



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

**CIVIL CASE NO. 107 OF 2016**

**AFRISON EXPORT IMPORT LIMITED.....1<sup>ST</sup> PLAINTIFF**

**HUELANDS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**V E R S U S –**

**JUDSONN ORIEMA OKOTH & KENNETH KIPLAGAT**

**T/A OKOTH & KIPLAGAT ADVOCATES..... DEFENDANT**

**RULING**

1. Afrison Export Import Ltd and Huelands Ltd, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs took out the motion dated 11<sup>th</sup> April 2016 in which they sought for interalia.

**3. THAT pending the hearing and determination of the suit herein this honourable court be pleased to issue a permanent stay of proceedings of MISECELANEOUS CAUSE NUMBER 65 OF 2016. JUDSON ORIEMA OKOTH ADN KENNETH KIPLAGAT T/A OKOTH & KIPLAGAT ADVOCATES VERSUS AFRISON EXPORT AIMPORT LIMITED.**

**4. THAT costs of this application be provided for.**

2. The motion is supported by the affidavit of Geoffrey Mutisya Mbili. When served with the motion, Judson Oriema Okoth and Kenneth Kiplagat T/A Okoth & Kiplagat Advocates, the defendant /respondent filed a notice of preliminary objection to resist the motion. When the motion came up for interpartes hearing, the preliminary objection had to be disposed of first. Learned counsels presented oral submissions.

3. I have considered the grounds stated on the face of the notice of preliminary objection dated 5<sup>th</sup> May 2016 plus the rival oral submissions. In the aforesaid **notice of preliminary objection**, the defendant/respondent put forward the following grounds:

1. **THAT there is no jurisdiction to arrest the pending taxation of costs in any manner not contemplated in the Advocates (Remuneration) Order and the Plaintiffs' notice of motion is fatally defective.**
2. **THAT there exists another suit before this honourable court, being Nairobi Milimani Commercial Courts Miscellaneous Cause No. 65 of 2016 in which the plaintiffs have sought to strike out the defendants bill of costs and the plaintiffs are barred from lodging a different suit to litigate on exactly the same issues.**
3. **THAT the plaintiffs can urge any and all their objections in the taxation proceedings.**

4. ***THAT the notice of motion is, otherwise, an abuse of the court process.***
5. ***THAT the ex parte orders were issued and granted on the 11<sup>th</sup> April 2016 but the order was conveniently served upon on the defendants on the 6<sup>th</sup> May, 2016 one working day before the inter partes hearing ( a practice employed to defeat and or delay the proper and fair administration of justice) and the defendants will insist that”***
  - a. ***The matter proceeds on the said date on the defendants’ preliminary objection herein; and/or***
  - b. ***Alternatively the interim orders herein are discharged forthwith.***

4. It is the submission of Dr. Kipagat learned advocate for the defendant/respondent that this court has no jurisdiction to issue orders to stay proceedings before a court of concurrent jurisdiction. It was pointed out that the proceedings being sought to be stayed are taxation proceedings vide H.C. Misc Application no. 65 of 2016. Dr. Kiplagat was of the view that this court has no jurisdiction to stay taxation of costs in any manner not contemplated by the Advocates Remuneration Order. The learned advocate relied on two authorities

**i. Kenya Pipeline Co. Ltd = vs= Nyamogo & Nyamogo advocates Nairobi H.C.C.C no. 1142 of 2005.**

**ii. Attorney General =vs= Kenneth Kiplagat H. C Misc. Application no. 1060 of 2009.**

5. It was submitted by the learned advocate that any party who is dissatisfied with the decision of the taxing officer has to first wait for the outcome of the taxation proceedings and in the end may apply for stay of execution of the resultant decision.

6. Mr. Nyamai, learned advocate for the plaintiff/applicant that this court has inherent power under Section 3A of the Civil Procedure Act and Article 159 of the Constitution, 2010 to stay taxation proceedings. He pointed out that the substantive suit is in respect of a claim based on professional negligence which needs to be determined before the taxation proceedings are heard and determined. Mr. Nyamai was of the view that this court has jurisdiction to issue orders staying further proceedings.

7. The substantive suit in this dispute is expressed in the plaint dated 11<sup>th</sup> April 2016 in which the plaintiffs are seeking for judgment against the defendants in the following terms:

- a. ***This honourable court be pleased to issue a declaration that MISCELLANEOUS CAUSE NUMBER 65 OF 2016: JUDSON ORIEMA OKOTH AND KENNETH KIPLAGAT T/A OKOTH AND KIPLAGAT ADVOATES VERSUS AFRISON EXPORT IMPORT LIMITED is baseless, has no merits, is mischievous, malicious, and the same has no factual or legal basis and the same be dismissed with costs to the plaintiffs.***
- b. ***Further to prayer (a) above this honourable court be pleased to issue a declaration that DR, KENNETH KIPLAGAT/the defendant is not owed the alleged KENYA SHILLINGS ONE BILLION FIVE HUNDREND AND FOURTY EIGHT MILLION SIX HUNDRED AND SEVENTY FOUR THOUSAND AND FOUR HUNDRED AND TWENTY EIGHT SHILLINGS (KSHS.1,548,674,428) or any money at all by the plaintiff.***
- c. ***Further to prayer (a) and (b) above this honourable court be pleased to issue a declaration that DR. KENNETH KIPLAGAT /the defendant has a duty to indemnify/compensate the plaintiffs for any legal charges and/or legal fees and/or other costs/charges arising from MISCELLANEOUS CAUSE NUMBER 65 OF 2016: JUDSON ORIMA OKOTH AND KENNETH KIPLAGAT T/A OKOTH & KIPLAGAT ADVOCATES VERSUS AFRISON EXPORT IMPORT LIMITED and the suit herein.***
- d. ***Further to prayer (a) (b) and (c ) above this honourable court be pleased to issue a declaration that DR KENNTH KIPLAGAT’S the defendants bill of costs (as computed in MISCELLANEOUS CAUSE NUMBER 65 OF 2016: JUDSON ORIEMA OKOTH AND KENNETH KIPLAGAT T/A OKOETH & KIPALGAT ADVOCAES VERSUS ARISON EXPORT IMPORT LIMITED has no legal of factual basis/foundation and such legal charges***

*and/or legal fees and/or other costs/charges costs be passed over to the DR KENNETH KIPLAGAT/Defendant who are supposed to indemnify the plaintiff due to their professional negligence and misconduct.*

- e. *A declaration that DR KENNETH KIPLAGAT/Defendant filed PETITON NUMBER 376 OF 2015: AFRISON EXPORT IMPPORT LIMITED and HUELANDS LIMITED VERSUS ATTORNEY GENERAL un-procedurally, negligently and without the full authority of the plaintiffs board of directors hence he/it cannot claim any legal fees from the plaintiffs.*
- f. *An order compelling DR. KENNETH KIPLAGAT/Defendant to compensate /refund the plaintiffs monies they have spent in respect of legal charges/costs paid/payable to M/A N.R. NYAMAI AND COMPANY ADVOCATES and other costs/charges for services rendered generally ad in particular in relation to the prosecution of the suit herein, the defence of PETITION NUMBER 376 OF 2015: AFRISON EXPORT IMPORT LIMITED and HUELANDS LIMITED VERSUS ATTORNEY GENERAL and MISCELLANEOUS CAUSE NUMBER 65 OF 2016: JUDSON ORIEMA OKOTH AND KENNETH KIPLAGAT T/A OKOTH & KIPLAGAT ADVOCATES VERSUS AFFRISON EXPORT IMPORT LIMITED.*
- g. *An order compelling DR KENNETH KIPLAGAT /the defendant to account and/or refund KENYA SHILLINGS FIVE MILLION NINE HUNDREND AND EIGHTY THOUSAND (KSHS5,980,000) to the plaintiffs.*
- h. *General damages*
- i. *Costs*
- j. *Interest on (f), (g), (h)( and (i) above at court rates*
- k. *Any other relief this honourable court deems fit to grant.*

8. This court has been beseeched to stay proceedings in H.C. Misc application no. 65 of 2016 pending the hearing and determination of this suit. In H.C Misc. Application no. 65 of 2016, the applicant is basically seeking to the have advocate clientbill of costs taxed. In this suit, the plaintiffs are saying that the defendant unprofessionally, maliciously and mischievously filed the petition which gave rise to the filing of the bill of taxation no. 65 of 2016, before it was furnished with written instructions or authority to act and or without the approval of the board of directors of the plaintiffs hence it cannot claim any legal fees. The plaintiffs are now saying that there is need to stay the taxation of the bill of costs pending the determination of the questions as to whether or not the defendant had instructions to file the petition. The plaintiffs are also alleging that they will be able to prove that the defendant was negligent in prosecuting the aforesaid petition therefore they are not entitled to claim advocates fees. The question raised in the notice of preliminary objection is whether this court has jurisdiction. There is no doubt that taxation proceedings are conducted by a taxing officer whose decision can be challenged on appeal to this court by way of reference pursuant to paragraph 11 of the Advocates (Remuneration) Order.

9. It is therefore incorrect to state that this court has no jurisdiction to stay such proceedings whereas it has an appellate jurisdiction. What is being sought here is an order for stay of taxation proceedings pending the hearing and determination of this suit. I have looked at the bill of costs annexed to the supporting affidavit of Geoffrey Mutisya Mbili and I have noted that one of the items sought to be taxed is instructions fees. In the suit before this court the plaintiffs are alleging that the defendant had no instructions to file and prosecute the petition which gave rise to the aforesaid bill of costs. In other words the plaintiffs are challenging the foundation of the Bill of costs and not the process of taxation. In the circumstances this court has jurisdiction to entertain the current motion in exercise of its inherent power and without coming under the purview of the Advocates Remuneration Order and the Advocates Act.

10. In the end the preliminary objection is found to be without merit. It is dismissed with costs abiding the outcome of the motion dated 11.4.2016.

Dated, Signed and Delivered in open court this 31<sup>st</sup> day of May, 2016

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant