REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC APP NO 23 OF 2012

IN THE MATTER OF THE ADVOCATES ACT, CAP 16, LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS

BETWEEN

WAMBUGU, MOTENDE & COMPANY ADVOCATES……..…. APPLICANT

Versus

KAMAL BHUSAN JOSHI.....……1ST RESPONDENT

KAMAL JOSHI INVESTMENT LIMITED.....…...2ND RESPONDENT

KENYA KNITTING & WEAVING

MILLS LIMITED.....3RD RESPONDENT

MOTEX KNITWEAR MILLS LIMITED.....4TH RESPONDENT

RULING

Two applications

[1] This ruling relates to two applications; the first one is dated 8th November and the other is dated 26th February, 2014. The former is seeking for two significant orders; 1) extension of time to issue notice in writing to the taxing officer of the items which the Applicants intend to object to in the taxation Ruling delivered on 16th September, 2013; and 2) stay of execution of the taxed costs thereof, whereas the latter is seeking that the taxed costs be deposited in an interest earning account in the joint names of counsels for the parties. I will deal with the former application first.

EXTENSION OF TIME AND STAY OF EXECUTION

[2] The application for extension of time and stay of execution of taxed costs is filed by the

Respondents in the main cause and is supported by two affidavits sworn by KAMAL BHUSHAN JOSHI. For purposes of this application, the Respondents shall be referred to as the Applicants and the Applicant as the Respondent. However, a preliminary objection to the application was taken out by the Respondent that the Motion dated 8th November 2013 is fatally defective for it has been brought under the wrong provisions of law. The gist of the objection is that the application has been grounded on the Civil Procedure Act, and Civil Procedure Rules which do not apply on taxation of bill of costs- the Advocates Act does. They cited the case of **Machira & Co Advocates v Magugu** which was quoted with approval in the case of **Daly & Figgis & Co Advocates v Karuturu Networks Ltd [2009] eKLR**. Secondly, the Respondent argues that the retainer is not disputed and the taxing master based her decision on the submissions filed and evidence by parties. And finally, the application offends the mandatory provisions of paragraph 11 of the Advocates Remuneration Order. Therefore, it should be dismissed.

Threshold of a preliminary objection

[3] A proper practice is that a preliminary objection is determined *in limine* because of its preliminary significance. I propose to first determine the Preliminary Objection herein and thereafter deal with the merit of application if need be. Is the objections raised by the Respondent true Preliminary Objection in the sense of the law? The test of a Preliminary Objection was set out in the celebrated case of **MUKISA BISCUITS MANUFACTURING COMPANY LTD V WEST END DISTRIBUTORS (1969) EA. 696**. A Preliminary Objection should not be entangled with factual issues and should be one which will dispose of the entire suit or application. On this see a work of the court in the case of **ENGINEER E.M KITHIMBA v AG & ANOTHER [2014] eKLR** that:

A preliminary objection was clearly delineated in the case of MUKISA BISCUITS MANUFACTURING CO. LTD v WEST END DISTRIBUTOR LTD [1969] E.A 696 where Law JA stated the following:-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

And J.B Ojwang J (as he then was) made it clearer in the case of Oraro Vs Mbajja where he stated:-

"I think the principle is abundantly clear. A "preliminary objection" correctly understood is now well identified as, and declared to be the point which must not be blurred with factual details liable to be contested and in any event, to be through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle a true preliminary objection which the court should allow to proceed. I am in agreement … that 'where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

[4] Applying this test on the circumstances of this application, the Respondent's objection is founded on a technicality. The case cited dealt with a completely different situation where a party had filed an appeal instead of a reference. And with clear provisions specifying the manner of appealing on taxation, the court found the application to be fatally defective. The objection here is on the citation that section 3A of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules are the enabling provisions in the application, which really does not go to the root of jurisdiction of this court to entertain the application. See what the court said in the case of **Zadock Furnitures Limted & Another v Central Bank of Kenya [2014] eKLR** on similar arguments:

'...***although it is desirable to cite the relevant provisions of the law on which an application is premised, with the enactment of Article 159(2) (d) of the Constitution, there has been a paradigm shift; insistence now is on courts to decide cases on the substance rather than technicalities. And, if a court is to pay undue regard to technicalities will do so contrary to the constitutional desire that courts should serve substantive justice.***

In any event, section 3A of the CPR merely emphasizes on invocation of inherent jurisdiction of the court where there is no specific or express provision of the law which governs the issue at hand. Needless to state that section 3A of the Civil Procedure Act does not grant or confer inherent jurisdiction on the court, for the court always possesses inherent jurisdiction as a court of law which enables it to do justice in any justiciable situation but which may not be covered by an express or specific provision of law. Similarly, order 50 rule 6 of the Civil Procedure Rules relates to application by Notice of Motion. And, looking at the substance of the provisions cited from the Civil Procedure Rules, the objection herein becomes a procedural technicality which has been diminished by Article 159 of the Constitution. The objection is not capable of disposing of the entire application, or the issue it relates to, and in that sense of it is not a true preliminary objection in the Mukisa Biscuit case test. I dismiss the objection. The other points that the retainer is not disputed and that stay of execution is not available herein for the reason that there is no reference are matters which are entangled with factual issues and should be canvassed within the application herein as points of opposition rather than as a preliminary objection. The court will need to interrogate factual issues and evidence in order to determine whether there is a dispute on retainer or whether stay of execution should issue. I will now proceed and determine the merit of the application.

