



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

**AT NAIROBI**

**THE COMMERCIAL AND TAX DIVISION OF THE HIGH COURT**

**CIVIL SUIT NO. 2335 OF 1997**

**MOTICHAND VIRPAL SHAH.....1<sup>ST</sup> PLAINTIFF/APPLICANT**  
**RAMJI VIRPAL SHAH.....2<sup>ND</sup> PLAINTIFF/APPLICANT**  
**DHARMESH KUMAR**  
**RAMJI VIRPAL SHAH.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**INVESTMENT & MORTGAGES**  
**BANK LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**  
**SHAH MOTORS**  
**LIMITED (IN RECEIVERSHIP).....2<sup>ND</sup> DEFENDANT/RESPONDENT**  
**HARIT SHETH.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

On 9<sup>th</sup> August 2010, the Plaintiff/Applicant filed a Chamber Summons dated 6<sup>th</sup> August 2010, seeking orders of this court as follows:-

- 1. THAT this honourable court be pleased to order that the 3<sup>rd</sup> defendant's Bill of Costs herein dated 20<sup>th</sup> March 2008 be taxed afresh before any other taxing officer other than her Honour Ms. Mokaya.**
- 2. THAT in alternative to prayer 1 above this honourable court be pleased to order that the reasons sought for in the Plaintiff's letter dated 21<sup>st</sup> July 2009, be deemed to be contained in the ruling herein purportedly delivered on 3<sup>rd</sup> December 2008, and that the said ruling to be typed and supplied to the Plaintiffs/Applicant within 14 days.**
- 3. THAT the costs of this application be provided for.**

The application is premised on the grounds that the execution of the 3<sup>rd</sup> defendant's costs was stayed by an order of this court made on 17<sup>th</sup> July 2009, pending the institution of objection proceedings by the Applicants within 14 days. The applicant commenced the process by applying for reasons for the taxation on 21<sup>st</sup> July 2009, which were not furnished, the Deputy Registrar only responding vide a letter dated 5<sup>th</sup> August, 2009, copied to the advocates for respondents, stating that there were no proceedings recorded on

the date of taxation. The Applicant advocate's letters of 21st July 2009, and the Deputy Registrar's reply of 5th August 2009, are annexed to the affidavit filed in support of the application. At the insistence of both parties, the Deputy Registrar then asked the parties to peruse the court file.

By their letter of 11<sup>th</sup> September 2009, counsel for the Applicant made it quite clear to the Deputy Registrar that reasons for the taxation were required for the purposes of filing an objection as provided for under paragraph 11 of **Advocates (Remuneration) Order** but the reasons are yet to be given. Despite the stalemate, the 3<sup>rd</sup> Defendant proceeded to proclaim the Applicants goods on 15<sup>th</sup> July 2010, leading to the filing of the present application. On 29<sup>th</sup> September 2010, the 3<sup>rd</sup> Defendant attached and removed the Applicants' goods from their premises in furtherance of the execution process, leading to the filing of the Applicant's Notice of Motion dated 1<sup>st</sup> October 2010, argued together with the one dated 6<sup>th</sup> August 2010. The Notice of Motion of 1<sup>st</sup> October 2010 seeks orders for the restoration of the Applicants goods or, on the alternative, the Respondents be restrained by themselves, their agents or servants from selling or otherwise disposing the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' goods removed from their premises on 29<sup>th</sup> September 2010, pending the hearing and determination of the application. Further orders sought under the Notice of Motion are as follows;

**4. "THAT it be declared that the execution for the 3<sup>rd</sup> Defendant's taxed costs made on 29<sup>th</sup> September 2010, against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, by attachment of their moveable property whilst there was in place an order for stay of execution of those costs in this matter is null, void and of no effect.**

**5. THAT the Respondents herein by themselves, their agents and or/or servants be restrained from harassing or intimidating the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's by way of execution of the 3<sup>rd</sup> Defendant's costs herein or otherwise, whatsoever until further orders of the court.**

**6. THAT the costs of this application be provided for".**

The Applicants contend that the whole execution process is fraudulent in view of the stay order of 17<sup>th</sup> July 2009, which has not been set aside.

