



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO 158 OF 2005**

**DR ZULFIQUAR ALI JAFFERY.....PLAINTIFF**

**VERSUS**

**AFRICAN BANKING CORPORATION LIMITED.....DEFENDANT**

**RULING**

1. The Plaintiff's Notice of Motion application dated and filed on 18<sup>th</sup> February 2014 was brought pursuant to the provisions of Sections 1A, 1B and 34 of the Civil Procedure Act, Rule 7 of the Auctioneer's Rules 1997 and all other enabling provisions of the law. It sought the following prayers:-

- 1. The Defendant/Judgment debtor be ordered to forthwith settle the auctioneer's costs of Kshs 1,534,209.10 in respect of the proclamation dated 25<sup>th</sup> April 2013.**
- 2. The order of 30<sup>th</sup> August 2013 be set aside and the sum of Kshs 24,112,313.50 together with accrued interest deposited in the joint escrow account in the names of Wamae & Allen Advocates and Waweru Gatonye Advocates with Bank of Africa Limited be released forthwith to the decree holder's advocates Wamae and Allen Advocates.**
- 3. The decree holder be at liberty to forthwith execute the decretal balance.**
- 4. Any further relief that the court deems fit in the interest of justice.**
- 5. The costs of the application be in the course.**

**THE PLAINTIFF'S CASE**

2. The Plaintiff's application was supported by the Affidavit of Dr Zulfiqar Ali Jaffrey that was sworn on 18<sup>th</sup> February 2014. In a nutshell, he stated that the Defendant was legally obligated under Rule 7 of the Auctioneers Rules to settle the auctioneers' costs following the proclamation its goods. He also contended that the orders of stay that were granted on 30<sup>th</sup> August 2013 ought to be set aside as the Defendant had been indolent. His written submissions were dated and filed on 2<sup>nd</sup> April 2014.

**THE DEFENDANT'S CASE**

3. On 24<sup>th</sup> March 2014, both James Ogal and Juma Ogai swore Replying Affidavits on behalf of the Defendant herein. They were both filed on even date. The Defendant pointed out that on 30<sup>th</sup> August 2013, this court granted it a stay of execution of the judgment that had been delivered by Musinga J (as he then was) on 4<sup>th</sup> October 2012 on condition that it deposited a sum of Kshs 24,112,313.50 into a joint interest earning account in the names of the advocates for both parties, which it duly complied with. It averred that the stay extended to all other consequential orders including auctioneers' costs.

4. It said that it applied for the certified copies of the proceedings but the same took long due to the number of proceedings that were being typed. In addition, it also stated that it was not able to access the court file as the same was at different times either coming up in court or pending ruling on notice by this court. It was its contention that it was eager to lodge its appeal for determination by the Court of Appeal. Its written submissions were dated and filed on 29<sup>th</sup> April 2014.

## **LEGAL ANALYSIS**

5. The Plaintiff submitted that an advocate was under a duty to further the overriding objectives of Section 1 A & 1B of the Civil Procedure Act to ensure the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources and the timely disposal of the proceedings. He also submitted that Article 159 (2)(b) of the Constitution of Kenya, 2010 provided that justice should not be delayed.

6. He referred the court to the case of **Duale Maryan Gurre vs Animal Mohammed Mohamood & Another [2014] eKLR** where the court held that inaction on the part of an advocate without explanation could not constitute an excusable reason for delay and that of **Mugo Mumenya Njogu vs Elizabeth Wamuyu Kaburu & 3 Others (2010) eKLR** where the court held that the court could not automatically excuse the mistakes of counsel as counsel had a duty and role to assist the court in realising the overriding objectives. He also placed reliance on the case of **Ratman vs Cumarasmy (1964) 3 ALL ER** where the court held that extension of time could not be considered to be a matter of routine and counsel.

7. On its part, the Defendant placed reliance on the case of **Violet Merab Song & 2 Others v James Muga Ogada & 2 Others (2013) eKLR** where it was held that after the application for stay was made for the setting aside of an arbitral award, no consequential orders could be issued pending the determination of the same and the auctioneers charges therein were not payable.

8. It also referred the court to the cases of **Daima Bank Limited (In Liquidation) v Prof David Musyimi Ndeti (2010) eKLR**, **David Waithaka Kaguru v Ibrahim Tanui (2007) eKLR** and **Aviation Cargo Support Limited v St Mark Freight Services Limited (2014) eKLR** where the common thread was that delay in typing of proceedings was justification for the delay in filing a record of appeal.

9. The Defendant attached copies of letters as proof that it had been following up the proceedings herein. The orders that were issued by this court on 30<sup>th</sup> August 2013 had neither been set aside, vacated or reviewed nor had they been challenged by the Plaintiff. In fact both parties fully complied with the same when they opened the joint interest earning account.

10. Evidently, there does not seem to be any justification that was advanced by the Plaintiff that would have persuaded this court to depart from the terms of its ruling of 30<sup>th</sup> August 2013 as the said orders have never been set aside or challenged by the Plaintiff.

11. Indeed, when the court granted a stay of the execution process, it meant that any subsequent or consequential order emanating therefrom also stood stayed. Payment of the auctioneers charges would thus have to await the determination of the appeal herein or upon further orders and/or directions of the Court of Appeal as the matter is now no longer in the hands of this court.

12. The explanation that was proffered by the Defendant regarding the cause of the delay in the typing of proceedings did not appear far-fetched bearing in mind that the court noted from the court file that the

Certificate of Delay to enable it lodge its appeal at the Court of Appeal was issued on 17<sup>th</sup> July 2014.

13. Accordingly, having considered the pleadings, the affidavit evidence and the written submissions, the court found that the Plaintiff had not demonstrated any sufficient reason why he should be granted any of the orders that he had sought in his application herein. Indeed, there was no evidence to suggest that the Defendant's advocates were acting contrary to the spirit of Section 1 A & 1B of the Civil Procedure Act or Article 159 (2) (b) of the Constitution.

**DISPOSITION**

14. For the foregoing reasons, the upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated and filed on 18<sup>th</sup> February 2014 was not merited and the same is hereby dismissed with costs to the Defendant.

15. It is so ordered.

**DATED and DELIVERED at NAIROBI this 18TH day of DECEMBER, 2014**

**J. KAMAU**

**JUDGE**