REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 645 OF 2009

EQUITY BANK LTD. ……..… PLAINTIFF/APPLICANT

VERSUS

CAPITAL CONSTRCUTION LTD. ……..…… 1ST DEFENDANT

VENKATA CHAILULU GANTI ……..…….. 2ND DEFENDANT

PRASAD GANTI ……..…… 3RD DEFENDANT

AL-KARIM BADRUDIN SUNDERJI ……..…..…… 4TH DEFENDANT

R U L I N G

1. Before the Court is an application by the Plaintiff dated 14th March, 2013 brought under the aegis of **Order 22 Rule 7 and 13**, **Order 21 Rule 7, 8 and 9** and **Order 51 Rule 1** of the *Civil Procedure Rules*, **Sections 1A, 3 and 3A** of the *Civil Procedure Rules* and all other enabling provisions of the law. The Court granted interim injunctive relief sought by the Plaintiff at paragraph 3 and prayers 1 and 2 having been already spent, what the Plaintiff now seeks are prayers 4 and 5 of its said Application as follows:

> **"4. THAT this Honourable Court be pleased to stay the proclamation and attachment of the Plaintiff's/ Applicant's property by the Defendant/Respondent whether by itself, representatives, employees, agents, servants or other person acting on its behalf or claiming through it, and any other proceedings and execution arising from the taxation ruling of Hon. Nyakundi delivered on 1st March, 2013 pending the issuance of reasons as to taxation and the hearing and determination of the Applicant's intended reference against the taxation.**

5. THAT costs of this application be provided for".

2. The application is predicated upon the grounds as set out therein and further supported by the Affidavit of **John Njenga**. In the grounds of the application, the Plaintiff/Applicant avers that the 4th Defendant/ Respondent has proceeded to execute without extracting a Decree as required under the Civil Procedure Rules and has further failed to serve it with the Certificate of Costs as taxed by the taxing master on 1st March, 2013. It is the Applicant's apprehension that it stands to suffer loss, damage and prejudice should the Respondent proceed with the execution. In the supporting

Affidavit sworn on 14th March, 2013, the deponent further depones as to his apprehension of the detriment that the Applicant stands to suffer should the Respondent fail to be restrained by allowing the instant application. Further, the Respondent has not shown that it would be in a position to compensate the Applicant for loss and damage that it may incur should the execution by attachment and proclamation proceed.

3. In opposing the application dated 14th March, 2013, the Respondent filed a Notice of Preliminary Objection and the Replying Affidavit of **Pauline Sewe**, both dated and sworn respectively on 28th March, 2013. In the Preliminary Objection, the Respondent contends that the *ex-parte* order issued by the Court on 14th March, 2013 directing the Applicant's application dated 31st July, 2013 be heard together with the instant application, offends the rules of natural justice with the Respondent being condemned unheard. It is further contended that the application offends the provisions of **Section 6** of the *Civil Procedure Act*.
4. In the Affidavit of **Pauline Sewe**, sworn as aforementioned, it is contended that the application is factually misconceived and misdirected and is an abuse of the process of this Court. It is deponed that the Applicant failed to file an application for stay of execution within the stipulated seven (7) day period after the Ruling by the taxing master on the bill of costs and the Respondent was therefore justified to proceed with execution after it was issued with a Certificate of Taxation by the taxing master dated 4th March, 2013. Further, the Respondent avers that the application is frivolous and mischievous, there having been previously filed other similar applications that have been dismissed by the Court. The instant application is a further attempt by the Applicant to deny the Defendant the fruits of his judgment.
5. The crux of the Plaintiff's application is contained at paragraph 10 in the grounds adduced in support of the application. the aforementioned paragraph reads:

> **"10. The 4th Defendant has proceeded to execute without first extracting a decree as required by law and without even extracting and serving the Plaintiff/ Applicant with the Certificate of Costs and is now purporting to proclaim the Plaintiff's/Applicant's property".**

The Applicant contends that the Respondent failed to follow the procedure as stipulated under **Orders 21 and 22** of the *Civil Procedure Rules*, and more particularly **Rules 7, 8 and 9** of the former and **7 and 13** of the latter. In its submissions dated 13th May, 2013, the Applicant submits that there was no Decree that was drawn and/or approved capable of being executed and that the Certificate of Taxation was not served. It also submitted the case of **Rubo Kimngetich Arap Cheruiyot v Peter Kiprop Rotich Eldoret High Court No. 133 of 1993** in support of its contention as regards execution of a Certificate of Costs.

