



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION – MILIMANI

MISC. APPL. NO. 351 OF 2012

GICHUKI KING'ARA & COMPANY ADVOCATES.....APPLICANT

Versus

MUGOYA CONSTRUCTION & ENGINEERING LTD.....RESPONDENT

RULING

Two applications: entry of judgment and stay of proceedings

[1] The Motion for entry of judgment is dated 19th March 2015 while the one for stay of proceedings is date 23rd March 2015. The former application has been made by the Applicant and the latter by the Respondent. I will deal with both applications, and so, I will use the titles Applicant and Respondent as they appear in the title of these proceedings.

APPLICANTS SUBMISSIONS

On Application for entry of judgement

[2] This application seeks for summary judgment for the sum of Kshs. 10,529,363 being the sum taxed and certified by the deputy registrar as due. The Applicant stated that he is entitled to summary judgment pursuant to section 51(2) of the Advocates Act, Chapter 16 laws of Kenya which provides as follows;

The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with cost.

[3] According to the Applicant, he needs only satisfy 3 conditions which are;

- a. That there is a certificate of taxation issued by the taxing officer;
- b. That the certificate of taxation has not been set aside or altered by the court; and
- c. There is no dispute on the retainer.

The certificate of taxation in this matter has been issued by the taxing master and is annexed as **PGK-1** in the affidavit of Peter Gichuki Kinga'ra in support of the application dated 10th March

2015. The same is admitted by the respondent in its replying affidavit. Secondly, the said certificate of taxation has not been set aside or altered by the court. Lastly, with regards to the retainer, the same is not disputed by the respondents. The Applicant referred the court to the ratio by Justice Azangalala on section 51(2) in **Ahmednasir Abdikadir & Company Advocates v National Bank Of Kenya Limited** [2006] eKLR that;

“A plain reading of the above provision seems to support the position taken by the advocates in the matter at hand. There is no dispute that J. M. Were Deputy Registrar, issued a Certificate of Taxation on 15.10.2005 certifying that on 25.8.2005 the advocate/client bill of costs was taxed in the sum of KShs.8,840,877.40 and allowed in the said sum. There is further no dispute that the said certificate has not been set aside or altered by the court. The retainer is not disputed; indeed it is expressly admitted by the client. All the prerequisites having been met by the advocates, the result is that the Deputy Registrar’s Certificate of Taxation is final as to the amount of the costs covered thereby”

[4] The respondent argued that it has commenced the process to challenge the decision of the taxing master through a reference. But the Applicant is of the view that, it is well settled that even the existence of a reference does not operate to stay proceeding such as this. In **Gichuki King’ara v Mugoya Constructions & Engineering Company Misc Application 624 of 2009**, Justice Musinga held as follows;

“...in the circumstance, pendency of the respondent’s Application seeking to challenge the decision of the taxing officer cannot be a bar to the determination of the applicant’s application. The court cannot speculate on the outcome of the respondent’s application and must therefore determine the applicant’s application of merits...”

Further, Justice Nambuye in **Njougoro & Company Advocates v Dubai Bank Kenya Limited** [2008] eKLR held as follows:

“...starting with the assertion that they have an arguable reference, in the absence of the Deputy Registrar’s reasoning for allowing the amounts allowed against the items objected, to on the one hand and the respondents reasons for objecting to the amounts allowed as against those items, on the other hand, as well as the applicants reasons as to why the amounts allowed by the taxing officer should not be disturbed, the court, is not in a position to assess the argue ability of the reference. In addition to the above, this court, is satisfied and in agreement with the observation made by Warsame J. in the sister application to this one, cited earlier on, that existence of such a reference does not operate as a stay...”

