

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIIRONMENT AND LAND COURT AT NAIROBI
ELC MISC. NO. 131 OF 2013

OSERO & COMPANY ADVOCATES.....APPLICANT

VERSUS

EASY PROPERTIES LIMITED.....RESPONDENT

RULING

The application before court is one dated 10th June 2014. The Applicant seeks orders that:

1. Judgment be entered in favour of the Applicant against the Respondent, forthe taxed and certified costs due to the Applicant, as follows;

NO.	CASE NO.	DATE FILED	DATE TAXED	AMOUNT AWARDED
1	118/2013	23/7/2012	26/5/2014	92,939.20/-
2	119/2013	23/7/2012	26/5/2014	98,739.20/-
3	120/2013	23/7/2012	26/5/2014	87,139.20/-
4	121/2013	23/7/2012	26/5/2014	92,939.20/-
5	122/2013	23/7/2012	26/5/2014	98,739.20/-
6	123/2013	23/7/2012	26/5/2014	85,689.20/-
7	124/2013	23/7/2012	26/5/2014	101,639.20/-
8	125/2013	23/7/2012	26/5/2014	91,489.20/-
9	126/2013	23/7/2012	26/5/2014	103,814.20/-
10	127/2013	23/7/2012	26/5/2014	103,814.20/-
11	128/2013	23/7/2012	26/5/2014	91,489.20/-
12	129/2013	23/7/2012	26/5/2014	99,319.20/-
13	130/2013	23/7/2012	26/5/2014	96,999.20/-

14	131/2013	23/7/2012	26/5/2014	97,289.20/-
15	132/2013	23/7/2012	26/5/2014	91,489.20/-
16	133/2013	23/7/2012	26/5/2014	92,939.20/-
17	134/2013	23/7/2012	26/5/2014	84,239.20/-
18	135/2013	23/7/2012	26/5/2014	98,014.20/-
19	136/2013	23/7/2012	26/5/2014	87,139.20/-
20	137/2013	23/7/2012	26/5/2014	99,000.20/-
			TOTAL	1,894,890.00/-

2. The Respondent to pay the Applicant interest at Court rates from the date of taxation as above.

3. The costs of the application be borne by the Respondent.

The application is premised on grounds that the Applicant's Bills of Costs were taxed in the presence of the Respondent's Advocates on 23rd July 2012 and Certificates of Taxation issued to that effect, and that to date, the Respondent has not paid or made part payment thereto. The Applicant avers that despite requests made to the Respondent, it has refused, failed and/or neglected to pay the taxed costs.

The application is further supported by an affidavit sworn by Lewis Ndemo Osero, an Advocate with the Applicant firm of Advocates. He deposes that the Respondent instructed his firm to act for it in respect of sale and purchase of various apartments erected on L.R. No. 12715/552 and 7149/123 situate at Mavoko within Machakos County. The deponent states that his firm rendered the legal services but that the Respondent has refused to settle the legal fees. Consequently, that the firm prepared Bills of Costs which were taxed on 26th November 2014 and allowed as enumerated hereinabove, totaling to Kshs. 1,894,890.00/-. In support of the application, the deponent annexed copies of Certificates of Taxation for the 20 Bills of Costs and urged the Court to allow the application as prayed.

Response

The Replying Affidavit in response to the application was sworn on 24th January 2015 by Tim Agufana Liko, an Advocate in the conduct of the matter on behalf of the Respondent. He deposed that there are two pending applications filed by the Respondent, first is an application dated 9th June 2014 seeking to set aside the taxation on the basis that the same proceeded without the participation of the Respondent. Second, an application dated 4th June 2014 seeking to set aside and expunge from the Court record all the proceedings in the taxation as they were conducted by Seda Kevin Brian Orwa, Advocate who at the time (Year 2014) did not hold a valid practicing certificate. The deponent states that these applications were served upon the Applicant on 10th June 2014 but has to date not filed a response thereto.

