



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. CAUSE NO. 686 OF 2008**

**ADIPO & COMPANY.....APPLICANT**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED.....RESPONDENT**

**R U L I N G**

1. Although time may well have moved on what is before me for ruling is an Application by Notice of Motion dated 24 May 2011 for staying the taxation of the Advocate/client Bill of costs herein, such being dated 24 September 2008 and amended on 16 May 2011. I say that time may well have moved on because the Deputy Registrar of this Court considered and heard submissions from the Advocate as regards the said Bill of Costs on the 27 May 2011 and the Deputy Registrar delivered her Ruling thereon on 16 September 2011. Since then, the advocates for the client have requested a typed copy of the Deputy Registrar's Ruling so that they may lodge an application under **Rule 11** of the *Advocates (Remuneration) Order* of the client's objections to the decision on taxation.

2. When counsel for the advocates and the client came before me to record their respective submissions as regards the Application, there seemed to be some discrepancy as between them as to what transpired before the Hon. Deputy Registrar on 16 May 2011. From my perusal of the record, Mr. Okwach and Mr. Odipo for the advocate/applicant appeared before the Deputy Registrar at 9.00 a.m. to indicate that they were ready to proceed with the taxation, presumably in relation to the original bill of costs dated 24 September 2008. At that time, there being no appearance for the client/respondent the file was set aside and taken up later at 10.40 a.m. The coram at that time was Mr. Okwach for the applicant/advocate and Mr. Masika for the client/respondent. Mr. Masika prayed to put in written submissions to the Deputy Registrar and thereafter a date for highlighting. Mr. Okwach requested that as the bill taxed arose from an arbitration, the advocate be allowed to amend items 1 and 2 in its Bill of Costs, to which Mr. Masika had no objection. The subsequent order of the Deputy Registrar warrants repeating here:

**“The submissions are noted and the court rules as follows:**

**(a) The applicant is granted leave to amend the Bill of Costs dated 24/09/2008.**

**(b) Parties to file written submissions and serve and exchange the same.**

**(c) Hearing of the taxation to be on 27/05/2011.**

**(d) R/A”.**

3. It is to be noted that in the Deputy Registrar’s recording of what transpired before her on 27 May 2011 she detailed: “*hg date was taken in Court by consent*”, referring to the above Order of 16 May 2011. It would appear that both counsel in their submissions before me in relation to the Notice of Motion dated 24 May 2011 referred as to what transpired before the Deputy Registrar on that day. Firstly, there is no doubt that the Deputy Registrar made an Order of this Court and, secondly, it was not a Consent order, merely the date that the taxation of the Bill of Costs was agreed upon by consent.

4. The said Notice of Motion was brought upon the grounds that the client faced a winding-up Petition in *Winding – Up Cause No. 8 of 2011* filed on 5 May 2011. It was stated in such grounds that the Court is mandated to stay all proceedings against the Company (the client) at any time after the presentation of a winding-up petition and before a winding-up order has been made. It was also noted that the client needed time to deal with the winding-up petition and for that reason applied for the stay of all proceedings in this matter pending the outcome of the Winding-up petition brought against it (underlining mine). It was brought to the attention of the Court that the Application was made under the provisions of **Section 223** of the *Companies Act*.

5. In support of the Notice of Motion, **FLORA OKOTH (MRS)** the Company Secretary of the client company swore an Affidavit dated 24 May 2011. That Affidavit was fairly brief in content but did attach a copy of the *Winding-up Petition (No. 8 of 2011)* brought by Kenol Kobil Limited with the deponent stating that it had been served upon the client company on 18 May 2011 and that the company was taking all possible measures to challenge the filing of the same. Paragraph 6 of the deponent’s said Affidavit in support of the Application bears repeating:

**“I am advised by KPC’s advocate on record, and verily believe such advice to be correct, that Section 223 of the Companies Act, Chapter 486 gives the Court the requisite jurisdiction and discretion to stay such proceedings at any time after the presentation of a winding-up petition”.**

6. I have spelt out the above as counsel for the applicant submitted before me that in reference to the authority cited to me of **Bowkett v Fuller’s United Electric Works Ltd** [1922] All ER 281 this Court ought to stay all further proceedings before it as from the time that it became aware of the winding-up proceedings brought against the client company until a winding-up order has been made. Counsel further submitted that the Deputy Registrar should or ought to have been aware of this Application, assimilated its content and thereafter she should have stayed all proceedings in this suit more particularly the taxation proceedings before her.

