REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 784 of 2007

IN THE MATTER OF: AN APPLICATION BY KENYA COMMERCIAL BANK LIMITED FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTIONS 8 AND 9 OF THE LAW REFORM ACT AND ORDER LIII CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN INTENDED INVESTIGATION OF ACCOUNT NO. 15043651017

AND

IN THE MATTER OF: AN ORDER ISSUED BY THE CHIEF MAGISTRATE COURT AT KIBERA ON THE 14TH DAY OF JUNE 2007

KENYA COMMERCIAL BANK……..……..…..APPLICANT

VERSUS

THE COMMISSIONER OF POLICE……...……..1ST RESPONDENT

THE HON. ATTONRYE GENERAL……..…….....2ND RESPONDENT

BENJOH AMALGAMATED LIMITED……..……..3RD RESPONDENT

RULING

The ex-parte Applicant, Kenya Commercial Bank Limited, through the application dated 3rd February 2012 seeks an order of set off of the taxed costs of Kshs 632,537.00 in favour of the 3rd Respondent herein against the taxed costs of Kshs 20, 592,191.00 in favour of the ex-parte applicant against the 3rd Respondent in HCCC No. 205 of 2005.

The Application is supported by the Affidavit of Mr. Chris Theuri sworn on 3rd February 2012.

The Application is opposed by the 3rd Respondent who filed Grounds of Opposition dated 13th February 2012 as well as a Replying Affidavit sworn by Samuel Kungu Muigai.

The background leading to the application is that there were proceedings between the parties herein i.e. Nairobi HCCC No 205 of 2005. In these proceedings, the 3rd Respondent was the Plaintiff and the Applicant herein was the 5th Defendant. The suit was struck out with costs to the Defendants. The Ex-parte Applicants costs were taxed at Kshs 20,592,191.33 and a certificate of costs was issued. Sometime later, the 3rd Respondent filed an application for enlargement of time to challenge the taxation. This application is still pending.

The Applicant had also brought these proceedings, but later withdrew them. Costs of these proceedings were awarded to the Respondents, among them the 3rd Respondent herein. The 3rd Respondents costs were taxed on 30th September 2010 at Kshs 561,360.00 and a certificate of costs was issued to that effect. In 2010, the Applicant brought a chamber summons application seeking a stay of execution of the taxed costs. Korir J, dismissed that application for failing in procedure. He however noted that the Applicant has a claim for legal fees against the Respondent in HCCC No 1576 of 1999.

It is therefore undisputed that there are two certificates of costs: one in favour of the Applicant for the sum of Kshs 20,592,191.33 and another in favour of the 3rd Respondent for the sum of Kshs 561,360.00.

The advocates of the 3rd Respondent now wishes to execute to recover its costs and 'enjoy the fruit of his sweat' as he calls it. The Applicant has come back before this court under Order 22 Rule 14 (1) (b) seeking that the 3rd Respondents costs be set off against its costs of Kshs 20,592,191.33.

The Applicants case is that Order 22 Rule 14 (1) (b) allows the set off of a lesser sum from a larger sum. The 3rd Respondent is of the view that the application is vexatious and an abuse of the court process. He claims that this issue is res-judicata having been handled by Korir J in the dismissed application of 8th September 2010.

The 3rd Respondent further claims that it does not owe the Applicant any money as it (the 3rd Respondent) has since filed a substantive application under Rule II of the Advocates Act for a reference against the said taxation. In view of the fact that the matter is due for determination on merit, the certificate of taxation (which is in favour of the Applicant) arising out of the proceedings in HCC No. 205 of 2009 is not conclusive. The 3rd Respondent further contends that it has no relevance to the Bill of costs of Kshs 561,360.00 (which arose out of these proceedings) which is due and outstanding.

From these facts, and having read through the pleadings and submissions of counsel for the parties, I consider the issues for determination to be whether:

a) Order 22 Rule 14 cited by the Applicants applies in this case; and

b) Whether the Applicant is entitled to the orders sought.

Order 22 Rule 14 (1) relates to execution in case of cross-decrees. It reads:

14. ***(1) Where applications are made to a court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such court, then—***

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

I agree with counsel for the Applicant that this rule allows a decree holder of a larger sum of money to

apply to court of the satisfaction of a smaller sum of money. For this to happen, there must there must be two definite decrees that can be satisfied at the same time.

The Applicant has directed the court to a number of authorities in support of his claim. On the 3rd Respondent's contention that this matter is res judicata, I was referred to ***Wanguhu V Kania [1987] KLR 51*** where the court found that a matter is not res judicata until it is decided on the merits. I agree with this position. The record bears out the fact that Korir J dismissed the application for stay on a procedural issue, and not on the merit of the issues brought forth in the application.

The Applicant also faults the 3rd Respondent for stating that since it has filed an appeal, it ought not to pay costs. I agree with the Applicants submission that the fact that an appeal has been filed does not mean that there is a stay. Order 42 rule 6 is clear that *"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…."* In this case, there has been no stay of execution with regard to either of the decrees.

For this reason, I am persuaded that Order 22 rule 14 (1) (b) would properly apply in this case. I am convinced that it would be just and equitable to set-off the smaller sum of cost that is owed to the 3rd Respondent against the larger sum owed to the Applicant.

I therefore make an order that the Application is allowed in terms of prayer 5 and 6 of the application dated 3rd February 2012. Each party shall bear its own costs in this application.

DATED, DELIVERED and SIGNED at NAIROBI this 19th day of November 2012

M. WARSAME

JUDGE