



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 241 OF 2013

**IN THE MATTER OF THE TAXATION OF COSTS BETWEEN ADVOCATE
& CLIENT**

ODERA OBAR & Co. ADVOCATES.....ADVOCATE/RESPONDENT

VERSUS

ALY ENTERPRISES LIMITED.....1ST CLIENT/ APPLICANT

**HALAL MEAT PRODUCTS LIMITED.....2ND
CLIENT/APPLICANT**

MOHAMED ALI MOTHAS.....3RD CLIENT/APPLICANT

MAFUTA PRODUCTS LIMITED.....4TH CLIENT/APPLICANT

RULING

1. On 3rd December, 2015, the court rendered a ruling on the Respondents’ application dated 31st August, 2015 seeking for extension of time for filing a notice of objection to taxation. The court in this regard made the following orders;

a. The Applicants/Clients shall file and serve notice of objection to taxation within 14 days of the delivery of this ruling. Subsequently, the Applicant is also at liberty to make a reference to the court in accordance with the provisions of paragraph 11 of the Remuneration Order as maybe necessary.

b. There shall be a stay of execution in this suit until the lapsing of 14 days prescribed in subparagraph 11(2) of the advocates (Remuneration) Order and as extended in order (a) above.

c. The Client is also to pay the costs of this application assessed at Kshs. 15,000/= within 14 days of the Ruling. In default of the payment of costs, the Advocate may execute the same.

2. On 3rd February, 2016, OderaObar& Co. Advocates filed a Notice of Motion of the same date. The Advocates prayed that this court strike out the Notice of Objection dated 11th December, 2015 and allegedly filed on 11th December, 2015. That further, the Court discharges and/or vary the Orders made for stay of execution made on 3rd December, 2015 and issue any further orders it may deem fit. The same

was based on the grounds set out in the application and supported by the affidavit of OderoObar Kennedy sworn on 3rd February, 2016.

3. It was averred that the Honourable Court directed the Respondents to file and serve the Notice of Objection within 14 days of the date of the ruling, that is before on 17th December, 2015. That further to this, the Court issued further orders that the Clients pay costs to the advocate of Kshs. 15,000/= similarly within the stipulated 14 days.

4. The Applicant posits that the Respondents/Clients purported to serve him with a Notice of Objection allegedly filed in court on 11th December, 2015 on 21st January, 2016. In his deposition, the Advocate asserted that it had on numerous occasions perused the court file to ascertain the filing of the Notice of Objection, of which, none was in the court file.

5. That further there was no minute or indication in the court file confirming filing of the said Notice of Objection. In line with this fact, the advocate contended that it wrote a letter dated 22nd January, 2016 to the deputy registrar of this court to launch investigation on the matter.

6. The Applicant also requested the Deputy Registrar to furnish him with copies of the bank slips together with the court receipts issued by the Registry upon payment of the prescribed and mandatory court filing fees in respect of the Notice of Objection. According to the Court record, the Deputy Registrar summoned the Respondents on the issue on 1st February, 2016.

7. It was the Applicant's assertion that upon investigations carried out, the Respondent admitted that the Notice of Objection was not filed at all since the same was neither paid for nor did the court registry issue a receipt in respect of the same as indicated in the letter by the deputy registrar dated 2nd February, 2016. That in light of these circumstances the impugned Notice of Objection amounts to an outright fraud perpetuated by the Respondents and the same should be struck out. Moreover, it was the applicant's contention that the order of the court for payment of Kshs. 15,000/- within 14 days of the ruling of 3rd December, 2015 was likewise breached.

8. The Applicant deponed that the Respondents' forwarded to the applicant a cheque of the said amount on 21st January, 2016, which was not within the time prescribed by the court. In sum, the Applicant urged the court to discharge the conditional orders for stay of execution issued in favour of the Respondents for want of compliance. In short, the Applicant prayed that the orders sought in the application be allowed.

9. The Respondents, in response to the application, filed the replying affidavit of Charles Agwara sworn on 23rd February, 2016. It was contended that the Respondents were not notified by the court registry on the delivery of the ruling dated 3rd December, 2015 which was originally slated to be delivered on 20th November, 2015.

