



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 261 of 2004

FULCHAND M. SHAHPLAINTIFF

VERSUS

PANACHAND J. SHAH1ST DEFENDANT

DIPAK P. SHAH 2ND DEFENDANT

AZIZ A. LALANI3RD DEFENDANT

HANSRAJ F. GUDKA 4TH DEFENDANT

P.J. DEDHA 5TH DEFENDANT

AJUL H. GUDKA 6TH DEFENDANT

**RELIANCE BANK LTD (IN LIQUIDATION) BING SUED THROU
THE DEPOSIT PROTECTION FUND BOARD7TH DEFENDANT**

RULING

1. The suit against the 1st 2nd and 7th defendants was struck out by a ruling of this court delivered on 3rd July 2009. The proceedings that followed the order of dismissal, was a party and party bill of Costs filed on 28th September 2009 by the 7th defendant and another by the 1st and 2nd defendants filed on 30th July 2009. The plaintiff who is also the applicant filed the notice of motion under order **XLI rule 4** seeking for orders of stay of execution and Proceedings until the hearing and determination of the appeal of the ruling delivered on 3rd July 2009.
2. This application is supported by the plaintiff's affidavit sworn on 20th November 2009. The application is also based on the grounds that the plaintiff has filed a notice of appeal to the Court of Appeal which was filed on 13th July 2009 and unless the proceedings are stayed the intended appeal be rendered nugatory. There are further grounds espoused in the supporting affidavit. The plaintiff denies that he had given authority to his advocate, Mr. Ndege to enter into a consent order regarding discovery of the documents.
3. After the order dismissing the suit was made, the defendants are pursuing the taxation of their respective party and party bill of costs. This is notwithstanding the fact that the plaintiff's savings were lost due to alleged fraud perpetrated by the defendants thus the plaintiff intends to pursue the appeal. He is apprehensive that unless a stay of execution of the ruling and the order of the court made on 3rd July 2009 and subsequent proceedings are stayed the party and party bills of costs coming up for hearing on 25th November 2009 will proceed and he will

suffer execution which will cause him irreparable damage.

4. This application was opposed by the 1ST, 2ND and 7th defendants. It was submitted that this court has no jurisdiction to stay proceedings in respect of taxation before a taxing officer. A taxation of bill of costs is a special jurisdiction by dint of the provisions of rule 11 of the Advocates Remuneration Order which is a reserve of the taxing master. Counsel cited three cases of; Donholm **Rahisi Stores (SUING AS A Firm) vs. East African Portland cement Limited [2005] eKLR**. In that case Waweru J. held that:

“Taxation of costs, whether those costs be between party and party or between Advocate and client, is a special jurisdiction reserved to the taxing officer by the Advocate (Remuneration) Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates (Remuneration) Order. The present application is not such reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself. The taxing officer does nothing beyond taxation of the bill of costs. The consequences of such taxation, for instance recovery of the taxed costs, will be a matter for the court, and the court can at that stage be asked to stay recovery of those costs pending whatever event, say, an appeal against the order granting the costs, or a reference under Rule 11 of the advocates (Remuneration) Order.”

The Court of Appeal while dealing with similar set of facts in the case of; **Sharma vs. Uhuru Highway Development Limited (2001) 2 EA 530**. Held per the judgment of Akiwumi, J.A.

“... (the High Court judge) not being seized of the taxation itself, and there being no appeal or reference to him as provided for by paragraphs 11(1) and 12 of the Advocates (Remuneration) Order from a decision of the taxing Officer who was dealing with the taxation, and the taxation not being a suit filed in the High Court for the recovery of costs, simply had no jurisdiction at all, to hear as he did, the Respondent’s application to strike out the (application for taxation). This by itself makes his hearing of and his ruling of 19th May 2000, of the Respondent’s application a nullity from the word go. . .”

5. The effects of the ruling of 3rd July 2009 conclusively determined the rights between the plaintiff and the defendants. It was argued that counsel for the plaintiff could not have come on record without first seeking leave of the court. Therefore the application was faulted as the advocate lacked locus standi to lodge this application without first obtaining the leave of the court. The applicant has also not satisfied the court that he will suffer substantial loss and no security has been offered. He did not annex a draft of Memorandum of Appeal to show that he has an appeal thus he has not satisfied the conditions for granting an order of stay of execution as set out under Order 41 of the civil procedure Rules. The applicant merely alleges his inability to pay the costs which has never been a ground for appeal.
6. Upon evaluation of this application and the rival submissions, this application seeks a stay of execution and

proceedings in regard to the ruling delivered by this court on 3rd July 2009. The outcome of that ruling has only resulted in the 1st, 2nd and 7th defendants filling their respective party and party bill of costs against the plaintiff. In essence this application seeks a stay of the proceedings of the party and party bill of costs. The principle elements to consider on whether this court can issue an order of stay of taxation are well articulated in the two decisions of; Donholm **Rahisi Stores and Sharma vs. Uhuru Highway Development (supra)**

7. Apart from stating that I wholly agree with the holdings in those decisions, I also add that the courts in Kenya are hierarchical; the jurisdiction of determining the costs is vested upon the taxing master. If there are any issues arising from taxation they can only be brought to the high court by way of a reference. This court has no jurisdiction therefore to stay proceedings before the taxing master. This now leads me to the other issue regarding the prayer for an order of stay of execution. What is there to be stayed as a result of the order issued on 3rd July 2009 can only be costs. The costs payable by the plaintiff to the defendants are not yet ascertained.
8. Accordingly at this stage there is nothing to stay and there is nothing to show that the plaintiff will suffer irreparable loss if an order of stay is not granted. In the result I find no merit in this application which is dismissed with costs to the respondents.

RULING READ AND SIGNED ON 19TH FEBRUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE