



REPUBLIC OF KENYA

High Court of Kisii

Constitutional Application 22 of 2011

SOUTH NYANA SUGAR COMPANY LTD. PETITIONER/APPLICANT

AND

SILVAN KECH RESPONDENT

RULING

1. The Petitioner/Applicant filed a Notice of Motion on the 31st October 2012 praying for an order of interim stay of execution for the recovery of taxed costs in this matter pending hearing and determination of the application interpartes. In prayer (c) of the application the applicant seeks an order of stay of the taxed costs pending hearing and eventual determination of an intended reference to be filed pursuant to the provisions of paragraph 11 (1) and (2) of the **Advocate's Remuneration Order**. The application is brought pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Order 42 Rule 6** of the **Civil Procedure Rules** and paragraph 11 of the **Advocates Remuneration Order**.

2. The grounds for the application are set out on the face and in particular, the affidavit avers that it is aggrieved by the decision of the Deputy Registrar and has already lodged an objection to the same. The applicant also avers that unless the application is granted as prayed, the intended reference shall be rendered nugatory as the execution process is already in hand. It is also the applicant's contention that it will suffer substantial loss in the nature of taxed costs totaling Kshs.128595/= for the reason that the Respondent shall not be able to refund the same in the event the intended reference succeeds. The applicant expresses its willingness to provide security including depositing the taxed costs into court, for the due satisfaction of the taxed costs of this petition in the unlikely event that the intended reference whose process the applicant has already lodged fails.

3. I wish to point out that the applicants Notice of Motion was filed with only page 1 thereof but it is supported by an affidavit sworn by Gabriel Ouma Otiende dated 30th October 2012. The deponent says that out of the taxed costs of Kshs.248595/=, the applicant has paid out to the Respondent Kshs.120,000/= and now wants payment of the balance of Kshs.128595/= stayed pending the hearing and final determination of the intended reference. The deponent has annexed to the supporting affidavit a copy of Notice of Objection to the taxation dated 27th September 2012. The deponent has also annexed to the affidavit a letter dated 11th October 2012 addressed to the Deputy Registrar and asking to be furnished with reasons for taxation as per the provisions of paragraph 11 (2) of the **Advocates Remuneration Order**.

4. At the hearing of the application, Mr. Odhiambo Kanyangi, counsel for the applicant submitted and

reiterated the averments on the body of the application as well as the averments in the supporting affidavit of Gabriel Ouma Otiende, advocate.

5. Miss Kusa holding brief for Mr. Oduk told the court that Mr. Oduk, advocate relied wholly on the filed Replying Affidavit filed on behalf of the Respondent to which was annexed a copy of a ruling in Nairobi **ELC Case No.1861 of 2001 – Davidson Kariuki Maina t/a Bills Consult –vs- Bobmill Properties Limited [2012] e KLR** in which the court (P. Nyamweya, J) persuasively held that stay cannot be granted in respect of costs. In the case, the learned judge relied on 2 Court of Appeal decisions, the first of which is **Cooper –vs- Nevill [1959] EA 731**. The Court of Appeal was considering an application for suspension of further execution of taxed costs pending appeal to the Privy Council, the Court of Appeal held that a stay of taxed costs will not be granted save in very special circumstances, and that “the normal practice is for all costs ordered to be paid on an undertaking from advocates to refund if the appeal to the privy council is successful.” In the case of **Mandavia –vs- Commissioner of Income Tax [1957] EA 1 (C.A)**, a case that was cited with approval in the **Cooper case** (above) the Court of Appeal held that:-

“It is contrary to the usual practice, on an application of this nature, to

stay any direction for the payment of costs, provided the solicitor who is to receive the costs gives an undertaking to refund them if called upon to do so.”

6. The second case cited by the Court of Appeal in the **Davidson Kariuki Maina case** was **Francis Kabaa –vs- Nancy Wambui & another Civil Appeal NO.298 of 1996** in which the Court of Appeal reiterated the general principles to be applied in applications similar to the instant application.

7. In response to the authority relied on by the Respondent in this matter, counsel for the applicant submitted that there can be no stay of execution on party and party costs and further that in the instant case there are exceptional circumstances such as the Respondent’s inability to refund costs should the reference succeed. Counsel further submitted that the principle expressed by the Court of Appeal in the **Cooper case** is not cast in stone and that each case must be considered on its own facts.

8. I have now carefully considered the application as filed, the circumstances surrounding the entire dispute between the parties herein and the applicable principles of law and find that contrary to the applicant’s contention there are no proved special circumstances that would persuade me to deviate from the applicable principles. Apart from alleging at paragraph 4 of the Replying Affidavit that the Respondent shall be unable to refund the taxed costs should the reference succeed, the applicant did not avail evidence to this court to support such an allegation.

9. In the premises, I find and hold that the applicant does not merit the order sought and accordingly I dismiss the Notice of Motion dated 31st October 2012 with costs to the Respondent.

10. It is so ordered.

Dated and delivered at Kisii this 21st day of March, 2013

RUTH NEKOYE SITATI
JUDGE

In the presence of:

Mr. Moracha for Odhiambo for Petitioner/Applicant

M/s Oduk & Co. (absent) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE

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