6. **Order 21 Rule 7 (2)** as read with **Order 21 Rule 8 (2)** provides that any party to the suit shall prepare a draft Decree in accordance with **Rule 7 (2)** and present the same to the other party or parties for approval, with or without amendment. It also provides at **Rule 8 (2)** that if the draft is approved the same shall be forwarded to the Registrar who shall sign and seal the Decree if he is satisfied that the draft Decree is in accordance with the judgment. It is further provided at **Rule 8 (3)** that the Registrar may approve the decree if within seven days of service of the draft decree on the other parties, no approval or disagreement is filed and/or received.
7. The Respondent in its Replying Affidavit stated that the Order or Decree had been extracted on 23rd February, 2012 by the Plaintiff. It is further contended that the Certificate of Taxation was duly extracted in accordance with the provisions of **Order 21 Rule 9 (2)** of the *Civil Procedure Rules*, and it was thus justified in executing the warrants for attachment and sale. In its Affidavit therein was attached the exhibit marked as **"PS-1"** being the Order and Certificate of Taxation dated 22nd February, 2012 and 6th March, 2013 respectively. The Respondent also relied upon the case of **Commissioner of Prisons v Jarda Ramji Dhanji C.A No. 86 of 2002** in support of its contentions that failure of service of the draft Decree was not fatal, and that in any event it was the Plaintiff's own advocate who had extracted the Order dated 22nd February, 2012. Reliance was also placed in **Petro Sonko & Another v H.A.D Patel & Another (1952) C.A.E.A 23** with regards to the act and conduct of the advocates on records. However, a copy of the aforementioned case of **Commissioner of Prisons v Jarda Ramji Dhanji C.A No. 86 of 2002** was not attached to

the bundle of authorities submitted by the Respondent.

8. From the foregoing, it cannot be surmised that there was a Decree that had been extracted by the Plaintiff's advocates on record dated 22nd February, 2012. It may be inferred that the same had been signed and sealed by the Registrar in compliance with the procedure under **Order 21 Rules 7 (2), 8 (2) and 8 (3)**. It is not on record whether there was an approval or disagreement received with regards to the aforementioned Order. It seems therefore, in accordance with the Respondent's averments, that there was an Order extracted by the Plaintiff following the judgment of Musinga, J (as he then was) on 22nd November, 2011. Following the procedure in **Order 21 Rule 9 (2)**, the Respondent contends that the Certificate of Costs dated 6th March, 2013 was extracted accordingly, but that the law does not provide the requirement of its service upon the Applicant. The procedure for an application for the execution of a Decree is provided under **Order 22 Rule 6** and substantively in *Form 14, Appendix A* of the *Civil Procedure Rules*. These provisions, as read together with **Order 22 Rule 7 (2)** give the requirements for an application for execution of a Decree. The Respondent/4th Defendant attests that indeed it followed the due procedure in executing the Decree dated 23rd February, 2012 thus the application is a veiled attempt at denying it the fruits of the Judgment delivered on 22nd November, 2011. There is on record, an application for execution of the Decree filed by the Respondent and dated 7th March, 2013. There is also a letter to the Deputy Registrar dated 7th March, 2013 from the Respondent, requesting for the issuance of warrants of attachment and sale. The same were issued by the Court on 8th March, 2013.
9. In my view, **Rubo Kimngetich Arap Cheruiyot v Peter Kiprop Rotich** (supra) is distinguishable from the instant suit. In the aforementioned case, the distinction arises in two forms: one is that the Court had issued Orders for stay of execution and that secondly, there was no Decree from which the Certificate of Taxation would be executed. Kasango, J, in determining the matter, reiterated as follows:

"The order of this Court had stayed any form of execution of the decree. This included the recovery of costs which could only be expressed in the decree. ..as stated earlier, the certificate of costs is not an executable instrument".

In the present suit the Registrar issued the Certificate of Taxation after an Order had been extracted by the Plaintiff dated 23rd February, 2011. For the Plaintiff to allege that it was not served with the same Order that it extracted would not only be misleading the Court, but also conducting the suit in a mischievous manner. The mischief in this case would seem to be its fervent attempt at keeping the Respondent/ 4th Defendant away from enjoying his judgment. In any event and to my mind, the Respondent has established that proper procedures were followed in execution of the Decree, and that the pending application was not an automatic stay of the execution of the same.

10. The Applicant's pronouncement that it intends to file a reference in objection to the taxation does not hold water. Under **Rule 11** of the *Advocates (Remuneration) Order 2009*, an objection to the taxing officer's decision may be made according to the said proviso. The Applicant filed an objection dated 26th February, 2013 and filed submissions on the same date. It objected to the Respondent's Bill of Costs dated 10th July, 2012. The Applicant further wrote a letter dated 1st March, 2013 to the Deputy Registrar, requesting for reasons for his decision to enable them file a reference. However, in **Gathenji & Co. Advocates v Waihenya & 3 Others Nairobi Milimani H.C.C.C No. 721 of 2000**, it was held that:

"What is referred to as "reasons for the taxing officer's decision" is no more than his ruling on the matter. Since such ruling has been made, signed and delivered by the taxing officer on 2nd October, 2001, there was obviously no need to request for such reasons."