Both Applications are opposed on the strength of a Statement of Grounds of Opposition dated 11<sup>th</sup> October 2010, and filed on 12<sup>th</sup> October 2010, in which the Applicant states that;-

**1. That the application dated the 15<sup>th</sup> of October 2010 is misconceived and an abuse of the court process.**

**2. That the orders by Honourable Lady Justice Lesiit were very clear that the Plaintiff's stay of execution order was to expire after fourteen (14) days of the date thereof if no reference was filed and the fact remains no reference was field up to date.**

**3. That the reasons advanced by the Plaintiffs are not sufficient enough to warrant the issuance of the orders sought and therefore the Plaintiff/Applicant be dismissed with costs to the 3<sup>rd</sup> Defendant/Respondent.**

**4. That on or before the 5<sup>th</sup> day of May 2009 the Applicants had the opportunity to apply to set aside the ex-parte taxation but they preferred to file application for extension of time to file reference which was granted on terms which the Plaintiffs did not comply with and the Plaintiffs cannot now come back for orders they ought to have applied before 15 months ago as they made their legal choice.**

**5. That the orders of stay granted by Honourable Lady Justice Lesiit were not a general stay and the fact is that the said orders did not and can never be taken to cover applications field later**

thereof such as the application by the Plaintiffs dated 9<sup>th</sup> August 2010 (Now fixed for hearing on 19<sup>th</sup> October 2010).

6. That the applicants have been guilty of inordinate delay which is not explained at all except blaming the 3<sup>rd</sup> Defendant's Advocates for taking action for and on behalf of their client.

In the oral submissions made at the hearing, the Applicant cited three authorities as follows;

1. **SHAH & PAREKH –VS- APOLLO INSURANCE CO. LTD** [2005] ?KLR NRB. Misc. Application No. 328 of 2003

2. **KIPLAGAT & ASSOCIATES T/A KIPLAGAT ASSOCIATES –VS- NATIONAL HOUSING CORPORATION** [2008] ?KLR NRB. Misc. Application No. 128 of 2005

3. **WANGA & COMPANY ADVOCATES -VS- DORCAS J. KISORIO** [2007] ?KLR ELD. Misc. Application No. 68 of 2004

The three decisions are in agreement that the jurisdiction of the High Court in taxation matters cannot be properly invoked in the absence of reasons for the decision of the decision of the taxing officer being given as is required under paragraph 11 (1) of the **Advocates (Remuneration) Order** which provides as follows:

**“should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects”.**

The said provision of the **Advocates (Remuneration) Order** continues to provide in paragraph 11 (2) that once a notice has been given to the taxing officer under 11 (1)

**“The taxing officer shall forthwith record and forward to the objector the reasons for his decisions on those items (objected to) and the objector may within fourteen day from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection”. (underlining and modification by this court).**

The Respondent's main objection to the applications is that the order of Lady Justice lapsed 14 days from the date it was rendered since no reference was filed as directed by the court and that the Applicants are guilty of inordinate delay. The following are the issues I consider pertinent to the dispute herein

(1) whether the stay granted by Lesiit J in the Ruling dated 26<sup>th</sup> June 2009, did lapse as directed therein or whether it was in force when execution herein was undertaken

(2) whether the window for objection is still open.

(3) whether this court can order that reasons be given even at this stage or whether it should find that the Applicant is guilty of unreasonable and unexplained delay.

(4) Whether the Ruling of 3<sup>rd</sup> December 2008 can be deemed to contain the reasons for the taxation and be adopted as providing the same.

Regarding the taxation of 3<sup>rd</sup> December 2008, the Honourable Lady Justice Lesiit had this to say when she allowed the Applicant's application for an extension of time to file an objection:

**“It was irregular for the taxing master to proceed with matter when it had been omitted from the day's cause list especially in absence of one party. That irregularity could have been cured, since the matter was adjourned to a new date, if the Applicants were informed of the new date. Since**

**Applicants were not informed of this new development and since matter proceeded ex parte that is sufficient ground to allow this application”.**

Having so found, the Honourable Lady Justice Lesiit extended time to file an objection to the taxation with an order that there be a stay of execution of the 3<sup>rd</sup> Defendant/Respondents’ costs “pending the hearing and determination of the intended objection”. The judge proceeded to order that if no objection was filed within 14 days the orders granting the extension of time would lapse immediately (ipso facto).

