



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 68 OF 2011

KENYA AIRPORTS AUTHORITY.....APPLICANT

-VERSUS-

OTIENO, RAGOT & CO. ADVOCATES.....RESPONDENT

RULING

The plaintiff/applicant has moved the court by way of a notice of motion pursuant to Section 1A, 1B, 3A; 27(i) & 63(e) of the Civil Procedure Act, Section 51 of the Advocates Act and Order 51 of the Civil Procedure Rules 2010, seeking for several prayers. Prayer 1 & 2 are now spent; for determination are the 3rd and 4th prayers as follows:-

“3. That this honourable court be pleased to order that the hearing of HCC MISC. APPL. NO. 95 of 2011 be stayed pending the hearing and determination of this suit.

“4.Costs of the application be provided for.”

The application is premised on the supporting affidavit of **Joy Nyaga** dated 12th May, 2011 and the grounds that; the Misc Cause no. 95 of 2011 has been fixed for hearing; the defendant’s claim for costs as against the plaintiff in the total sum of Ksh 227,476,921.38 is in complete disregard of the instructions given and carried out by the defendant and is further based on an erroneous and superficial value of the subject matter in complete disregard of the fair value of the subject matter in KISUMU HCCC NO. 156 OF 2009; that if the hearing proceeds and this suit will be rendered nugatory as the only recourse then available would be to object to the taxation as provided for in paragraph 11 of the Advocates (Remuneration) Order, which would be most unsatisfactory as the plaintiff’s objection would be limited to only specific items of the taxation; the defendant will not be prejudiced by the orders being sought; in the interest of justice the orders need to be granted to enable the court establish the truth, the plaintiff is a public institution, the amounts are colossal and the matter is of general public interest.

The defendant/respondent objected to the application by filing a replying affidavit dated 20th May, 2011. The gist of the opposition is that the issues being raised in the suit can be ventilated in the **MISC. APPL. NO. 95 OF 2011**, before the taxing master, that the application sought is not known to law, this court has no jurisdiction to grant the orders sought in the motion and that issues being raised squarely lie within the jurisdiction of the taxing officer.

At the hearing of the application **Mr. Munyu** for the plaintiff/applicant submitted that the bill by the respondent was filed in

contravention of the Advocates Act, the applicant is seeking certain declarations as the plaintiff's claim based on subject value of 13 million is invalid and unenforceable; the respondent only entitled to remuneration on work done. The taxing master has no power to make the declarations being sought and if the taxation proceeds there will be a miscarriage of justice.

Mr. D. Otieno for the respondent in opposing had this to say. The court has no jurisdiction; jurisdiction to tax is domiciled in the registrar; the only time a dispute of this nature can find its way to the high court is by way of reference and the applicant can convince the registrar on the value of the subject matter.

In response **Mr. Munyu** submitted that the suit before court is not about taxation, the suit seeking for declaration on 2 issues.

Having considered the submissions and general authorities cited, the court notes that the authorities and arguments by the parties have largely dealt with the issue of taxation and the issues raised for determination in the main suit. For consideration before me is whether or not to stay the Misc. Cause No. 95 of 2011 pending hearing and determination of this suit. In doing so I must strike a balance between the two competing interests in this matter, mainly the interest of the respondent to tax its bill and the interest of the applicant to have this suit heard and determined before taxation of the bill by the respondent.

The applicant has cited the need to have the suit determined first otherwise the suit will be rendered nugatory as it seeks for declarations on the value of the subject matter, and a declaration that the respondent is entitled to fees only for the work done.

The respondent is of the view that the court lacks jurisdiction and the issues may be canvassed at taxation that had been scheduled for hearing before the court issued temporary order of stay.

Whether or not to grant stay is discretionary; whether or not the court can grant the declarations sought on the face of a pending taxation is for the trial court to determine.

This suit is not about taxation of the pending bill and I am convinced that if the taxation proceeds this suit will be rendered useless and the applicant may be prejudiced; however should the suit fail the taxation even if stayed will be taxed accordingly at some stage I am also of the view that other than a delay of the taxation no prejudice is likely to be suffered by the respondent. I am therefore inclined to grant prayer 3 of the application. Costs of the motion be in the suit. I so order.

DATED AND DELIVERED IN KISUMU ON 30.6.2011.

ALI-ARONI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant