



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO.16 OF 2006

MOSES WACHIRA.....PLAINTIFF

-VERSUS-

NIELS BRUEL.....1ST DEFENDANT

HELMUTH RAME.....2ND DEFENDANT

AIRTRAFFIC LIMITED.....3RD DEFENDANT

RULING

1. This Ruling is in respect of five (5) of the applications pending herein; three of which were filed by the 1st Defendant and two of the applications were filed by the Plaintiff. The parties agreed that the said applications be heard concurrently, and an order made to that effect on **21 April 2015**. Since the five applications are all inter-related, I propose to deal with all of them together.

2. The **first application** is the Plaintiff's Notice of Motion dated **9th March 2012** and filed on **12th March 2012**. It is expressed to be brought under **Sections 1A, 1B, 3A, 38 and 94** of the Civil Procedure Act as well as **Order 51 Rule 1** of the **Civil Procedure Rules**. The Plaintiff thereby sought for one main order, namely: that leave be granted by the Court for the execution of the decree issued on **17th May, 2011** to proceed by way of attachment of aircraft Registration Number **5Y EKO** and **5Y BMA** or any other assets of the Defendants to satisfy the decree herein before taxation of the Plaintiff's Bill of Costs.

3. The application is based on the grounds set out therein and is supported by the affidavit of the Plaintiff, sworn on **9th March, 2012**, in which he deponed that he has been unable to have his Bill of Costs taxed because the Court file was moved from the Commercial Division of the High Court to the Land and Environment Division and thereafter to Mombasa High Court in a bid to have **Okwengu, J** (as she then was), who heard and determined the case, to hear the 1st Defendant's application for review. He further averred that the delay was further compounded by the Defendant's objection to the taxation and the numerous other applications that have since been filed herein.

4. It was further the Plaintiff's case that the 1st Defendant resides in Denmark and that the aircraft aforementioned are the only known assets within the jurisdiction of the Court; and that the 1st Defendant through the 2nd Defendant, irregularly transferred the aircraft on the very day that judgment was delivered, to **Queencross Aviation**, a company belonging to the 1st Defendant's son; but the transfer was

thereafter cancelled by the **Kenya Civil Aviation Authority**. He added that the 1st and 3rd Defendants have been attempting to transfer the lease of the said two aircraft to **Capital Airline Limited** and **Phoenix Aviation**; and that, in the circumstances, he stands to suffer irreparable loss if the said aircraft are transferred, contending that such transfer would deny him the only available option for recovering the fruits of this litigation. It was on account of the foregoing that the Plaintiff sought leave to execute the Decree before taxation of his Party and Party Bill of Costs.

5. The **second application** is the 1st Defendant's Notice of Motion dated **20th April, 2016** and filed on **21st April, 2016**. It is expressed to be brought under **Articles 50 and 159 (2) (a) of the Constitution**, as well as **Sections 1A, 1B, and 3A of the Civil Procedure Act**. The application seeks that the taxation of the Plaintiff's Party and Party Bill of Costs and further proceedings herein be stayed pending the hearing and determination of **Nairobi Civil Appeal (Application) No. 188 of 2012: Niels Bruel vs Moses Wachira & Others**; and that costs be in the cause.

6. The application is based on the grounds set out therein and is supported by the affidavit of **ALLEN GICHUHI** sworn on **20th April, 2016**. It is the contention of the 1st Defendant that following the delivery of judgment of the Court of Appeal on **5th February 2016**, dismissing his appeal, an application was promptly filed on behalf of the 1st Defendant, seeking a review of that judgment; and that as long as that application is pending, the Order in respect of the Court of Appeal judgment cannot be extracted for further action by the High Court. Counsel further averred that, in the event the review application succeeds, the present taxation will not be necessary as costs may be awarded to the 1st Defendant. He added that the Plaintiff cannot be heard to complain about delay as he had in the past frustrated the expeditious hearing of the appeal. Counsel thus urged the Court to grant their application and issue an order staying the taxation pending the hearing and determination of the review application by the Court of Appeal.

7. In response to the second application, the Plaintiff swore a Replying Affidavit on **22nd April 2016** affirming that the Court of Appeal delivered its Judgment on **5th February, 2016** whereby both the Appeal and the Cross Appeal were dismissed and the Judgment of the High Court upheld. It was the Plaintiff's contention that the application had been brought in bad faith to further delay this matter and frustrate his chances for realizing the fruits of his judgment. According to him, this was evident in the fact that the application for review was filed on **7th March 2016** after the parties had appeared before this Court and an order made for the expeditious taxation of the his Bill of Costs.

8. The Plaintiff reiterated his contention that the aircraft aforementioned are the only known assets of the 1st Defendant, and that their value has been depreciating with time; and that it is for this reason that he fears that any further delay in the conclusion of this matter will result in his not being able to sufficiently recover the monies owed to him by the Defendants. He added that the 1st Defendant currently resides in Denmark but that since there is no extradition treaty between Kenya and Denmark, the possibility of his extradition is non-existent; and that it is in the interests of justice that the taxation of the Bill of Costs be proceeded with, and that the 1st Defendant's application filed on **21st April 2016** ought therefore to be dismissed to save on judicial time and prevent abuse of the Court process.

9. Before the 1st Defendant's application was heard, his Advocate filed a Supplementary Affidavit sworn on **6th May, 2016** notifying the Court that the review application in the Court of Appeal had been fixed for hearing on **14th July, 2016**. It was however explained at the hearing of these applications that the review application did not proceed for hearing as scheduled and that another date is yet to be fixed for its hearing in the course of time.

10. The **third application** was filed by the Plaintiff. It is the Notice of Motion dated **26th July, 2016**. The application was supported by the Plaintiff's affidavit sworn on **26th July 2016**. It was brought under **Order 22 rule 6, Order 49 rule 1 of the Civil Procedure Rules and Sections 3, 3A, 30, 38 and 94 of the Civil Procedure Act** for the following orders:-

1) Spent

2) THAT the Court be pleased to order that the taxation of the Plaintiff's Bill of Costs be proceeded with.

3) THAT to facilitate speedy resolution of the Plaintiff's application dated 9th March 2012, the appointed auctioneers be given leave to proceed and attach the aircraft registration numbers 5Y EKO and 5Y BMA.

4) THAT the application dated 9th March 2012 and any objection proceedings to be heard concurrently within short notice or during the August 2016 High Court vacation.

5) THAT the interim orders that are in place be extended until the process of execution is completed.

6) THAT the costs of the application be provided for.

11. The grounds set out in support of the application are that Judgment was delivered herein by **Okwengu, J** in favour of the Plaintiff against the 1st and 3rd Defendants whereby the 1st Defendant was ordered to pay **USD 110,000** together with costs and interest, while the 3rd Defendant was ordered to pay **Kshs. 129,500** together with interest in addition to an order for the return of all spare parts provided by the Plaintiff within 30 days from the date of the Judgment. It was further averred that the 2nd Defendant, who is a director of the 3rd Defendant was tried and convicted in **the Chief Magistrate's Criminal case No. 2661 of 2005** on counts of conspiracy to defraud the Plaintiff and obtaining **USD 10,000** by false pretences. It was further the averred by the Plaintiff that the two aircraft are depreciating at an alarming rate while the Defendants are trying to delay his right to execute by filing myriads of applications with the sole intention of frustrating the Plaintiff's attempts at execution. The Plaintiff further posited that the 1st Defendant fled to Denmark to defeat the course justice and that the only property the said Defendant has in Kenya are the two aircraft.

12. The **fourth** and **fifth applications** are the 1st Defendant's Notice of Motion dated **11th August 2016** and filed on even date and the Notice of Motion dated **17th August 2016** and filed on even date. Both applications were taken out under **Articles 50 and 159 (2) (a) of the Constitution, Sections 1A, 1B & 3A of the Civil Procedure Act and Order 51 rules 3, 5, 12 & 15 of the Civil Procedure Rules**. The said applications, in essence, sought for orders that all the pending applications herein be consolidated and heard together and that the *status quo ante* prior to **5th February 2016** be reinstated pending the hearing and determination of the review application in **Nairobi Civil Appeal (Application) No. 188 of 2012: Niels Bruel vs. Moses Wachira**; and that the costs be in the cause.

13. The application dated **11th August 2016** was supported by the affidavit of **Allen Waiyaki Gichuhi** annexed thereto, in which it was deponed that on **6th July 2016** the parties agreed that the Notice of Motion dated **20th April 2016** be fixed for hearing on **6th September 2016** so as to await the outcome of the pending review application, but that the review application was subsequently taken out by the Court of Appeal for the reason that a bench could not be constituted. That in spite of the foregoing, the Plaintiff's advocate filed an application seeking orders that the taxation be proceeded with.

14. The application dated **17th August 2016** was predicated on the affidavit of **Prestone Wawire**, sworn on even date as a follow up to their application of **11th August 2016**, basically detailing what transpired before the Deputy Registrar on **16th August 2016** with respect to the 1st Defendant's application for stay of taxation. Counsel particularly took issue with the fact that the Deputy Registrar was poised to deliver her Ruling on Taxation notwithstanding the pendency of the review application and the applications filed herein, yet the parties had, in the past agreed to a stay of taxation.

15. The Plaintiff opposed the 1st Defendant's application dated **17th August 2016** vide its Grounds of Opposition dated **18th August 2016**. The Plaintiff contended that the said application was an abuse of the Court process, and ought to be dismissed with costs. The respective applications were prosecuted by way of written submissions, which were orally highlighted by Learned Counsel.