7. In response to the said Notice of Motion, **MR. COLLINS ODHIAMBO ADIPO** an advocate of this Court practicing in the name and style of Adipo & Company (the Advocate/Respondent herein) swore a Replying Affidavit dated 3 September 2011 but not filed herein until 3 October 2011 after the Deputy Registrar had delivered her Ruling on the taxation on the 16 September 2011. The Replying Affidavit related the history of this case before court more particularly that the Bill of Costs had been filed on 24 September 2008 and that there had been two applications to have the same struck out on the 8 October 2008 and 26 November 2009 respectively. Mr. Adipo deponed to the fact that both these Applications had been dismissed and thereafter the Court file disappeared. It was only after Mr. Adipo’s application for reconstruction of the file was allowed that the court file re-appeared. Mr. Adipo then detailed his knowledge of the progress of the winding-up proceedings brought against the client company by the said Kenol Kobil Co. Ltd. He also noted another High Court suit brought against the client by an entity called **Glencore Energy – HCCC No. 244 of 2009**. He observed that in that suit, no attempt had been made to stay the proceedings as a result of the filing of the winding-up petition. Finally, Mr. Adipo opined that in his opinion this Application had only been brought to delay proceedings herein and offends the principle of expeditious justice under Article 159 (2) (b) of the Constitution.

8. In his submissions made before me on the 1<sup>st</sup> November, 2011, Mr. Adipo more or less repeated to me what he had deposed to in his said Replying Affidavit, so far as the court history and record of the taxation matter is concerned. He highlighted that the Application had been served on his firm on 24 May 2011 but was not under Certificate of Urgency, there was no interim orders in place as regards the same. He noted that when the taxation of his firm's Bill of Costs came before the Deputy Registrar on 27 May 2011 there was no court order stopping her from proceeding. Mr. Adipo did not think that the fact that the client had filed no submissions in relation to the taxation proceedings, was any bar to the Deputy Registrar dealing with the taxation application. Further, Mr. Adipo observed that on 26 July 2011 the matter of this Notice of Motion was mentioned before Apondi J with Mr. Masika appearing for the clients/respondent. The learned Judge recorded that this Application would now be heard on 27 October before any Judge. There was no attempt made by the client/respondent to stay either the entire proceedings or the taxation ruling that was pending before the Deputy Registrar. Further, Mr. Adipo commented that at the delivery of the Deputy Registrar's Ruling on 16 September 2011, Mr. Bwire was present for the client/respondent and again no protest was raised that the Deputy Registrar should not deliver her said Ruling.

9. Mr. Adipo put before Court a list of authorities dated 26 October 2011 particularising the cases of **DUNCAN OUMA MAJIWA vs. UNITED INSURANCE CO. LTD.** (under Statutory Management) ([2009] eKLR and **THE UNION INSURANCE COMPANY OF KENYA LIMITED vs. RAMZAN ABDUL CANO** – *Civil Application No. Nai. 179 of 1996*). Both of these cases indicated that under **Section 223** of the Companies Act, the court has a discretion as to whether to grant a stay of proceedings or not, after presentation of a winding-up petition and before a winding-up order has been made.

10. Mr. Ohaga built his submissions around the **Bowkett** case (supra). The holding in that case was: **“once a winding-up petition had been presented the Court ought, unless there were very exceptional circumstances in the case, to stay all further proceedings in an action against the company where it was necessary to do so to protect the assets of the company and to secure equality among all creditors of the same class”**.

11. Similarly, Mr. Ohaga referred me to the 1995 issue Vol. 1c of Atkin's Encyclopaedia of Court Forms in Civil Proceedings 2<sup>nd</sup> Edition page 66 paragraph 32. Under the heading *“Stay of Proceedings before a winding-up order”*, the learned authors had this to say:

**“32. Stay of proceedings before a winding-up order. Where any action or proceeding against a company is pending in the High Court or Court of Appeal, the company or any creditor or contributory may, at any time after the presentation of a winding-up petition and before a winding-up order has been made, apply to the court in which the action or proceeding is pending for a stay of the proceedings and the court may stay the proceedings on such terms as the court thinks fit. Where any other action or proceeding against a company is pending the company or any creditor or contributory may, at any time after the presentation of a winding-up petition, and before a winding-up order has been made, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding, and the court may restrain the proceedings on such terms as the court thinks fit.**

**The court also has an inherent jurisdiction to stay proceedings when, for example, the company is in voluntary liquidation or where a compromise or scheme of arrangement has been proposed. The jurisdiction does not apply to proceedings in foreign courts, although such proceedings may in certain circumstances be restrained by the court in the exercise of its equitable jurisdiction.**

**In determining whether or not to exercise its discretion to stay or restrain the proceedings the court will ask itself whether any good will be done, or expense saved, by staying or restraining proceedings which have been properly brought and, in effect, sending the claim to be determined in the winding-up proceedings. It will not however, allow any creditor to gain priority over other creditors of the same class by bringing proceedings on his claim instead of taking his place with other creditors in the winding up”**.

In Queensway Trustees Ltd. vs. Official Receiver & Liquidator Tanneries of Kenya Ltd. [1983] KLR 51, the Court of Appeal clearly detailed that:

**“a winding-up by the Court dates from the date of presentation of the petition .....**”.

This was, of course, in connection and relating to **Section 226 (2)** of the *Companies Act*.

12. Finally, Mr. Ohaga referred me to Re Continental Credit Finance Ltd. [2003] 2 EA 399 and the dictum of Njagi J who stated at page 403:

**“As intimated earlier on in this ruling, once a winding-up order has been made, no action can be commenced against the company except by the leave of the Court and subject to such terms as the Court may impose”.**

I really did not see the relevance of this authority to the Application before me as, in the authority, it was clear that the winding-up order had been made whereas in this suit the Court has still to consider the winding-up petition.

13. As I understand the crux of Mr. Ohaga’s argument herein the authorities he has cited to this Court show that once a winding-up petition has been presented then this Court should stay all further proceedings in an action against the client company. Mr. Ohaga goes further, I think, in submitting that this Application was filed on 24 May 2011 three days before the taxation date before the Deputy Registrar of 27 May 2011 and that the Deputy Registrar should have acquainted herself with the content of the same. Having discovered or ought to have discovered that a winding-up petition had been filed in this Court, it was Mr. Ohaga’s opinion that the Deputy Registrar should have stayed the proceedings – more particularly the taxation hearing and thereafter, as a consequence, her Ruling on the taxation delivered on 16 September 2011.

14. With respect to Mr. Ohaga’s reasoning, I do not think that the Hon. Deputy Registrar had any such obligation. In my reading of the authorities cited but more particularly of **Section 223** of the *Companies Act* under which this Application is brought, it was for the client company herein to bring an application for stay of proceedings. **Section 223** reads as follows:

**“223. At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may –**

**(a) Where any suit or proceeding against the company is pending in the High Court or the Court of Appeal, apply to the court in which the suit or proceedings is pending for a stay of proceedings therein; and**

**(b) Where any other suit or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceeding;**

**and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit”.**

15. As Mr. Adipo has detailed this Application had been filed on 24 May 2011. It was not brought by way of Certificate of Urgency and the Advocates for the Client/Applicant were perfectly aware that the taxation of the Bill of Costs had been fixed with their knowledge and assent for 27 May 2011. Why, the said advocates did not even turn up for the hearing before the Deputy Registrar on the 27 May 2011, although they had been served with the Amended Bill of Costs of the Respondent/Advocates. To make matters worse and with their Application pending for hearing on the Court file, no stay was applied for by Mr. Masika or a date requested for the hearing of the Application, when he appeared as representing the

Client/Applicant before Apondi J on 26 July 2011.

16. In conclusion therefore, I dismiss the Client/Applicant's Notice of Motion dated 24 May 2011 with costs. I referred in the introduction to this Ruling, as to how I conjectured that this Application had been overcome by events. As Mr. Adipo observed, the Client/Applicant has filed its Notice of Objection to the decision of the Hon. Deputy Registrar, as Taxing Master, dated 19 September 2011 and has written on the same date, for a copy of her Ruling and the Proceedings in relation thereto. The Client/Applicant has not been shut out as regards its dissatisfaction at the Deputy Registrar's Ruling on the taxation. Further, initially as pointed out by counsel, the taxation proceedings are still alive and **Rule 11** of the *Advocates (Remuneration) Order* may be invoked. Secondly, the provisions of **Sections 224** and **225** of the Companies Act may still come into play in relation to these proceedings.

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of November, 2011.**

**J. B. HAVELOCK**  
**JUDGE**