REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 163 OF 2011

HARI GAKINYA & CO.ADV. ……..... APPLICANT

VERSUS

RIFT VALLEY AGRICULTURAL CONTRACTORS LTD. ……..... RESPONDENT

RULING

The application dated 8th September 2014 seeks that:-

> ***(1) There be stay of execution of the intended sale by public auction in respect of parcel No.Cis-Mara/Ewaso-Nyiro/678 Narok County.***
>
> ***(2) That the ruling by the taxing master in respect of the advocate/client bill of costs taxed exparte be reviewed and/or set aside.***
>
> ***(3) In the alternative, an order do issue referring the matter back to the taxing master for purposes of taking accounts to establish the amount of fees already paid to the advocate but otherwise not taken into account in the taxation of the said bill of costs.***

The property has been advertised for sale in pursuit of the respondents endeavour to recover his costs as taxed regarding **Nakuru HCCC No.206 of 2009** where the Advocate/ respondent acted for the applicant.

The applicant contends that the court taxed the bill without being aware that counsel had actually been paid a deposit of Kshs.150,000/ = , and when the bill of costs was drawn, counsel did not give him credit for the said sum; and this was not brought to the attention of the taxing master. The applicant states that there had been an agreement that legal fees for the primary matter was Kshs. 173,000/=.

He contends that for execution to issue, the advocate ought to file and prosecute a substantive suit claiming the amount awarded by the taxing master, and not execute on the basis of the advocate's certificate of costs - which procedure is termed as a short cut. He urges this court to be guided by the decision in **CYRUS MINDA T/A MINDA & CO. ADV. V YENUS KERUBO ORUTA (2013) eKLR.**

In opposing the application, the respondent's counsel deposes in a replying affidavit that he had been instructed to file a claim for land rent amounting to Kshs. 1.4 million, and he obtained interlocutory Judgment. However he fell out with the applicant's directors and after disagreeing on his legal fees, the contested bill of costs was filed and taxed. He explains that the bill was not taxed at the first instance, and after several adjournments at the instance of the applicant, it was finally taxed as drawn on 2nd March

2012, the applicant having failed to attend court despite filing a notice of objection. The certificate of costs was adopted as a decree of the court, well after one year, and in the presence of the applicant's counsel. It is contended that even when the execution process begun and a prohibition order was lodged on the applicant's property, a notice of setting terms was set for 11/11/2013 and served on the applicant who did not attend court.

After the settling of terms, the court file mysteriously disappeared, and the applicant never sought to have the taxation set aside. It was only after the respondent successfully applied to have a skeleton file open that the applicant now instructed counsel to stop the execution as well as set aside and/or review the orders of the Taxing Master vide an application dated 18/12/2013.

Although the application was set down for hearing, it did not proceed as the applicant sought adjournments with a view to negotiating the bill - but this process came to nought.

Subsequently the application dated 18/12/2013 was dismissed on 24/06/2014 and the respondent advised the auctioneers to proceed with execution. It is also pointed out that the applicant filed a notice of appeal and sought to have the proceedings typed - that notice has not been withdrawn. It is deposed that applicant has tried all manner of ways to frustrate the execution of the decree, including reporting the matter to police.

In his submissions, Mr. Gakinya argued that what the applicant seeks is an opportunity to challenge the decision of the taxing master by hiding behind the issue of taking of accounts. Counsel also pointed out that despite claims that there was an agreement on legal fees payable, the applicant had not produced any agreement. He poked holes at the annexed receipt for Kshs.150,000/= for legal fees saying it did not specify which matter the payment was for, bearing in mind that he acted for the applicant on various matters.

It is argued that in any event the applicant had the receipt in his possession from 2009, which means that at the time of taxation it was within the applicant's possession and he could easily have referred to it when he filed the objection to the bill.

I agree with Mr. Gakinya that the sum total of this application is really to challenge the decision by the taxing master. The applicant having been locked out in their application for extension of time to challenge the decision, has now come by way of review. The end result would be that the applicant gets to have a 2nd bite at the very cherry it tried to nibble at by way of execution of time and failed. I need not repeat the observations made about the inordinate delay and indolence on the part of the applicant which spanned 1 ½ years.

Indeed the Judge correctly noted that under Rule 11 of the Advocates Remuneration Regulations, if a party wishes to object to the decision of the taxing officer, it must be done within 14 days after the decision is made by giving a notice in writing to the taxing officer of the items of taxation which he objects to - not 1 ½ years.

This court also noted that the applicant had failed to justify the delay nor gave an explanation as to why its counsel did not move the court as required. This is what the applicant is attempting to do in a roundabout manner.

It is with this realisation that the applicant now comes to court under Order 45 which provides that:-

> **“45 1(1) Any person considering himself aggrieved-.-**
>
> **(a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred, or**
>
> **(b) By a decree or order from which no appeal is allowed**

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge, or could not be produced by him at the time when the decree was passed..... may apply for review..... without unreasonable delay."

I note that the applicant does not deny having filed a notice of appeal with regard to the taxation and that the said notice has not been withdrawn. But even if for argument's sake it is to be contended that the notice of appeal is in itself not an appeal, then there are several other conditions set by Order 45 , which the applicant must satisfy. The first fault is that this application is being made after an inordinately prolonged delay, and no explanation is given for such delay.

Secondly the existence of the receipt was not a new matter. That receipt was issued and was in the possession of the applicant long before the bill was taxed. There is no reason given why the applicant while filing its objection to the bill did not make reference to the receipt. In my view, the existence of the receipt was neither new, nor has it been demonstrated that even after exercise of due diligence, the applicant could not have been able to produce it at the time of filing notice of objection to the bill.

Thirdly the existence of that receipt was within the applicant's knowledge; after all it was issued to him.

The worst mischief and which is what persuades me that the Applicant does not deserve the favourable exercise of this court's discretion, is the indolent and casual manner in which it handled the taxation, then the orchestrated delays by way of adjournments, applications, all in an attempt to forestall the execution process, then now comes for orders of review in a bid to upstage the applicant. I honestly think this kind of conduct must be discouraged.

I respect the view held by Okongo J in **Cyrus Minda V Yunis Kerubo** but, I do not think the fact that counsel moved court by way of miscellaneous application for purposes of recovering costs is so fatal as to warrant stopping the execution process - I am of the view that the matter can be disposed of on the basis of an absent suit.

I do not find the application merited whatsoever and the same is dismissed with costs to respondent.

Delivered and dated this 23rd day of September 2014 at Nakuru.

H.A. OMONDI

JUDGE