedings of the said date do not show if the respondent was present in court. The appellant learnt of the assessed costs on perusing the court file on 24/11/2015 after the auctioneers proclaimed the property of the applicant by serving upon them with a notice of proclamation dated 19/11/2015. The applicant could not file a reference to the Taxing Master after proclamation had commenced.*
  - viii. *Mr. Osango submitted that the applicant has drafted a memorandum of appeal, a Notice of Appeal had been filed and he has applied for copies of proceedings. He prayed for the Preliminary Objection to be dismissed with costs.*
7. *In response thereto, the respondent submitted that the applicant would have applied for extension of time in which to refer the matter of costs to the Taxing Master and therefore the decree is properly on record. It was his submission that taxed costs must attract interest according to the Banking Act. The 14% interest was at court rates. He sought prayers for the preliminary objection to be upheld.*
  8. *After due consideration of the Preliminary Objection, affidavits filed by the two parties and the submissions made, this court lists the following issues for determination:-*
    - i. ***Does this court have jurisdiction to grant stay of execution orders against a decree issued on 16/6/2015 when there is no pending appeal in the Court of Appeal?***
    - ii. ***Does this court have jurisdiction to review taxed costs by the Deputy Registrar in this case?***
    - iii. ***Is the Notice of Motion dated 25<sup>th</sup> November, 2015 incompetent for the applicant's failure to indicate the hearing date on the body of the application?***
    - iv. ***Is the applicant in contempt of court?***

### **Determination of the Preliminary Objection**

9. *It is trite law that a preliminary objection should be based on pure points of law. In the case of*

**Oraro Vs. Mbaja [2005] 1 KLR 141**, Justice Ojwang, as he then was, cited with approval, the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) EA 696**, where Law JA; at page 700, expressed himself thus on preliminary objections:-

*“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop .....*”

Hon. Justice Ojwang, in the case of **Oraro vs. Mbaja (supra)** held as follows:-

*“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point .....Anything that purports to be a preliminary objection must not deal with disputed facts, and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence .....*”

Guided by the above decision, this court will determine the issues at hand.

**Does this court have jurisdiction to grant stay of execution orders against a decree issued on 16/6/2015 when there is no pending appeal in the Court of Appeal?**

10. Order 42, rule 6, sub-rule 1, of the Civil Procedure Rules provides as follows:-

*“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused*

*by the court appealed from, the court to which such appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”*

Sub-rule 4 provides that

*“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.”*

11. The above provisions clearly indicate that this court has jurisdiction to hear an application for stay of execution following the filing of an appeal arising from a decree issued by either the High Court or a subordinate court. It is also crystal clear under the provisions of order 42, rule 6, sub rule 4, that once a notice of appeal has been issued to the Court of Appeal, an appeal is deemed to

have been filed. I am satisfied that the applicant herein has complied with the foregoing provisions of law.

12. As to whether this court can grant the orders sought by the applicant after a lapse of 5 ½ months since the issuance of a decree is a matter that falls within the discretion of this court and determinable upon hearing of the application filed by the applicant herein.

I therefore decline to uphold the preliminary objection on the above ground.

**Does this court have jurisdiction to review taxed costs by the Deputy Registrar?**

13. Article 165 (6) of the Constitution provides that:-

***“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function, but not over a superior court.”***

14. This court is of the view that in exercising its supervisory jurisdiction, the court must ensure that due process is followed as provided in law. The Court of Appeal in the case of **Kimani Wanyoike vs. Electoral Commission of Kenya [1995] eKLR** held that:-

***“Where there is a clear procedure for the redress of any particular grievance prescribed by either the Constitution or an Act of Parliament that procedure should be strictly followed.”***

15. The procedure to be followed in filing of objections to issues of taxation is found in Paragraph 11 of the Advocates Remuneration (Amendment) Order 2009 which was published as Legal Notice No. 50 of 2009 and now commonly known as the “Principal order” after the amendments of the year 2014. To quote in *extenso* it provides as follows:-

***“(1) Should any party object to the decision of the taxing officer, he may within fourteen days, after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.***

***(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection;***

***(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under sub-paragraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

***(4) The High Court shall have power in its discretion by order to enlarge the time fixed by sub-paragraph (1) or subparagraph (2), may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

***(4) (sic) The High Court shall have power in its discretion by order to enlarge the time fixed by sub-paragraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”***

16. In the present case, the applicant is objecting to the validity of the 14% interest that has been imposed on costs as the same was not awarded by Justice Chitembwe. It is the finding of this court that the applicant was required to follow the elaborate procedure stipulated in paragraph 11 of the Advocates Remuneration (Amendment) Order, 2009 to raise an objection.

