



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
MISC CAUSE NO 731 OF 2012

KAGWIMI KANG'ETHE & COMPANY ADVOCATE.....APPLICANT

VERSUS

A.A. KAWIR TRANSPORTERS LIMITED.....RESPONDENT

RULING

1. This Ruling is in respect of the Notice of motion dated **17th September, 2015**. That application by the Respondent herein, seeks orders that:-
 1. **The application be certified urgent and be heard ex parte in the first instance. (Spent)**
 2. **There be a stay of any further proceedings herein including the Applicant/Advocates application dated 28th July, 2015 pending inter partes hearing and determination of this application. (Spent)**
 3. **There be a stay of any further proceedings herein including the Applicant/Advocates application dated 28th July, 2015 pending the Respondent/Client's intended Reference.**
 4. **That costs be in the cause.**
2. The Respondent/Client's case is that following the taxation of the Applicant Advocate's Bill of Costs by the Deputy Registrar on 17th November, 2014 he promptly filed a Notice of Objection and requested for Reasons for the Taxation, in which the Advocate's Bill of Costs was allowed in the sum of Kshs 1,009,652/40. That inspite of reminders as shown vide the five letters annexed as **AA7** and **AA8**, the Deputy Registrar is yet to furnish the Respondent/Client with the requested Reasons, without which no Reference can be filed. In the meantime, an application has been filed for judgment pursuant to the Certificate of Taxation dated 16th December, 2014. The Respondent/Client's prayer therefore is for these proceedings to be stayed pending the intended Reference.
3. Regarding the circumstances leading to the Taxation, Abdi Ahmed Abdi, a Director of the Respondent/Client deponed that the Respondent/Client, AA Kamir Transports Limited instructed the Applicant/Advocates to act for them in a land sale transaction. Thereafter injunction orders were issued in Nairobi **ELC Nos. 746** and **747 of 2011** stopping the sale transaction. At the same time conservatory orders were issued in Constitutional Petition No. 194 of 2011 in respect of the two parcels of land consequent to which the sale aborted. The Applicant/Advocate thereafter filed a Bill of Costs dated 4th December, 2012. That Bill was first taxed in the sum of Kshs. 255,652/=

- before Hon. Nyambu, Deputy Registrar.
4. The Applicant/Advocate being dissatisfied therewith applied for the setting aside of the Taxation, which application was allowed by Havelock, J on 14th May, 2014 thus paving the way for a fresh taxation limited to the Instructions Fees only. This second Taxation was done before Hon. Nyakundi, Deputy Registrar (as he then was) who in his Ruling dated 17th November, 2014 taxed the Bill in the sum of Kshs 1,009,652.40. A Certificate of Taxation followed, dated 16th December, 2014. It is thus the Respondent/Client's contention that the Intended Reference is arguable, taking into account the minimal work done by the Advocate.
 5. On the part of the Applicant/Advocate, it was argued that the Application as drafted is fatally defective and should therefore be struck out with costs for being incompetent and for the reasons that the Respondent has not invoked the proper provisions of the law.
 6. It was further argued that the Respondent/Client has been largely indolent by failing to take active steps to procure the Reasons for Taxation and therefore it would be unjust and prejudicial for the Court to grant him a general unlimited stay of proceedings. The Applicant/Advocate was however of the view that if stay is to be granted at all then the Respondent/Client should be ordered to deposit in Court the taxed amount of Kshs 1,009,652/40.
 7. Starting with the argument that the Application is fatally defective for not being based on a specific provision of the law, the Court notes that indeed the application is expressed to have been brought under Sections 1A, 1B, 3 & 3A of Civil Procedure Rule and order 50 Rule 1 of the Civil Procedure Rules, the Advocates Act and "...all enabling provisions of the law."
 8. It is true therefore that Sections 1A, 1B and 3A of the Civil Procedure Act are general provisions and therefore are not specific to the application at hand; while **Order 50 Rule 1 of the Civil Procedure Rules** deals with computation of time, which is not a relevant factor in the instant application. The relevant provisions of the Advocates Act have not been cited either. I however take it that Order 50 Rule 1 of the Civil Procedure Rules was cited by mistake, and that the intention was to cite Section 50(1) of the Advocates Act, Chapter 16 of the Laws of Kenya.
 9. Whereas specificity is a requirement of **Order 51 Rule 10, Civil Procedure Rules**, which states that the Order, Rule or other statutory provision under or by virtue of which any application is brought be stated, that Rule also provides that:

...no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

10. In the premises, not much turns on the arguments by Mr. Kang'ethe as to the competence or otherwise of the instant application. Indeed Art. 159(2) of the Constitution of Kenya, 2010 and the provisions relied upon by the Applicant enjoin the Court to administer justice without undue regard to legal technicalities and to facilitate the just, expeditious, proportionate and affordable resolution of disputes. For all intents and purposes therefore, the Notice of Motion is validly before this Court for determination on merits.
11. Paragraph 11 of the Advocates Remuneration Order permits a party to challenge the Taxing Master's decision by way of Objection by way of a Chamber Application. That provision also stipulates that such an application can only be filed upon the Deputy Registrar furnishing Reasons for Taxation. The Respondent/Client has demonstrated that such Reasons have been sought from the Deputy Registrar and that the same have not been supplied.
12. The record further shows that in the meantime, the Applicant/Advocate has put in motion the process leading to the ultimate enforcement of the certificate of Taxation dated 16th December, 2014. In the case of **Nyakundi & Company Advocates Vs Kenyatta National Hospital Board HCCC 415 of 2004 (Milimani Commercial Courts) Azangalala, Judge(as he then was)** had this to say in a similar application:

"At this stage of the Proceedings, I do not have to make a definitive finding on the merits of the intended reference. On a prima facie basis however, on the material canvassed before me, I cannot say that the intended reference is an idle one... There is finally the allegation that the sum awarded by the Deputy Registrar is manifestly excessive as to suggest an error of principle. In my view the intended reference is arguable... The applicant should also not be prejudiced in its legitimate efforts to seek relief against the Deputy Registrar's decision..."

13. The Respondent/Client having shown that minimal work was done by the Advocate for which a sum of Kshs 850,000/- could have been awarded as instructions costs, the court is of the view that that is sufficient to dispose of this matter, as I need not at this stage consider the merits of the application. In the premises, the Court has been convinced that a good case has been made for the stay sought.
14. As to whether the Respondent/Client is under duty to provide security, I would agree with the submissions by his Counsel that there is a distinction between stay of execution and stay of proceedings. What is in issue herein is a stay of proceedings. Hence, the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules do not come into play (see **Nyakundi & Company Advocates vs. Kenyatta National Hospital Board, Supra**).
15. In the result, the application dated 17th September 2015 is hereby allowed and orders issued in terms of Prayers 3 and 4 thereof. It is further ordered that the undisputed part of the costs be paid forthwith to the Advocate.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2015

OLGA SEWE

JUDGE