10. That it was only, on 11th December, 2015 that the Respondents knew that the ruling had actually been delivered. On this premise, it was the deponent's assertion that he prepared a Notice of Objection on the aforesaid date and served it upon the taxing master by having it received by the court registry on the afternoon of 11th December, 2015.

11. That on 21st January, 2016, the Respondents wrote to the Deputy Registrar of this court for a request for the reasons for the subject taxation. The Respondent further contended that there is no requirement in law for a Notice of Objection to be paid for as alleged by the Applicant.

12. In his contention, the deponent stated that the Notice of Objections can be filed through formal letters addressed to the deputy registrar without requiring payment of court fees. That in view of the foregoing, the Notice of Objection and the subsequent reference was done expeditiously and without delay. That upon being summoned by the Deputy Registrar, the deponent was able to produce the original Notice of Objection duly stamped by the Court registry on 11th December, 2015.

13. The Respondent insisted that according to the letter dated 11th February, 2016, the Deputy Registrar clarified that the Notice of Objection was indeed stamped as received by the commercial and admiralty division on 11th December, 2015 though the same was not paid for and consequently, there existed no bank slip nor court receipt for the same as requested by the Applicant.

14. The Respondents also averred that their attempts to pay Kshs. 15,000/= as costs to the Applicant did not yield any fruit, as the Applicant refused to receive the same. In sum, the Respondents prevailed on the court to dismiss the application as any purported delay of the Notice of Objection and payments of the costs was not inordinate and no prejudice had been suffered by the Applicant.

15. The parties appeared before this court on 26th February, 2016 to submit on the subject application. In their oral arguments, the advocates more or less repeated what was contained in the affidavits of their respective clients. I have considered the application, affidavits, and submissions of the learned counsel to the respective parties including the various cases cited in support of their arguments.

16. The first issue for this court to decide is whether as at the date and time when the court ordered, a Notice of objection was filed. I have combed this file, turning each sheet of paper on it, in search for any Notice of Objection filed to the court. I have not seen any at all. What I have seen are various communications between the Deputy Registrar of this court and the advocates to the various parties. One such communiqué is a letter dated 2nd February, 2016 from the Deputy Registrar of this Court, Honourable Elizabeth Tanui. The same was addressed as follows;

Prof. Albert Muruma & Co.

Advocates

5th Avenue Office Suites

5th Floor Suite No.1

5th Ngong Avenue

P.O.Box 10481-00100

NAIROBI

ATTENTION: MR. CHARLES AGWARA

RE: NAIROBI HIGH COURT MISC.CIVIL APPLICATION

NO. 241 OF 2013 – ODERA OBAR & CO. ADVOCATES VERSUS

ALY ENTERPRISES LTD & 4 OTHERS

Thank you for personally attending before the undersigned pursuant to our letter of 28th January 2016.

We discussed the circumstances surrounding the Notice of Objection dated 11th December 2015 and wish to have it on record that though the said notice was stamped as having been received on 11th December 2015, the same was not paid for hence there does not exist a bank slip nor court receipt for the same.

It was also pointed out that the court record had no such Notice of Objection, and that the copy now on record was forwarded to the undersigned by yourself on 1st February, 2016 for purposes of

perusal.

Having noted with concern that you didn't receive our letter dated 26th January, 2016 advising you that the reasons for taxation are contained in the ruling.

I hereby forward a copy of the same for your records.

Yours faithfully,

Elizabeth Tanui

Deputy Registrar

17. The above letter was written after the Deputy Registrar summoned the learned advocate to the Respondents. This was precipitated by the Applicant's letter to the Deputy Registrar calling for an investigation into the manner in which the Notice of Objection dated 11th December, 2015 was filed by the Respondents. From the contents of the above referenced letter, one thing is clear. Apart from a court date stamp for the date of December 11, 2015, on it, there is nothing else to show that the notice of objection was indeed filed.

18. Filing would have attracted a payment of the requisite court fees, upon which an official court receipt would have been issued. Indeed if there had been such payment, Learned Counsel Mr. Charles Agwara would have said so in his said affidavit; but not a word is said about payment and issuance of an official payment receipt by the court.