17. The Court of Appeal in the case of **Machira & Company Advocate Vs. Arthur K. Magugu [2012] eKLR**, held as follows:

*“Appeals require the typing of proceedings compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those of section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the face of the record and so on. In our view, the rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with the decisions on advocates bill of costs through references under Rule 11 to a judge in chambers.”*

The Court of Appeal continued to state that:-

*“The appellate jurisdiction of any court is a creature of the statute and has to be exercised in accordance with the provisions creating it. With regard to the advocates’ bill of costs, we agree with the decision of Ringera J (as he then was) in Machira & Co. Advocates Vs. Arthur Magugu & Another, HCC Misc. application No. 358 of 2001 that the Advocates Remuneration Order is a complete code which does not provide for appeals from the taxing masters decisions. Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used .....*”

18. In this case there is no reference as contemplated under paragraph 11 of the Advocates Remuneration (Amendment) Order 2009 filed before this court challenging the decision of the Taxing Officer that would grant this court jurisdiction to hear and determine the prayer sought in ground 4 of the applicant’s Notice of Motion dated 25<sup>th</sup> November, 2015. Instead of following the laid down procedure, the applicant has devised his own procedure in an attempt to draw from the well of justice. The well has however yielded nought for want of compliance.

As a result of the foregoing, grounds No. 2 and 5 of the Notice of Preliminary Objection dated 1/12/2015 are hereby upheld.

**Whether the Notice of Motion dated 25<sup>th</sup> November, 2015 is incompetent for the applicant’s failure to indicate the hearing date on the body of the application.**

19. The respondent cannot cry foul for having been served with an application without a hearing date. It is evident that he was served with a court order dated 25<sup>th</sup> November, 2015 which gave the hearing date of 7<sup>th</sup> December, 2015 for the applicant’s application dated 25<sup>th</sup> November, 2015. This ground of Preliminary Objection is without basis and is hereby dismissed.

**Whether the applicant is in contempt of court**

20. There are no contempt proceedings before this court for consideration of whether or not the applicant is in contempt of court. In any event the issue raised in ground No. 4 of the Preliminary Objection is tied to issue No. 3, whereby I have found that the respondent was informed of the hearing date of the application dated 25<sup>th</sup> November, 2015. Ground 4 of preliminary objection is hereby dismissed.

## **Orders**

21. The upshot of the foregoing is that this court upholds the preliminary objection on grounds No. 2 and 5. Grounds Nos. 1, 3, and 4 of the preliminary objection are hereby dismissed.
22. Under article 159 (2) (b) of the Constitution, section 1A and 3 of the Civil Procedure Act, courts of superior jurisdiction have an expanded mandate and enhanced jurisdiction, and more

particularly, with regard to section 1A of the Civil Procedure Act. In the case of **John Gakure and 148 Others vs. Dawa Phamaceuticals Co. Ltd & 7 others [2010] eKLR**, Waki JA, cited the following holding with approval from the case of **City Chemist (Nbi) and Another vs. Oriental Commercial Bank Civil Application No. NAI. 302/2008 (unreported)**;

*“Jurisdiction of this court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and principle aims. In our view, dealing with a case justly includes inter alia, reducing delay and costs, expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court including granting of appropriate interim relief in deserving cases.”*

23. In this case, the prayer for stay of execution pending the hearing of the Appeal in the court of appeal is still subsisting. Taking note that this is an old case and in the interest of justice, I make the following orders:-

- i. *The application dated 25<sup>th</sup> November, 2015 with regard to prayer No. 3 will be heard on 8<sup>th</sup> February, 2016;*
- ii. *The interim orders granted herein are extended until 8<sup>th</sup> February, 2016;*
- iii. *Each party will bear its own costs.*

**DELIVERED, DATED and SIGNED** in open court at Kakamega on this **21<sup>ST</sup>** day of **JANUARY, 2016**.

**NJOKI MWANGI.**

**JUDGE.**

**In the presence of**

.....**for the Applicant**

..... **Respondent**

.....**Court Assistant**