Stay of execution

[5] I will begin with the easier option- stay of execution. There is no reference which has been filed on which a stay may be based. Moreover, there is no application under section 51 of the Advocates Act for judgment on the Certificate of Costs or judgment on the taxed costs or decree thereof which ordinarily would be the source of a threat of execution. In the circumstances, I deny the prayer for stay of execution.

Extension of time

[6] The Applicants have explained that failure to file the reference on time is because the previous advocate who was acting for them, M/S Rombo & Company Advocates attended the taxation of the bill of costs herein but did not inform them of the outcome of taxation. The Applicants believe the said advocates did not inform them of the outcome of taxation because of a complaint they had filed with the Advocates Complaints' Commission that the said advocates had refused to release to them a sum of Kshs. 5,600,000 which was proceeds of sale of the 1st Applicant's house at Ngong Road. They only came to learn about the Ruling from the Respondent one month after delivery of the ruling which was outside the period provided for the filing of a reference to the High Court. They also say that their reference raises arguable issues as the said firm of advocates failed to present the sale agreement marked as ''**KBJ 4'' on LR NO 209/3574** which would have shown that the advocates taxing the bill did not participate in the transaction. In addition, the Applicants stated that the valuation of the property was done after it had been sold and it included the extensive developments done by the new owners. Other issues of alleged falsehoods in the bill of costs were canvassed by the Applicants. They also claim that the properties had not been valued when they instructed the Respondent and so they should have charged minimum fees thereof. A plethora of judicial decisions were cited and filed in court. See the Applicants' list of authorities filed on 15th April, 2014.

[7] The Respondent opposed the application and filed a replying affidavit sworn by John Wacira Wambugu on 19th November 2013, preliminary objections, submissions and judicial authorities. I have dealt with the preliminary objections. The gist of their arguments against the request for extension of time is that the bills were served on the Applicants who instructed Rombo & Company Advocates. Although the advocates for the Applicants engaged in delaying tactics, the taxation nonetheless was completed after parties submitted and filed their respective documents as ordered by the taxing master. The advocates for the Applicants objected to only two items and not others. The items which were not objected to remains uncontested, but surprisingly, the Applicants have not made efforts to settle even the uncontested items. All the other points of the intended reference raised by the Applicants were responded to appropriately by the Respondent. After the meticulous traverse of the proposed points of intended reference, the Respondent was convinced that the Applicants have not shown any sufficient ground for the extension of time to be granted. They implored the court to treat the request suspiciously and with great caution as it may be a deliberate attempt to delay the settlement of the claim herein. For a reference to have prospects of success, it must be shown that the taxing master applied wrong principles in the taxation.

[8] These arguments are powerful but it is all a matter of discretion of the court albeit it must be exercised judicially. At this stage the court is not determining the prospects of the intended reference without full scale arguments of the parties. It only looks to find whether reasonable explanation has been given for the delay in filing the reference. The reasons advanced are plausible and they have not been refuted by the Respondent that the Applicants were not informed of the outcome of the ruling. It is also not disputed that there was a dispute between the Applicants and their former advocates. The Respondent just mentions in passing that the Applicants ought to have relieved the said advocates of their duties if they were not acting properly for them. That was an option but it does not take away the Applicants claim that they learnt of ruling a month after its delivery. In that lies reasonable reason to grant an extension of time. The extension herein will also not prejudice the Respondent as it will only be the enabler of Applicants' right of appeal. I allow the Applicants to file a reference within 14 days of today.

DEPOSIT OF TAXED COSTS

[9] The Applicant in the main cause filed the application dated 26th February, 2014 seeking for an order that the taxed costs i.e. Kshs. 5,640,815, be deposited in an interest earning account in the joint names of counsels for the parties. The application is grounded on the affidavit of John Wacira Wambugu. They also filed submissions and judicial authorities. The Applicant at one point seems to tie this application to the grant of orders in the application dated 8th November, 2013. I presume it relates to the prayer for stay of execution. Indeed, the submissions on stay of execution of taxed costs filed in opposition to the application dated 8th November, 2013 were reproduced word for word in the submissions in support of the application dated 26th February, 2014-thanks to technology, ''cut and paste''. The request for the deposit of the taxed costs may have been made to act as security under order 42 of the Civil Procedure Rules should a stay of execution be ordered. Now that I have already determined the question of stay and declined to grant stay of execution, it will be imprudent to spend precious judicial time on merit of the submissions by parties in so far as they relate to security envisaged under order 42 Rule 6 of the Civil Procedure Rules which is granted pending determination of appeal. But the application is expressed to be drought under order 39 rule 1 of the Civil Procedure Rules and also the grounds of the application give the security sought in form of deposit of the taxed costs a soul in the sense of order 39 Rule 1 of the Civil Procedure Rules. Let me consider the application in that lens.

