



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISC. CIVIL APPLICATION NO. 83 OF 2015**

**LABH SINGH HARMAN SINGH LTD.....APPLICANT**

**VERSUS**

**HONOURABLE ATTORNEY GENERAL**

**THE PRINCIPAL REGISTRAR OF TITLES**

**DENACY INVESTMENT LIMITED.....RESPONDENTS**

**RULING**

1. By a Chamber Summons dated 17<sup>th</sup> September 2016, the applicant who challenges the taxation by the Taxing Officer of the Court of the 3<sup>rd</sup> Respondent's Party and Party Bill of Costs on the 4<sup>th</sup> June 2015 issued sought the following principal Orders:

- 1. That there be a stay of execution of the Certificate of Taxation pending hearing and determination of the Reference.**
- 2. That this honourable Court enlarges the time within which to file a reference against the decision of the taxing officer delivered on 4<sup>th</sup> June, 2015.**
- 3. That the Reference filed herein be deemed as properly filed though filed out of time.**

2. The Chamber Summons is based on the grounds set out in the application as follows:

- a. That the 3<sup>rd</sup> Defendant Bill of Costs dated 24<sup>th</sup> April, 2014 was taxed ex-parte at Kshs. 1,564,155/= on 4<sup>th</sup> June, 2015.*
- b. That on 18<sup>th</sup> June, 2015, the Applicant filed a Notice of Motion Application dated 17<sup>th</sup> June, 2015 under Certificate of Urgency seeking stay of execution of the Certificate of Taxation and praying that the order issued on 4<sup>th</sup> June, 2015 be set aside.*
- c. That the Deputy Registrar on 17<sup>th</sup> September, 2015 delivered a ruling striking out the said application on grounds that she does not have jurisdiction to set aside the taxing officer's order of 4<sup>th</sup> June, 2015 and that the application ought to have been heard and determined by a judge.*

d. That it is for this reason that the Applicant now seeks leave of the court to file a reference out of time as the taxation was done ex-parte and the taxing officer failed to take into account the fact that the Bill of Costs is a party and party Bill of Costs that was filed by a stranger in the suit and also filed in the wrong suit.

e. That the applicant's advocate was unable to attend the matter for taxation on 4<sup>th</sup> June, 2015 because on the same day his sister in law who had been terminally ill passed on and was therefore not able to raise this important objection to the present bill.

f. That it is in the interest of justice that this application be allowed as the 3<sup>rd</sup> Defendant's Bill of Costs was taxed at a colossal sum of money (Kshs. 1,564,155/=) and proclamation done on 17<sup>th</sup> June, 2015.

g. That if stay of execution is not granted, the 3<sup>rd</sup> Respondent will definitely proceed to execute against the Applicant thus rendering the intended Reference nugatory.

h. That the 3<sup>rd</sup> Respondent Company, Denancy Investments Limited is a shell company without any fixed abode or any known assets and therefore the Applicant will not be able to recover the Ksh. 1,566,500/= taxed costs in the event it succeeds in this application."

3. The 3<sup>rd</sup> Respondent which is the respondent to the application dated 17<sup>th</sup> September 2015 opposed the said application upon Grounds of Opposition dated 29<sup>th</sup> September 2015 as follows:

1. That the application discloses no cause of action against the respondent.

2. The application is scandalous frivolous and vexatious.

3. The application may prejudice embarrass or delay the conclusion of this case.

4. The application is otherwise an abuse of the process of the court.

4. I have considered the application and the submissions by the counsel for the parties, Ms. Ameyo for the applicant and Mr. Agina for the 3<sup>rd</sup> Respondent, and the issues that arise for determination are-

a. Whether the court may extend the time for filing of a reference under the Advocates' Remuneration Order in the circumstances of this case and

b. Whether the court may stay execution of certificate of taxation of costs pending the hearing of the reference.

#### ***Extension of time to file reference from taxing officer's decision on costs***

5. Clause 11 of the Advocates' Remuneration Order 2009 is clear that the Court has discretion to extend time for lodging a reference notwithstanding the expiry of the 14 day period prescribed for the reference from the taxing master's decision on costs. Paragraph 11 of the Advocates' Remuneration Order provides as follows:

#### **"11. Objection to decision on taxation and appeal to Court of Appeal.**

**(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 subparagraph (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 subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

**(5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (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.**

6. The decision of Onyancha J. in **Soundd Entertainment Limited v. Antony Burungu and Co. Advocates** [2014] eKLR, correctly pointed out the procedure for the challenge of a taxation of costs by way of a reference under paragraph 11 of the Advocates' Remuneration Order and therefore, properly, refused an application for leave to extend time to file an appeal from a certificate of taxation of costs. The situation in the **Soundd Entertainment** case is obviously distinguished from this case.