I would not imagine that the court could have overlooked the fact that no objection can be filed in the High Court in relation to costs in the absence of reasons of the taxing officer as required under paragraph 11 of the **Advocates (Remuneration) Order** since the same is a mandatory requirement. By extending the period within which the Applicant should file an objection, the learned judge gave cognizance to the “*irregular*” taxation subsequent to which the Respondents have proceeded to execute, despite the fact that the reasons of the taxing officer were never given. The Deputy Registrar communicated to counsel on both sides that there were no proceedings recorded and invited them to peruse the court file. On 18<sup>th</sup> September 2009, counsel for the Respondents wrote to the Deputy Registrar with a copy to the advocates of the Applicants, bringing to his attention that the taxation had proceeded by way of written submissions and a ruling delivered in the absence of counsel on 3<sup>rd</sup> December 2008. They enclosed copies of the proceedings and requested him to “urgently verify the declaration that there were no proceedings on 3<sup>rd</sup> December 2008, and revert on the same”.

This court has not been told what transpired after the Deputy Registrar was requested to clarify the matter. What is clear is that the advocates for the Applicants continued to believe that they were protected by the stay orders of Lady Justice Lesiit and did nothing until they were woken up by the proclamation made against their client on 15<sup>th</sup> July, 2010. They had however commenced the objection process by notifying the Deputy Registrar of their objection and requesting for the reasons for the taxing officer’s decision on 21<sup>st</sup> July 2009, which I consider to have been within the time given by the court on 17<sup>th</sup> July 2009 when Lady Justice Lesiit’s Ruling of 26<sup>th</sup> June 2009, was delivered. I note from the proceedings of 17<sup>th</sup> July 2009 that counsel for the Respondent applied for leave to appeal against Lady Justice Lesiit’s Ruling but no appeal appears to have been filed in that regard.

My view as regards the jurisdiction of this court in matters of this nature is as expressed in my decision in **SHAH & PAREKH -VS- APOLLO INSURANCE CO. LTD [2005] ?KLR** cited herein by the Applicants, where I held that until reasons for a decision in a taxation are given, a judge will ordinarily not have jurisdiction to entertain a reference. I do not think time can run until after such reasons have been given and I can only conclude that the court, in fixing a 14 days period to file an objection must have taken cognizance of the legal provisions in that regard. I think counsel for the Applicants were right in assuming that the 14 days extension granted by Lady Justice Lesiit related to the service of a notice of objection upon the taxing officer and the requesting for the reasons for his decision. They therefore complied and the stay is in my considered opinion, still in force. The intimation that they would appeal the decision of Lady Justice Lesiit implies quite clearly that counsel for the Applicants were of the same view, hence their writing to the Deputy Registrar on 18<sup>th</sup> September 2009. In the event that their letter was not responded to they ought to have, in good faith, suggested to their counterparts that the matter be referred to a judge for an opinion under the provisions of paragraph 12 of the **Advocates (Remuneration) Order**.

In view of the above I find that the two applications herein have merit. Accordingly the same are allowed. Since the Applicants do not consider the irregularity in the taxation of the 3<sup>rd</sup> Defendants Bill of Costs dated 20<sup>th</sup> March 2008, as noted by Lady Justice Lesiit (and admitted by the advocates for the respondent’s in their letter of 18<sup>th</sup> September 2009) to be in any way prejudicial to the taxation process itself, I see no reason to order that the bill be retaxed before another taxing officer. As the Ruling of 3<sup>rd</sup> December 2008, appears to both parties adequate for the purposes of the Applicant’s objection, I grant prayer 2 of the Chamber Summons dated 6<sup>th</sup> August 2010, and direct that the said Ruling be deemed to contain the reasons for the decision in the taxation. The handwritten copy of the same shall be furnished to the counsel for the Applicants forthwith for typing, in order that the Applicants may file their

reference. They must do so within 21 days.

This court takes note that prayer 2 of the Notice of Motion dated 1<sup>st</sup> October 2010, was granted on 1<sup>st</sup> October 2010, but just in case the same have not been complied with, an order in terms of prayer 3 is granted. Prayers 4 and 5 are also granted.

Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 25<sup>TH</sup> day of MARCH, 2011.**

**M. G. MUGO**  
**JUDGE**

In the presence of:

Miss Mwangi

For the Applicant

Mr. Kabita holding brief for A.N. Ngunjiri

For the Respondent