On Application for stay of proceedings

[5] The Applicant wondered whether this court should issue an order of stay of proceedings pending hearing and determination of the Winding up petition No. 7 of 2013. He submitted that the application is anchored on section 223 of the Companies Act. An order of stay envisaged by section 223 is discretionary in nature. The objective is always to ensure that no creditor will gain priority over other creditors of the same class. But, if stay was to be granted in every application such as this, any company faced with executions would only need to procure third parties to file winding up petitions in order to pre-empt execution. Therefore, the present application is not filed in good faith. The applicant has not disclosed to the court that it has filed an application to strike out the winding up petition and which is due for consideration by the court. The applicant has been transferring its property to Uganda where its director and principal shareholder, James Mugoya, hails from and hiding others under shell Companies with the sole intention of defeating the respondent’s claims. The Advocate stated that he is the main creditor and the application by the Respondent is merely an attempt to buy more time. That explains why the applicant is not willing to furnish any

security at all in the matter herein and in all enforcement proceedings against it where it has makes applications such as this, a case in example being in Miscellaneous Application 624 of 2013 between the parties herein where the applicant was ordered to furnish security but it has never done so to date.

[6] *In Re GREAT SOUTHERN COACH [2009] eKLR*, Justice J.NKhaminwa held as follows;

The power of court to stay proceedings is discretionally under Section 223 of Companies Act. The supporting affidavit states that for reason of the Winding Up proceedings the company shall not have capacity to proceed with all these suits.

I have perused the lists of cases contained in the affidavit. They are several and must involve sums of money. I am of the view that the interests of so many litigants would be prejudiced if stay was granted and it appears the orders are not sought in good faith.

The only other creditor is Dew Securities Limited. The said company is already a decree holder as against the applicant company and will be in no way prejudiced. The applicant did not show by evidence how the Respondent could disadvantage other creditors or that any other creditor exists at all. In fact, they never filed any affidavit at all. Allegations about Dew Securities Limited and/or other creditors would have been better presented to this court by way of evidence. This is clearly an afterthought. The submissions that other creditors will be prejudiced without evidence of their existence should be disregarded. Further, failure to annex an affidavit means that the applicants are estopped from relying on facts which that must be backed by evidence. In the circumstance, the applicants are limited only to the grounds listed in the Notice of Motion. See the case of **Unilever Kenya Limited v Procter & Gamble & 3 others [2014] eKLR** where Justice Kamau held as follows;

“...a reading of the said provision shows that an applicant can exercise the option of serving an affidavit to support his application or not to depending on whether or not his motion is grounded on evidence by affidavit. Setting out of the grounds is, however, mandatory. Its compliance is couched in mandatory terms. The 1st and 2nd Defendants opted to rely on the grounds only. An applicant who opts to rely on grounds only must be able to make out his case based on those grounds only without alluding to facts that would need to be supported by evidence. The grounds must therefore be sufficient to support the prayers that he seeks in his application.”

[7] In an application for stay, the court must be satisfied that substantial loss will result to the applicant unless the order is made; that the application is made without unreasonable delay and lastly, the applicant does furnish security as the court orders for the due performance of such decree or order as may ultimately be binding. The applicant herein has not showed by way of affidavit what loss will result to them and does not offer any security at all. In fact, in **Misc 624 of 2009**, the applicant was ordered to furnish security but it has never done so to date. This court has been referred to Justice (Retired) J B Havelock’s decision in **Adipo & Company Advocates vs Kenya Pipeline** on stay of proceedings. The Applicant urged that the paragraph quoted was never adopted by the court and was merely part of the applicant’s submissions. The issue of stay of proceeding was never addressed by the court. In the matter, the issue was whether the taxation officer should have automatically stayed taxation upon the filing of a winding up petition. In the above matter, while dismissing the applicant’s application with costs, the learned judge observed that the applicants were not prejudiced by denial of orders of stay since they could still invoke provisions of section 224 and 225 later in the proceedings. It is our humble submission that in the matter herein, if the court was to grant the orders prayed in the application dated 23rd March, the applicant company will not be prejudiced as it can still invoke section 224 and 225 of the Companies Act at any time later. Finally, contrary to the submission by the Respondent that the application dated 19th March 2015 would serve no purpose in view of section 225 of the Companies Act, indeed, if the prayers therein are allowed, as argued above, the Respondents would still have

recourse to section 224 and 225 of the Companies Act.

RESPONDENT'S WRITTEN SUBMISSIONS

On both applications

[8] The Respondent relied on the Replying Affidavit sworn by **James Abiam Mugoya Isabirye**. They saw two issues namely:

- i. Whether this Honourable Court should issue an order for stay of proceedings pending the hearing and determination of winding up proceedings;
- ii. Whether the application for entry of judgment is premature.

Of stay of proceedings

The Respondent submitted that it is facing a winding up proceeding in **Winding Up Cause No. 7 of 2013**. The said winding up Petition is pending before this Honourable Court. In view thereof, this Honourable Court has the discretion to stay all proceedings against a company facing winding up proceedings. See Section 223 of the Companies Act, Chapter 486 of the Laws of Kenya ('the Act') which provides as follows as follows;

At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may –

- a. **where any suit or proceeding against the company is pending in the High Court or the Court of Appeal, apply to the court in which the suit or proceedings is pending for a stay of proceedings therein; and**
- b. **where any other suit or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceeding;**

and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

[9] They relied on the decision by Justice Havelock (as he then was) in **Adipo & Company vs. Fuller's United Electric Works Ltd (2011) eKLR** who quoted Atkin's Encyclopedia of Court form in Civil Proceedings, 2nd Edition Page 66 paragraph 32 on stay of proceedings as follows;

Stay of proceedings before a winding-up order. Where any action or proceeding against a company is pending in the High Court or Court of Appeal, the company or any creditor or contributory may, at any time after the presentation of a winding-up petition and before a winding-up order has been made, apply to the court in which the action or proceeding is pending for a stay of the proceedings and the court may stay the proceedings on such terms as the court thinks fit. Where any other action or proceeding against a company is pending the company or any creditor or contributory may, at any time after the presentation of a winding-up petition, and before a winding-up order has been made, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding, and the court may restrain the proceedings on such terms as the court thinks fit.

The court also has an inherent jurisdiction to stay proceedings when, for example, the company is in voluntary liquidation or where a compromise or scheme of arrangement has been proposed. The jurisdiction does not apply to proceedings in foreign courts, although such proceedings may in certain circumstances be restrained

by the court in the exercise of its equitable jurisdiction.

In determining whether or not to exercise its discretion to stay or restrain the proceedings the court will ask itself whether any good will be done, or expense saved, by staying or restraining proceedings which have been properly brought and, in effect, sending the claim to be determined in the winding-up proceedings. It will not however, allow any creditor to gain priority over other creditors of the same class by bringing proceedings on his claim instead of taking his place with other creditors in the winding up. (Emphasis ours)

[10] It is important to note that Justice Havelock on 23rd May, 2013 in **High Court Civil Case No. 190 of 2006 – Dew Security Services Limited vs. Mugoya Construction & Engineering Limited** ordered stay of proceedings pending the hearing and determination of the winding up proceedings herein. Dew Security Services Limited joined the winding up proceedings as creditor and supported the said Petition. They argued that it would save the judicial time by staying all the proceedings pending the determination of the Petition. Additionally, they submitted that entry of judgment as prayed by the applicant's herein would amount to granting the Applicant priority over other alleged creditors such as Dew Security Services Limited. It is instructive to note that the determination of the Winding up Petition is at the tail end as the outstanding issue is only the filing of submissions by the Company, the Respondent herein where after Judgment shall be rendered. See **Bowkett v Fuller's United Electric Works Ltd [1922] All ER 281** the Court was emphatic as follows;

'once a winding-up petition had been presented the Court ought, unless there were very exceptional circumstances in the case, to stay all further proceedings in an action against the company where it was necessary to do so to protect the assets of the company and to secure equality among all creditors of the same class.'

