REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO 465 OF 2009

JARIBU CREDIT TRADERS LTD……..……..……PLAINTIFF

VERSUS

MUMIAS SUGAR COMPANY LTD ……..…..…….……DEFENDANT

RULING NO. 2

1. The plaintiff prays for stay of proceedings of taxation of costs. The party and party bill of costs is pending before the taxing master of the Court. By a notice of motion dated 4th February 2014, the plaintiff avers that it has lodged an appeal at the Court of Appeal against the order of this Court dismissing the suit.

2. It is thus the plaintiff's case that it will be prejudiced by the taxation and that the appeal will be rendered nugatory. Those matters are buttressed by a deposition of its learned counsel, Dominic Mbigi, sworn on 4th February 2014.

3. The motion is contested. There is a replying affidavit sworn by Brian Otieno on 20th February 2014. There is also a notice of preliminary objection dated 27th February 2014. The gravamen of the objection and reply is this: that the jurisdiction conferred on a taxing master is special and not amenable to stay; and, that the High Court would only be properly seized of jurisdiction on a reference from such taxation. It is also contended that the application has not reached the threshold for grant of stay pending appeal.

4. The plaintiff's suit was dismissed inter-parties on 3rd October 2013. The defendant was granted costs of the suit. The plaintiff has filed a notice of appeal at the High Court dated 10th October 2014. The plaintiff conceded freely that no other steps have been taken in the intended appeal. The plaintiff has not moved this Court or the Court of Appeal to stay execution of the order of 3rd October 2013. What the plaintiff seeks is to stay proceedings *before* the taxing master of this Court for assessment of the party and party bill of costs dated 16th December 2013.

5. This Court has power and discretion to stay such taxation. See *Kenya Commercial Bank Limited Vs. Muturi, Gakuo & Company Advocates*. The reason is that the taxation is a step or proceeding in the suit. However, the exercise of the discretion must be done in a judicious manner. In this case, the plaintiff's suit has been dismissed. There is no order staying the dismissal. The defendant,

having been granted costs, is entitled to proceed with taxation of its bill. To that extent, the matter can be distinguished from *The Board of Trustees National Hospital Insurance Fund Vs. Kipkorir, Titoo & Kiara Advocates*, Nairobi, High Court case 154 of 2004 (unreported). In the latter case, stay of taxation was granted primarily because the basis of taxation was impugned.

6. The taxing master exercises a special and primary jurisdiction. The High Court only gets seized of jurisdiction over taxation by an appeal or reference from the taxation. *Sharma Vs. Uhuru Highway Development Company* [2001] 2 E.A 530, *Donholm Rahisi Stores Vs. East African Portland Cement Limited* [2005] e KLR, *Stanley Mwandoe Righa Vs. Braimoh Joseph Mburu* Nairobi, High Court suit 224 of 2013 (unreported). In a sense then, it was open to the applicant to make an application for stay of the taxation *before* the taxing master. That is the true forum seized of the bill.

7. Like I stated earlier, this Court is nevertheless empowered to grant a stay pending appeal under Order 42 of the Civil Procedure Rules. In fact, the present motion is predicated upon Order 42 rule 6 (1) of the Rules. What I am required to consider is whether the applicant has met the conditions for grant of stay of execution set out in Order 42 rule 6 (1) and (2) of the Civil Procedure Rule 2010 which provides:-

> *"6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*
>
> *(2) 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."*

8. In the case of *Butt Vs Rent Restriction Tribunal* [1982] KLR 417 the learned Judge, Madan JA (as he then was) quoted with approval the views of Brett L.J. in *Wilson Vs Church* (No 2) 12 Ch D [1879] 454 at 459.

> *"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory"*

9. Justice Madan delivered himself thus in the *Butt* case (Supra) at page 419,

> *"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings"*

10. Again the court will grant a stay if special circumstances of the case dictate so. See *Attorney General Vs Emerson and others* 24 QBD [1889] 56 at page 59. In the *Butt* decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a "special circumstance" that gave the applicant an undoubted right of appeal. Those general principles were restated in *Madhupaper International Limited Vs Kerr* [1985] KLR 840 at page

11. The Court should pay heed to the overriding objective to do justice to the parties enunciated by article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act. I cannot put it better than the court of Appeal in *Harit Sheth T/a Harit Sheth Advocate Vs Shamas Charania* [2010] eKLR (Civil Application No 68 of 2008;

> *"The next aspect of such an application like this is, however, difficult to resolve. This is whether or not the appeal, if successful would be rendered nugatory. In our view, the sum of Shs.32 million is relatively substantial taking into account the station of the applicant's legal practice. We draw guidance herein from this Court's decision in the well known case of Oraro & Rachier Advocates Vs. Co-operative Bank of Kenya Ltd [1999] 1 EA 236. Further in this regard, we have also taken into account the provisions of section 1A and 1B of the Civil Procedure Act and section 3A and 3B of the Appellate Jurisdiction Act, which provisions came into force on 23rd July, 2009. By these new concepts of jurisprudence the courts, including this Court, in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or in exercising any power must take into consideration the overriding objective as defined in the two Acts. The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. See E. Muriu Kamau t/a Muriu Mungai & Co. Advocate Vs. National Bank of Kenya Ltd Civil Application No.Nai. 258/2009 (unreported)."*

12. Regrettably, the plaintiff has chosen to rely on the affidavit of its advocate Dominic Mbigi who simply states at paragraph 7 and 8 as follows:-

> *"7. That if stay of proceedings is not granted and the taxation is allowed to proceed, the applicant's appeal will be reduced to a mere academic exercise thus occasioning the applicant great prejudice since should the appeal succeed it will have already paid costs for a suit that will still be pending.*
>
> *8. That the applicant has a good appeal with a high probability of success which appeal is at grave risk of being rendered nugatory".*

13. From those averments, there is no evidence of *substantial* loss or *sufficient* basis to show that taxation of costs will render the appeal nugatory. There is no support for the proposition that payment under the bill of costs being taxed would become *irreversible* if the appeal is determined in favour of the applicant. I should not even prejudge the outcome of the taxation proceedings: they may well turn out to be in favour of either party.

14.In my view, the averments by Dominic Mbigi were best left to the plaintiff. Its counsel is ill placed to depose to them *conclusively*. True, counsel states at paragraph 1 that he is authorized to swear the affidavit on behalf of the plaintiff. I also appreciate that in interlocutory proceedings such averments may as well pass under order 19 rule 3 of the Civil Procedure Rules 2010. But that is an exception to the general rule. See *M'kiara M'mbijiwe Vs Frankline Mugambi and others* [2007] e KLR, *Small Enterprises Finance Company Limited Vs George Gikubu Mbuthia* Nairobi High Court case 3088 of 1994 (unreported) *Salim Alhamed Ali and another Vs Emag Ag* Nairobi, High Court case 1806 of 2000 (unreported).

15. Granted all those circumstances, the plaintiff's notice of motion dated 4th February 2014 is devoid of merit. I dismiss it with costs to the defendant.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 3rd day of April 2014.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the plaintiff instructed by Mbigi, Njuguna & Company Advocates.

No appearance for the defendant instructed by Otieno Ragot & Company Advocates.

Mr. C. Odhiambo, Court clerk.