It deposed that the intent of the instant application is to circumvent the two applications which are pending before Court. The deponent contends that the application dated 4th June 2014 ought to be determined first because it has the effect of nullifying the taxation since it is based on Sections 9, 24, 30, 31, 32, 33, 34, 56 and 85 of the Advocates Act. Further, that the said application, in so far as it seeks to sanction the advocate who conducted the taxation proceedings border on contempt of court and ought to be given priority before the instant application. The deponent urged the court to let the two applications

be heard first stating that it would be in the interest of justice so to do.

Determination

On perusal of the record, I note that there are 20 files (Nos. 118/2013 – 137/2013) in respect of various related transactions. When the matter came up for taxation on 17th February 2014, the parties recorded consent before Senior Principal Deputy Registrar of this Court, Hon. Makori that the 20 files be consolidated and that File No. 131/2013 be the pilot file. Subsequently, the bills were taxed before the Deputy Registrar, Hon. Wachira (Mrs.) and a ruling on taxation and reasons delivered on 26th May 2014. On the date the said ruling was delivered, Counsel for the Respondent sought for stay of execution for purposes of filing a reference which stay was granted for 7 days in all the files. On 9th June 2014, the Respondents filed an application dated 4th June 2014 and a reference dated 6th June 2014. Both applications were filed in the agreed pilot file being Misc. No. 131 of 2014. The instant application was filed on 10th June 2014 immediately after the reference was filed. The instant application was filed in one of the consolidated files being Misc. No. 118 of 2013.

There are now three applications pending before this court. The import of the Respondent's applications is that the taxation, subject matter of the Applicant's application could be nullified. I note that the Applicant filed the instant application in File No. 118/2013 whereas both parties by mutual consent agreed that File No. 131/2013 be the pilot file. It is easy to infer tomfoolery on the part of the Applicant. The filing of the current application in another file was evidently intended to defeat the Respondent's applications. The resultant effect, if such behavior were to continue will be to confuse proceedings with the possibility of issuing conflicting orders. It would certainly not be proportionate and neither would it be in tandem with the overriding objectives of the court in the process of dispensing justice. Professor Adrian Zukerman in the second edition of his book Zukerman on Civil Procedure: Principles of Practice (Sweet & Maxwell, Lond. 2006) at paragraphs 13.16 to 13.20 whilst discussing a court's inherent and express powers to stay proceedings writes that:

“The court has a wide ranging jurisdiction to stay proceedings... The facility of bringing proceedings to a halt, while keeping open the possibility of their revival at some later stage provides a useful case management power... The jurisdiction to order a stay is not confined to instances expressly mentioned by statute or by rules of court but may be exercised whenever the court deems it just or necessary”.

I agree with the view expressed by Professor Zukerman. A better case management strategy would dictate that the Respondent's applications are disposed of first. It would be of little use and indeed not an efficient use of the available judicial time and resources to determine the instant application only for the same to be revisited if not reversed once the Respondent's two applications are determined. I hasten to add that the Respondents applications do not only challenge the taxations rendered herein by the taxing master but also raise an important public policy issue as to a non-licensed practitioner's actions vis-a-vis proceedings in before a taxing master.

I would consequently exercise my discretion and stay the Applicant's application for judgment and particularly make orders as follows:

1. All future pleadings and submissions shall be filed under File Misc. No. 131/2013 being the pilot file.
2. The Applicant's application dated 10th June, 2015 is hereby stayed pending the determination of the Respondent's applications dated 4th June, 2015 and 6th June, 2015.
3. The two applications filed by the Respondent shall be heard and disposed of jointly.
4. The Applicant is granted leave of 14 days from the date hereof to file and serve any responses to the Respondent's applications.
5. The applications shall be canvassed by way of written submissions which shall be filed and exchanged simultaneously within 14 days from the date of receipt of service of the Applicant's responses.

6. The matter shall be mentioned on 5th May, 2015 for purposes of confirming compliance and taking a ruling date.

Dated, signed and delivered at Nairobi this 23rd day of March, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant

..... for the Defendants/Respondent