



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 982 OF 2009

ADOPT A LIGHT LIMITED.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

There are two applications before the court. The first one is made by a Notice of Motion dated 21st March, 2011, and taken out under Paragraph 11 (4) of the Advocates (Remuneration) Order; Order 51 Rule 1 of the Civil Procedure Rules; Sections 1A, 3 and 3A of the Civil Procedure Act, and any other enabling provisions of the law. The applicant seeks three main orders. These are –

- (1) That this honourable court be pleased to stay any proceedings arising from the taxation ruling of Honourable Njora delivered on 31st January, 2011 pending the hearing and determination of this instant application.**
- (2) That this Honourable court be pleased to extend the period within which the applicant may file its notice of objection and request for reasons for the ruling of the taxation of the respondent's Party and Party bill of costs delivered by Honourable Njora on 31st January, 2011.**
- (3) That the Honorable court be pleased to stay any proceedings and any execution arising from the ruling of Honourable Njora on the taxation pending the applicant's intended reference against the taxation dated 31st January, 2011.**

The application is supported by the annexed affidavit of Patrick Anam, Advocate, and is based on the grounds that the taxing officer's ruling was delivered in his absence without notice and by the time he got to know about it, the time for filing a reference had expired.

The second application is also made by a Notice of Motion dated 4th April, 2011, and is brought under Order 22 Rules 22 and 52; Order 51 Rule 1 of the Civil Procedure Rules; and Sections 1A, 3 and 3A of the Civil Procedure Act and any another enabling provisions of the law. The applicant seeks two main orders which are set out in the bodies of the respective applications. However, at the hearing thereof, counsel for the applicant said that he wished to seek only the order that this Honourable court be pleased to stay the proclamation and attachment of the applicant's property whether by itself, representatives, employees, agents, servants or any person acting on its behalf or claiming through it, and any other proceedings and execution arising from the taxation ruling of the Honourable Njora delivered on 31st January, 2011 pending the hearing and determination of the applicant's application dated 21st March, 2011. It is supported by the annexed affidavit of Stephen Muendo, Advocate, and is based on the grounds that the ruling in this matter was delivered without notice to the applicants and the respondents have now proclaimed the applicant's property in execution of the decree.

In opposition to the two applications, the respondent filed a replying affidavit sworn by Mansur Muathe Issa, Advocate, in respect of the first application and grounds of opposition in respect of the second application.

In the interest of economy of time, the two applications were heard together. Mr Anam for the Applicant argued that the ruling of the court was delivered without notice on 31st January, 2011. This, he submitted was contrary to Order 21 Rule 1 which requires that judgment should be delivered on notice. As the applicant was not aware that the ruling had been delivered, it could not have filed its reference within the time required. However, since the court had power to extend the time, he asked for orders as prayed otherwise the intended reference would be rendered nugatory.

Opposing the application Mr Issa for the respondent recapitulated that both applications were for stay of execution yet there was no appeal pending and no right of appeal. He submitted that the issue of refund of costs does not lie as it was a final order. He further submitted that it was incorrect for the applicant to allege that the ruling was delivered without notice. The fact that the defendant was not represented was because its counsel was not diligent. In any case, the court was firm and consistent that there cannot be a stay in respect of costs and that what the applicants are trying to do is to delay the payment of costs. He asked the court to refuse their application.

After considering the submissions of counsel and the authorities cited, I find that there are two main points to be determined in this matter. The first one is whether the ruling in question was delivered without notice and, secondly, whether the court has jurisdiction to order a stay of payment of costs. With regard to the first issue, I note that Mr Issa deposes in his replying affidavit that initially, the ruling was scheduled to be delivered on 17th December, 2010. However, it could not be delivered as the Deputy Registrar was indisposed. Her clerk informed the Advocates who were present that the rulings expected on that day would tentatively be delivered on 17th January, 2011, and that if there would be any change of the ruling date, notice would be posted on the door of the court. At the time this information was relayed to the Advocates, Mr Anam was not in court. On his way out of the Milimani Commercial Courts, however, Mr Issa met Mr Anam and informed him of the deferral of the ruling and requested him to confirm with the court clerk. On 17th January, 2011, the ruling was not ready and a notice posted on the court door informed the parties and advocates involved that the ruling would be delivered on 31st January 2011. Mr Issa appeared before the Honorable Mrs Njora on the said date when there was no representation from the firm of Sichangi & Co., Advocates, and the learned Deputy Registrar delivered her ruling on the plaintiff's bill of costs. ou

This deposition, coming from an advocate and an officer of this court, has not been controverted in any way. I therefore take it as correct. Consequently, I find that the applicant's advocates did not exercise due diligence and that their failure to attend at the ruling was due to some laxity on their part, and they cannot blame the court. Therefore, they do not have a good reason for the extension of time to file the objection proceedings.

Even if they had such a plausible reason, the authorities are replete with statements to the effect that the court has no jurisdiction in the Civil Procedure Rules or the Advocates Act to stay execution of the taxed costs. The Civil Procedure Act does not apply to the Advocates Act, and the Advocates Act does not provide for stay of taxed costs. The genesis of this state of affairs is rooted in Section 51 (2) of the Advocates Act which provides that –

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to amount of costs covered thereby...”

In the instant case, the certificate has not been set aside or altered and it is therefore final and conclusive as to the amount.

Moreover, as held in **Sande Investment Limited v Kenya Commercial Finance Corporation** [2007] 2 EA 450 costs are awarded to a party who succeeds in its claim before the court or a party who succeeds in having a claim dismissed. In the court’s view, it is not just for the court to stay execution of such costs. Such a party, having so succeeded, should not be prevented from being compensated or from enjoying the said compensation

For the above reasons, I find that there is no merit in the two applications and they are hereby dismissed with costs to the respondent.

DATED and DELIVERED at NAIROBI this 5th day of May, 2011.

L NJAGI
JUDGE