16. As to whether or not there ought to be a **stay of taxation** pending the 1st Defendant's application for review before the Court of Appeal, the Plaintiff pitched for expeditious disposal, contending that the taxation of their Bill of Costs should proceed uninterrupted. The Plaintiff urged the Court to consider that the Judgment delivered herein on **3^{0th} March, 2011** had been upheld by the Court of Appeal and therefore there was no justifiable cause for stopping him from enjoying the fruits of his judgment.

17. The 1st Defendant, on the other hand, is opposed to the taxation. He is seeking a stay of taxation pending the hearing of the application for review filed in the Court of Appeal. It is their submission that in the event that the application for review is granted, the taxation would have been a waste of time. The Defendants are also of the view that granting stay would serve the purpose of preventing multiplicity of proceedings.

18. I have carefully considered the cross-cutting issues in the applications, the averments in the affidavits filed herein and the submissions made herein by Learned Counsel, including the authorities cited. There is no gainsaying that the 1st Defendant has filed a review application in the Court of Appeal following the dismissal of his appeal on **5th February 2016**. The application was fixed for hearing on **14th July, 2016** but was taken out, and is pending hearing and determination. Under those circumstances, I am of the considered view that the Overriding Objective as set out in **Section 1A of the Civil Procedure Act** and the interest of justice generally would require that the 1st Defendant be accorded the opportunity to ventilate his cause as best as he can. It would serve no useful purpose, in my view, for the taxation to be proceeded with during the pendency of the aforesaid application granted that the final Order of the Court of Appeal is yet to be issued and transmitted to the High Court; and as was pointed out by **Mr. Gichuhi**, the outcome of the review application may impact on the Plaintiff's Bill of Costs.

19. In this respect, I would be of the same persuasion as **Odunga, J** when he stated thus in the case of **Commercial Bank of Africa vs. Lalji Karsan Rabadia & 2 Others [2012] eKLR**:

"In cases where the case is yet to be finally determined the taxation of costs arising from interlocutory proceedings has the effect of interfering with the orderly conduct of litigation as the file has to be shuttled from the Taxing Master to the Judge ... it would not constitute an optimum utilization of limited judicial time and contrary to the aims of the overriding objective to allow the taxation of costs to proceed piecemeal."

Although in this instance, judgment has been passed both in the High Court and in the Court of Appeal, the final Order of the Court of Appeal is yet to be transmitted to the High Court for enforcement on account of the pending review application. Hence, it can be rightly said that the case is yet to be "finally determined." Accordingly, to avoid piecemeal taxation, I would grant the order of stay of taxation as sought by the 1st Defendant in their three applications dated **20th April 2015, 11th August 2016** and **17th August 2016**.

20. The second issue is whether leave should be granted to the Plaintiff for execution to issue in respect of the two aircraft that are the subject of this suit before taxation, as has been sought in the Plaintiff's two applications dated **9th March 2012** and **26th July 2016**. The Plaintiff's case is that the several applications brought herein by the Defendants are merely to obstruct him from realising the Judgment. Counsel for the Plaintiff submitted that the only known attachable assets of the 1st Defendant are the two subject aircraft now lying at Wilson Airport. There is no denying that the same must be undergoing depreciation, five years down the line. Indeed, the Plaintiff attached an opinion from **Aero Cruise Africa** to the effect that the said aircraft had been grounded and were depreciating. (*See pages 21-40 of the Plaintiff's application dated 26th July, 2016*).

21. The 1st Defendant did not really put up any case as to why the said aircraft should not be attached. **Section 94 of the Civil Procedure Act** gives the Court discretion to allow execution before taxation. It provides as follows:-

“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.”

22. In the present case, it has been demonstrated by the Plaintiff that the 1st Defendant is not a resident of this Country and the aircraft are his only known assets in Kenya. It has also been shown that the 1st Defendant had once tried to transfer ownership of the said aircraft to a third party. This was clearly an attempt to subvert justice which should not be countenanced. The apprehensions by the Plaintiff that he may not fully recover the sums due to him given the foregoing reasons, is understandable. Granted that the foregoing averments by the Plaintiff were entirely uncontroverted, I would be of the view that the orders sought by the Plaintiff are not only justified, but would be in the interest of the parties herein.

23. In view of the foregoing, I would resolve the issues raised in the five applications thus:

- a) **That there be a stay of taxation pending the outcome of the review application that is now pending before the Court of Appeal.**
- b) **That execution of the Decree issued herein on 17th May, 2011 to forthwith issue by way of attachment and sale of aircraft Registration Numbers 5Y EKO and 5Y BMA pending the taxation of the Plaintiff's bill of costs.**
- c) **The proceeds from the attachment of the two aircraft to be deposited in a joint interest earning account in the joint names of the Plaintiff and the 1st Defendant's Advocates awaiting the outcome of the 1st Defendant's review application.**

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2016.

OLGA SEWE

JUDGE