7. In exercising its discretion in this regard, the Court notes, contrary to the submission by the respondent, that there has been no inexcusable delay in presenting this application. The applicant has been diligent in seeking to have the dispute on the taxation of costs herein determined expeditiously. The applicant did attempt to set aside the taxing officer's certificate of taxation of 10<sup>th</sup> June 2015 by an application of 18<sup>th</sup> June 2015 which was dismissed by the Deputy Registrar for lack of jurisdiction on 17<sup>th</sup> September 2015, where upon the applicant filed the present application.

#### ***Jurisdiction to order stay of certificate of taxation of costs***

8. I am unable to agree with the submission by counsel for the respondent that the Court has no power to order stay in cases of taxation for costs as exists in the Civil Procedure Rules. It is clear to me that taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. Indeed, section 94 of the Civil Procedure Act provides as a general rule that execution of orders of the court should await the confirmation of the costs by taxation unless the Court grants leave for execution before taxation of costs.

9. Section 94 of the Civil Procedure Act is in the following terms:

#### ***“94. Execution of decree of High Court before costs ascertained***

*Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”*

10. Moreover, section 89 of the Civil Procedure Act provides for the application of the Civil Procedure Rules in all cases of a civil nature such as the present application arising from taxation of costs. Section 89 of the Act is in terms as follows:

#### ***“89. Miscellaneous proceedings***

*The procedure provided in this Act in regard to suits shall be followed as far as it may be*

*applicable in all proceedings in any court of civil jurisdiction.”*

It follows, in my view, that the provisions of the Civil Procedure Act with regard to stay of execution will apply to proceedings, which are of a civil nature, for the reference of an objection to the Court from the taxation of a Bill of Cost by a Taxing Officer of the Court under the Advocates’ Remuneration Order.

11. This position accords with the interests of justice that a party against whom substantial sums of money have been adjudged in the nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates’ Remuneration Order, which is the procedure provided for such determination. Otherwise such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time.

### ***Terms of stay of execution***

12. By analogy of the stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules, a court will in granting stay of execution pending hearing and determination of a reference to a judge from taxation of costs be guided by presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the applicant.

13. The court, while asserting jurisdiction to order stay of execution of the certificate of taxation of costs pending the hearing and determination of the reference to a judge, will determine whether the applicant stands to suffer substantial loss if stay is not granted and whether the applicant has provided security.

### ***Merits of the application***

14. Counsel for the respondent has urged that the applicant has not given any notice in writing to the taxing master on the items in the Bill of Costs objected to. The Reference dated 17<sup>th</sup> September 2015 and filed on 18<sup>th</sup> September 2015 as Misc. Application No. 192 of 2015 and annexed to the supporting affidavit, may qualify as the notice in writing as Ground No. 4 of the Reference challenges the entire taxation of the items on the grounds that *“the Taxing Master’s decision was based on an error of principle and the fees award was manifestly high to justify an error of principle.”*

15. However, the applicable Rule 11 of the Advocates’ Remuneration Order contemplates a notice in writing requesting for reasons of the Taxing Officer’s decision on taxation of specified items of the Bill of Costs, and upon receipt thereof an application commonly referred as a reference to a judge, by way of Chambers Summons setting out the grounds of objection to the taxation. See paragraph 11 (2) of the Advocates’ Remuneration Order.

16. In the interests of justice, to enable the filing of an appropriate application for consideration by the Court, the Court will grant the applicant a limited period of time to comply with the provisions of Paragraph 11 of the Advocates’ Remuneration Order, and in the meantime order a stay of execution of the Certificate of Taxation of Costs dated 10<sup>th</sup> June 2015, upon terms.

### **Orders**

17. Accordingly for reasons set out above, the Court makes the following orders:

**a. The applicant has leave of court to file out of time a reference from the Certificate of Taxation of Costs dated 10<sup>th</sup> June 2015.**

**b. The applicant shall within fourteen (14) days from the date hereof give the requisite notice in writing in accordance with Paragraph 11 (1) of the Advocates’ Remuneration Order, 2009, and subsequently comply with sub-paragraph (2) of paragraph 11 thereof with regard to the**

**filing of a reference by Chamber Summons setting out its grounds of objection to the taxation of costs.**

**c. There shall be a stay of execution of the Certificate of Costs dated the 10<sup>th</sup> June 2015 pending the hearing and determination of the reference to be filed by Chamber Summons in accordance with Paragraph 11 of the Advocates' Remuneration Order, subject to the deposit in court of the amount of taxed costs in the sum of Ksh.1,564,155/- or a Bank Guarantee therefor within fourteen (14) days hereof.**

18. For its Counsel's failure to scrupulously comply with the provisions for reference of an objection on taxation under paragraph 11 of the Advocates' Remuneration Order, the applicant will pay the costs of this application to the 3<sup>rd</sup> Respondent.

**DATED AND DELIVERED THIS 12<sup>TH</sup> OF FEBRUARY 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Ms. Aweyo for the Applicant

Mr. Ngala Representative for 3<sup>rd</sup> Respondent

Ms. Doreen - Court Assistant.