According to the Respondent, there are no exceptional circumstances existing in the present case to warrant refusal of the stay of proceedings. Indeed, the Honourable Court ought to stay the proceedings herein to protect the assets of the Company and to secure equality among all creditors in the event winding up order is issued by this Honourable Court. They believed that no purpose would be served by the entry of judgment against the Respondent in view of the express provisions of section 225 of the Act. Section 225 provides as follows;

Where any company is being wound up by the court, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void

In light of the above it is beyond peradventure that Section 225 of the Act voids any attachment or execution against the estate or effects of the company after commencement of the winding up by Court. Section 226(2) of the Act is also clear on the time of commencement of winding up as follows;

In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.

See the Court of Appeal in **Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone E.A. (1969) Limited (1999) eKLR** held as follows;

In this particular case the winding up of the corporation is deemed to have commenced at the time of presentment of the petition for the winding up, that is to say 25th February, 1997. See section 226(2) of the Act. Section 225 of the Act provides in no uncertain terms that any attachment after commencement of the winding up 'shall be void'.

They submitted that the object of a winding up is to obtain an equal distribution of assets of the company amongst all persons entitled; instead of which, if one creditor brings an action on his

separate account, he may obtain an unfair advantage over other creditors, this was the holding in **Needham vs. Rivers Protection & Manure Company (1875) 1 Ch. D. 253.**

From the foregoing, the Respondent urged the court to exercise its discretion and grant stay of proceedings pending the determination of the Winding Up Petition.

Respondent: Application for entry of judgment is premature

[11] They made submissions non “Without prejudice” to the foregoing, that the Respondent has already expressed intention to challenge the decision of the taxing master the subject matter of the Applicant’s application herein. The Respondent has indeed written to the Deputy Registrar requesting for reasons for the decision to enable it challenge the decision of the taxing master through filing reference to the High Court. The reasons have not been furnished to enable the Respondent file the said reference. In light of the same, the Applicant’s application for entry of judgment is therefore premature. Section 51(2) of the Advocates Act, Chapter 16 of the Laws of Kenya upon which the Applicant’s application is premised provides as hereunder;

The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs. (Emphasis added)

On those reasons, the Respondent requested the court to stay entry of judgment for it is premature. The Respondent also argued that their Application is premised on the provisions of the law specifically sections 223 and 225 of the Companies Act and is not grounded on any evidence which will require the filing of supporting affidavit. It does not offend Order 51 Rule 4 of the Civil Procedure Rules which provides thus;

Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served

See the decision by the High Court of Uganda at Kampala in the case of **Odongkara and Others vs. Kamanda and Another (1968) 1 EA 210 (HCU)** that;

I agree with the submission that no affidavit was necessary in this case as there is no question of evidence, this being purely a matter; but can it be said that the notice of motion states in general terms the grounds of the application.

DETERMINATION

Existence of reference no bar

[12] In law, existence of a reference does not operate as stay of proceedings under section 51(2) of the Advocates Act, Chapter 16 laws of Kenya. See the decision of Musinga J (as he then was) in the case of **Gichuki King’ara v Mugoya Constructions & Engineering Company Misc Application 624 of 2009** as well as the decision by Nambuye J (as she then was) in **Njougoro & Company Advocates v Dubai Bank Kenya Limited [2008] eKLR**. I reject the argument by the Respondent which seems to suggest that existence of a reference is a bar to commencement of proceedings under section 51(2) of the Advocates Act. However, before I can determine with sanctification the application for summary judgment under 51(2) of the Advocates Act, Chapter 16 laws of Kenya, let me first determine whether these proceedings should be stayed under the companies Act.