19. Such a receipt would have also borne a serial number, the case number, the date of payment, at least the signature of the cashier who received the payment, and other particulars. No such receipt was exhibited or alluded to in the affidavit opposing the application, or in the course of the oral presentations before the court.

20. Instead, what Learned Counsel to the Respondent's chose to attribute to this anomaly was that there was no requirement in law for a Notice of Objection to be paid for as alleged by the Applicant. According to paragraph 11 of his replying affidavit, learned Counsel Mr. Charles Agwara stated as follows;

"11.previously I have filed Notice of Objections either through formal letters addressed to the Deputy Registrar or in the format adopted herein which is in form of an open letter addressed to the Deputy Registrar without being required to pay any fees for such letters. The letters are stamped by the Court's Registrar to document and record the dates they were received for purpose of commuting time."

21. I find no merit in the above argument advanced by the Respondent's learned Counsel. If indeed, this method of filing the Notice of Objection was prevalent in the practice of law, then, a Notice of Objection would have been in the court file, the same way all letters addressed to the court, are filed and placed in the court file.

22. As noted by the Deputy Registrar, the court record had no such Notice of Objection, and that notice of objection on record was a copy that was forwarded by Mr. Agwara himself to the Deputy Registrar during the meeting held on 28th January, 2016.

23. In the absence of all these things, coupled with the fact that no minute on the file reflects the alleged filing, I have no good reason to believe that Notice of Objection has ever been filed in this case, or that it was filed as at the material time. See the Case of **Unita Exports –vs- Customs (1970) E.A 428**.

24. As such, I rule that no Notice of Objection was filed on 11th December, 2015 as what was presented by the Respondents was not properly on record. I might add that no Notice of Objection has been filed up

to this day. Perhaps, noting that the Respondents failed to comply with the conditional stay granted by this court on 3rd December, 2015, the learned counsel to the Plaintiff, meant to mislead this court by presenting a document that was not properly filed.

25. This in my view amounts to disgraceful or dishonorable conduct incompatible with the status of an advocate. This cannot amount to a mistake on the part of the advocate as submitted by the Respondents. For this reason, I find that the Respondents failed to adhere to the prescribed time to file a Notice of Objection and any orders issued with regard to filing such a notice has been breached.

26. Similarly, the order for payment of Kshs. 15,000/= was also breached as the payment was not made within the stipulated time frame. From the evidence presented to this court, the same was forwarded to the applicant on 21st January, 2016 which was past the 14 days granted by the court on 3rd December, 2015.

27. Be that as it may, the Respondents called upon the court to use its discretion and allow the Notice of Objection it purportedly filed on 11th December, 2015, and overlook the fact that the Respondents did not pay the costs as ordered to the Applicant. I have considered this argument carefully.

28. I must state that the very wide and unfettered discretion of the court is not in vain. It is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. While considering whether the court should exercise its discretion, the concern of the court is to do justice to the parties, without imposing conditions on itself to fetter the wide discretion given it by the law. This was held by **Sir William Duffus, P in Patel v E A Cargo Handling Services Ltd, [1974] EA 75, at p 76.**

29. Considering the circumstances of this case, I am of the view that the Respondents have not proffered any persuasive reason for this court to exercise its discretion. The Respondents have not been denied a hearing with regard to whether the taxation of the bill of costs dated 6th March, 2013 was done in the proper way by the taxing master.

30. This court certainly accorded the Respondents a fair opportunity to be heard, but they refused or failed to seize that chance. Their advocate then resorted to misleading the court that they had properly filed a Notice of Objection within the stipulated time period when, in truth, the Respondents had not done so.

31. These, in my view are not parties to be trusted in this matter. It appears that the Respondents, through their advocate, deliberately sought to obstruct the course of justice.

32. In the foregoing, I allow the Notice of Motion dated 3rd February, 2016. The orders made for stay of execution on 3rd December, 2015 are hereby discharged and the Applicant is free to execute the decree dated 6th November, 2014 held in its favour.

33. I award the costs of this application to the Applicant.

34. It is so ordered.

Dated, signed and delivered in court at Nairobi this 23rd day of March, 2016.

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C. KARIUKI

JUDGE