[10] The Applicant argues that he tried to search the titles of the properties known as **LR NO 209/9268, LR NO 37/690, LR NO 37/691, LR NO 209/3574** and Release of Debenture but in vain. That, according to the to the Applicant is indicative of some illegal transfer of the said property and which acts would defeat the entire purpose of the Applicant's efforts to recover their legal fee which has been taxed and certified at Kshs. 5.600,000. It would defeat or obstruct the execution of the decree arising from the Certificate of Costs. The Applicant is apprehensive that the Respondents may dispose of the properties herein to defeat execution on the taxed costs.

[11] The Respondent opposed the request of the deposit of the taxed costs mainly on the reason that there are no searches or receipts for payment of search fee which have been annexed to show the property were missing. In any event, the property subject to taxation was sold on 8th November, 2007. The Respondents also categorically stated in the submissions that the Applicant should not fear because the 2nd and 4th Respondents are companies which do business within the country. They are stable going concerns, a fact the Applicant is aware of. They therefore beseeched the court to dismiss the application.

[12] The threshold for an application under Order 39 rule (1) and (2) of the CPR is set out in the order itself, which I reproduce below:

> ***1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—***
>
> a. ***that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—***

i. ***has absconded or left the local limits of the jurisdiction of the court; or***
ii. ***is about to abscond or leave the local limits of the jurisdiction of the court; or***
iii. ***has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or***

b. ***that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:***

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

2(1) Where the defendant fails to show cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or to make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1.

[13] But perhaps the appropriate should be Rule 5 of Order 39 of the CPR which provides as follows:

Where the defendant may be called upon to furnish security for production of property

5(1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

a. ***is about to dispose of the whole or any part of his property; or***
b. ***is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.***

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

[14] The court had occasion to consider the scope of Order 39 of the CPR in **Bgm Hccc No 5 Of 2013 Kanduyi Holdings Limited vs Balm Kenya Foundation & Another [2013] eKLR** and had the following to say;

''...Our Order 39 Rules 5 and 6 could be said and is a statutory codification of an interlocutory relief known as Mareva Injunction or freezing order in the UK....Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case [read-Mareva Compania Navierra SA v International Bulkcarriers SA [1975] 2 Lloyd dis Rep 509] and other judicial precedents on the subject. Order 39 rule 5 and 6 of the CPR is not to be used to: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any

decree that may be passed against him''.[Underlined text is an addition]

[15] Order 39 rule 1 and 2 of the CPR is about giving security for appearance or satisfaction of a decree which may be passed against the Respondent. I must state that Rule 1 is more draconian as it may result into the arrest of the Respondent. Rule 5 on the other hand is milder and deals with situations where the Respondent is about to dispose of or remove property from the jurisdiction of the court. But the Applicant who has applied under order 39 must show by ***affidavit or otherwise—***

c. ***that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—***

iv. ***has absconded or left the local limits of the jurisdiction of the court; or***
v. ***is about to abscond or leave the local limits of the jurisdiction of the court; or***
vi. ***has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or***

d. ***that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.***

And as I have already stated, order 39 should not be used to***: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him''.*** The Applicant has not shown that the Respondents have sold or are about to sell or to remove their properties from the local limits of the jurisdiction of this court with the intention of delaying or defeating the decree which might be passed against them. The alleged searches by the Applicant should have been exhibited to show the Respondent has illegally transferred their properties. None was exhibited, and therefore, the allegation of possible illegal transfer of assets by the Respondents remains an allegation or suspicion with no probative value to prove anything in law. The only asset which seems to have been sold was sold sometime in 2007 and it is not possible to connect such sale which took place almost 7 years ago with ominous intention to defeat the Applicant's claim. Given the averments by the Respondents it is apparent the Respondents are stable company operating in Kenya and are able to pay the sum being claimed. The request for security, as long as it is founded on order 39 rules 1 and 2 has not been proved to the standard of proof set out in the case of **GIELLA v CASSMAN** i.e. establish prima facie case on the conditions set out in order 39 of the CPR.

[16] Even if I were to treat the request for security to be one under Order 26 of the Civil Procedure Rules, the result will still be the same because the Respondents are residents and operating in Kenya and are able to pay the taxed costs. The Applicant has not shown that it may not be able to recover the taxed costs from the Respondents without unreasonable difficulty**.** See Law J.A in **SHAH v SHAH [1982] KLR 95** that;

"The general rule is that security is normally required from Plaintiff's resident outside the jurisdiction, but as was agreed in the court below, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given".

I should also note that I have not ordered any stay of execution. The Applicant is at liberty to follow through his remedies under the Certificate of Costs. Really, in the circumstances, there is absolutely no legal basis to order provision of security. The preponderant weight tilts towards refusing the request. Accordingly, the application dated 26th February, 2014 is dismissed. I make no order as to costs.

Dated, signed and delivered in court at Nairobi this 21st day of November, 2014

F. GIKONYO

JUDGE