Further in **S. Gichuki Waigwa v Nina Marie Ltd [2005] eKLR**, it was held that:

"I accept the advocate's argument that I should not concern myself with the merits or demerits of

the client's proposed reference, but on the other hand it is necessary for the client to show this Court, cause why the stay should be granted…the client has raised issues, which I believe ought to be ventilated at a reference for a final decision."

11. In my view, the Applicant has not shown or established sufficient cause for the Court to grant a stay pending its proposed or intended reference. **Rule 11** of the *Advocates Remuneration Order* provides for a reference to be filed within the stipulated period i.e. fourteen (14) days from the date of the decision by the taxing officer. The Court will not at this instance consider the merits or demerits of the Applicant's objection in pursuance of **Rule 11** of *the Remuneration Order*, but instead, whether the application has sufficient merit to allow for an Order for stay. In any event, the failure by the taxing officer to give reasons for his decision is not a bar to the objector to file a reference.
12. The grant of stay Orders is discretionary, and the same will not be issued if the applicant has not shown sufficient cause. In **Nyamogo and Nyamogo Advocates v Mwangi (2008) 1 E.A 283 (CAK)**, Kasango J. held *inter alia:*

"The client did not prosecute that application but instead went further and filed an objection under Rule 11 of the Advocate's Remuneration Order. The client yet again filed another application dated 23.10.2006. By that application the client sought a stay of execution of taxed costs and a declaration that the full amount of those costs had been paid. The application now for this ruling, made by the advocate, that is the chamber summons dated 18 December 2007 is brought under Order VI, rule 13 (1) (b), (c) and order XVI, rule 5 (d). It seeks to strike out the client's application dated 23 October 2006. Having considered the application and the arguments placed before court I am of the firm view that the Civil Procedure Act does not apply to matters relating to the Advocates Act. I therefore make a finding that the prayers sought by the client for stay of execution cannot be granted. The Advocates Remuneraiton Order has elaborated procedures laid out for objecting to taxed costs. The application therefore dated 29 September 2006 and 23 October 2006 are therefore incompetent for seeking to rely on the Civil Procedure Act. In the application for consideration before court the advocate has also relied on the Civil Procedure Act. Although so relying on that Act I find that the prayers sought can be entertained under the inherent jurisdiction that the court aways has. That inherent jurisdiction cannot be defeated by quoting the rules of the Civil Procedure Act. Having made a finding that there cannot be stay of taxed costs I find that the client's both applications must fail. In making that finding I rely on the case of Frances Kabaa v Nancy Wambui and Jane Wanjiru civil application number Nairobi 298 of 1996 (113 of 1996 UR) where the Court of Appeal had the following to say:

'In any case, even if that were so, the appellant, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs'."

That seems to establish that there cannot be a stay for taxed costs. That position seems to have been departed from somewhat in **S. Gichuki Waigwa v Nina Marie Ltd** (supra) where Kasango J. again held that:

"Indeed it is correct to state that a certificate of taxation once issued is final and binding on the parties unless it is set aside or altered by the Court. What that means is that if the advocate was to start execution for those costs, the client would not have a defence. It therefore follows, that to afford the client a measure of protection, it is necessary for stay of execution of those costs, to be granted. I accept the advocate's argument that I should not concern myself with the merits or demerits of the client's proposed reference, but on the other hand, it is necessary for the client to show this court, cause why stay should be granted. To back track a little, the court does accept the advocates argument that Order 41 Rule 4 cannot be invoked in a case of reference because a reference is not an appeal. The client has invoked, and correctly so, Section 3A of Cap 21, and the court can on that basis grant a stay. Getting back to the merits, the client has raised issues, which I believe ought to be ventilated

at a reference for a final decision. For the client to be able to ventilate those issues I find that a stay should be granted."

13. Indeed it is correct to state that a certificate of taxation once issued is final and binding on the parties unless it is set aside or altered by the court. What that means is that if the advocate was to start execution for those costs the client would not have a defence. It therefore follows, that to afford the client a measure of protection, it is necessary for a stay of execution of those costs to be granted. I accept the advocate's argument that I should not concern myself with the merits or demerits of the client's proposed reference, but on the other hand, it is necessary for the client to show this court cause why stay should be granted. To back track a little, the court does accept the advocate's argument that **Order 41 Rule 4** cannot be invoked in a case of reference because a reference is not an appeal. The client has invoked, and correctly so, **Section 3A** of Cap 21, and the court can on that basis grant a stay. Getting back to the merits, the client has raised issues, which I believe, ought to be ventilated at a reference for a final decision. For the client to be able to ventilate those issues I find that a stay should be granted. Turning to the application dated 31st July, 2012 filed by the Applicant and brought under the provisions of **Order 42 Rule 6** of the *Civil Procedure Rules* and **Sections 1A, 3 & 3A** of the *Civil Procedure Act*, the Court considers that the application has been overtaken by events. The Plaintiff's apprehension when it filed the application was that the taxation proceedings would proceed before any stay would be granted. However, the Plaintiff has not shown that it was keen on prosecuting the application, which was filed over one (1) year ago. The Respondent raised in its Preliminary Objection, that there was similar application being prosecuted, and was therefore in contravention of **Section 6** of the *Civil Procedure Act*. The aforementioned provision reads:

> **"6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed".**

The Respondent contends that the application is similar to the one dated 14th March, 2013 and should thus be dismissed and struck out. On its part, the Applicant reiterated that the two applications were dissimilar, with one seeking a stay of execution of the taxation proceedings pending an intended appeal, while the second sought a stay of the execution of the Decree.

14. As regards the Court allowing the two applications dated 14th March, 2013 and 31st July, 2012 to be heard at the same time, its attention was drawn to the provisions of the Constitution under *Article 159 (2) (b),* **Section 1A and 3** of the Civil Procedure Act and the Courts inherent jurisdiction as pronounced under **Section 3A** of the *Civil Procedure Act*. The Court, in exercising its mandate, has had its jurisdiction enhanced and expanded, especially and with regard to the provisions of **Section 1A** of the *Civil Procedure Act* in achieving the overriding objective being the equitable and expeditious determination of matters. As regards the question of jurisdiction, Waki, JA in **John Gakure & 148 Others v Dawa Pharmaceuticals Co. Ltd Civil Application No. 299 of 2007** held *inter alia:*

"…jurisdiction of the court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principle aims. In the court's view, dealing with a case justly includes inter alia, reducing delay and costs, expenses at the same time acting expeditiously and fairly. (emphasis added). **To operationalize or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court including granting of appropriate interim relief in deserving cases."**

As has been submitted by the Applicant, the two applications on the face of them may seem similar, but a closer scrutiny of the same reveals that the Applicant seeks two different reliefs in the two applications.

Suffice to say, the Court, in allowing for the two applications to be heard and determined concurrently, considered that such was in the best interest of the parties, and was in exercise of its mandate under the Constitution, the provisions of the *Civil Procedure Act* and its inherent jurisdiction.

15. That being said, the application dated 31st July, 2012 seeks the following order at paragraphs 2 and 3:

> **"2) THAT this Honourable Court be pleased to stay any taxation proceedings herein and those arising from the ruling of Honourable Musinga, J delivered on 29th June, 2012 pending the hearing and determination of this application.**

3. **THAT this Honourable Court be pleased to stay any taxation proceedings herein and those arising from the ruling of Honourable Musinga, J delivered on 29th June, 2012 pending the hearing and determination of the applicant's intended appeal against the ruling".**

The application is predicated upon the grounds that Judge Mutava erred in law when he dismissed the application dated 13th January, 2012 for review and setting aside of the Order of Musinga, J made on 22nd November, 2011. It is further stated that the intended appeal would be rendered nugatory should the proceedings be allowed to continue. The application is supported by the Affidavit of **John Njenga** sworn on 31st July, 2012. The application is brought under **Order 46 Rule 6** of the *Civil Procedure Act*. **Sub-rule (2)** of the said Order provides that:

> **"No order for stay of execution shall be made under subrule (1) unless—**
>
> a. **the court is satisfied that *substantial loss* may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
>
> b. **such *security as the court orders for the due performance of such decree* or order as may ultimately be binding on him has been given by the applicant".**

In establishing substantial loss, Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001** held that:

> **"... substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum."**

In the application and in the supporting affidavit therein, the Applicant does not show, or indeed establish what substantial loss that it stands to suffer should the application be dismissed. Instead, what is contended is that the Applicant has an arguable appeal against the determination of Musinga, J dated 29th June, 2012. The provisions of the law, are however, very clear and couched in mandatory terms; the Court shall not issue any stay orders unless the two grounds set out in **sub-rules (a) and (b)** of **Order 42 Rule 6** are satisfied. The applicant has failed to satisfy either of these grounds.

16. As a result, the Court hereby finds that the Applicant has not established sufficient and reasonable cause for it to allow either or both the applications. I find that the execution of the Decree by the Respondent is regular, procedural and in conformity with the law. In exercise therefore, of this Court's discretion and inherent authority as provided under **Section 3A**, and for the expeditious determination of this matter while considering the overriding objective, the applications by the Plaintiff dated 14th March, 2013 and 31st July, 2013 are hereby dismissed with costs of both applications awarded to the Respondent.

DATED and delivered at Nairobi this 28th day of January, 2014.

J. B. HAVELOCK

JUDGE