Stay of proceedings under s.223 of Cap 486

[13] The Respondent claims that, in view of the pendency of **Winding-Up Cause No. 7 of 2013** against the Respondent, this Honourable Court should exercise its discretion under section 223 of the Companies Act and stay these proceedings against the company. At least all parties agree that the power of the court under Section 223 of the Companies Act is discretionary. It is not automatic. I wish to cite Section 223 of Chapter 486 of the Laws of Kenya which provides as follows;

At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may –

- a. **where any suit or proceeding against the company is pending in the High Court or the Court of Appeal, apply to the court in which the suit or proceedings is pending for a stay of proceedings therein; and**
- b. **where any other suit or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceeding;**

and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

[14] Like any other discretion, under section 223 of the Companies Act, the court must not act capriciously or whimsically; it must be guided by the facts of the case and the law. In determining whether or not to exercise its discretion to stay or restrain the proceedings the court will ask itself whether the impugned proceedings would give advantage to one creditor over the others. The exact advantage in the law on winding-up of corporations is that the creditor in question will gain priority over other creditors of the same class by bringing proceedings on his claim instead of taking his position with other creditors in the winding up. Other than securing the equality among all creditors of the same class, the court will also seek to know whether the stay will be necessary to protect the assets of the company. Nonetheless, the court would refuse to stay proceedings where there are exceptional circumstances in the case. See **Bowkett v Fuller's United Electric Works Ltd[1922] All ER 281** where the Court emphasized that;

'once a winding-up petition had been presented the Court ought, unless there were very exceptional circumstances in the case, to stay all further proceedings in an action against the company where it was necessary to do so to protect the assets of the company and to secure equality among all creditors of the same class.'

[15] Other than the Applicant, only Dew Security Services Limited intimated it is a creditor. Their claim is that of a decree-holder. The Applicant has applied for judgment to be entered against the Respondent on taxed costs between advocate and client. The best the Applicant shall become is a decree-holder. Equality of creditors will not be destabilized at all. Indeed, the other creditor will not suffer any prejudice as they are in the same class with the Applicant. The object of winding up which is to obtain an equal distribution of assets of the company amongst all persons entitled will not be defeated by the entry of judgment on taxed costs.

[16] A none-issue has, however, emerged from the submissions by the Respondent on the creditors herein. I wish to state categorically that, in winding-up cause number 7 of 2013, there are only two creditors; the Applicant herein and Dew Security Services Limited. There is no evidence on other creditors other than the two. I will, therefore, ignore any submissions to the contrary. Further, despite the fact that a decree may result into execution, the current proceedings are not execution-proceedings or distress or attachment which may threaten the assets of the company. In any case, any future execution or distress or attachment arising from any decree herein will be subject to section 225 of the Companies Act. Accordingly, an order of stay of these proceedings is not needed at the moment to protect the assets of the company. Therefore, there is no good reason to stay these proceedings at this stage. I dismiss the application for stay of these proceedings. I

will determine the application for summary judgment now.

Judgement on taxed costs

[17] The substantive law on judgment on taxed costs between advocate and client is section 51(2) of the Advocates Act, Chapter 16 laws of Kenya which provides as follows;

The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with cost.

[18] According, for the Applicant to be successful under section 51(2) of the Advocates Act, he must show;

- a. That there is a certificate of taxation issued by the taxing officer;
- b. That the certificate of taxation has not been set aside or altered by the court; and
- c. That there is no dispute on the retainer.

[19] I see the certificate of taxation issued by the taxing master in this matter. It is marked as **PGK-1** in the affidavit of Peter Gichuki Kinga'ra in support of the application dated 10th March 2015. That fact is admitted by the Respondent. The said certificate of taxation has not been set aside or altered by the court. And, there is no dispute on retainer. As such, the application dated 19th March 2015 satisfies all the prerequisites under the relevant law. The result is that the Deputy Registrar's Certificate of Taxation is final as to the amount of the costs covered thereby. The retainer is not disputed, and there is nothing really which would require an inquiry into through intense method of trial. In light thereof, I hereby order that judgment be entered for the sum certified to be due with cost. Accordingly I enter judgment in the sum of Kshs. 10,529,363 being the sum taxed and certified by the deputy registrar as due. Costs of the application are awarded to the Applicant being the successful party. It is so ordered.

Dated, signed and delivered in court at NAIROBI this 16th day of July 2015.

F. GIKONYO

JUDGE