



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**Civil Suit 49 of 1997**

**ANDREW ACHOKI MOGAKA ::::::::::::::: PLAINTIFF.  
VERSUS**

**SAMSON NYAMBATI NYAMWEYA )**

**DR. MARANGA NYASAE ) ::::::::::: DEFENDANT.**

**R U L I N G.**

By a chamber summons dated 13<sup>th</sup> October, 2009, pursuant to the provisions of order XX1 rule 25 of the Civil Procedure Rules and sections 3A of the Civil Procedure Act and section 11 of the Advocates Remuneration Order, the applicant seeks orders:

1. **THAT**, this application be heard exparte in the first place.
2. **THAT**, pending inter partes hearing of this application there be stay of execution of warrants of attachment and sale issued herein on the 18<sup>th</sup> September, 2009.
3. **THAT**, the honourable court be pleased to extend or enlarge time within which the applicant/1<sup>st</sup> defendant is to file its reference to the High Court.
4. **THAT**, the warrants of attachment and sale issued on the 18<sup>th</sup> day of September, 2009 be declared null and void ab initio.
5. **THAT**, the costs and incidentals to this application be provided for by the respondent/plaintiff.

The application is based on the grounds:-

1. The decree purportedly being enforced was issued on 6<sup>th</sup> November, 2003 and no notice to

show cause was taken out before warrants were issued herein.

2. The applicant/1<sup>st</sup> defendant filed a notice of objection to taxation and has been awaiting for the taxing master to serve or furnish her with reasons for her taxation of the various items objected to.
3. The applicant/1<sup>st</sup> defendant is desirous of challenging the taxing master's taxation and may be denied this chance if the time within which to lodge his reference is not extended.
4. The non filing of the reference within the stipulated time arose not from the willful neglect or deliberate act of the applicant/1<sup>st</sup> defendant but from the failure or neglect of the taxing master to give reasons for the taxation she undertook.
5. The applicant/1<sup>st</sup> defendant will suffer substantial loss if time is not extended as she (the applicant/1<sup>st</sup> defendant) will be condemned to pay illegal amounts not provided under the remuneration scale.
6. The warrants of attachment and sale issued herein are illegal and a nullity *ab initio* as no notice to show cause was taken out prior to their issuance.

The application is predicated upon the annexed affidavit of Alice Kerubo Nyambuti sworn on the 13<sup>th</sup> day of October, 2009.

On behalf of the applicant, it was urged that after taxation and ruling emanating therefrom she was aggrieved and consequently instructed his counsel to lodge a notice of objection exhibited herein as "AM1"

The thrust of her contention is that the taxing master, after the filing of the notice of taxation, was required to record and forward to the applicant's advocate the reasons for the decision in respect of the items she had objected to.

The said taxing master has not to date written to his advocates giving reasons for the decision. Failure and/or neglect of the taxing master to carry out her duty as aforesaid has hindered the applicant's counsel from filing application and/or appeal against the taxation.

To make matters worse, execution has consequently been commenced as evidenced by exhibit "AM2". In that event the applicant shall suffer substantial loss by reason, inter-alia, that she will be condemned to pay taxed costs that is manifestly inflated quite apart from containing illegal items.

It is in the interest of justice that while she exercises her right of appeal against the taxation there be a stay of the execution of the decree herein.

Last but not least the warrants of attachment and sale issued herein is illegal by reason of the fact that no notice to show cause was taken out before the issuance of the warrant of attachment and sale when the decree is more than 12 months old.

For those reasons, counsel urged the court to enlarge time for lodging a reference. In the meantime there be a stay of execution.

The respondent opposed the application vide a replying affidavit sworn on 14<sup>th</sup> November, 2009.

On behalf of the respondent, it was urged that judgment was granted in favour of the respondent on 29<sup>th</sup> October, 2002 by the honourable lady Justice R. Nambuye. The applicant never preferred an appeal against the said judgment.

The respondent's bill dated 6<sup>th</sup> August, 2003 was taxed inter-partes on 6<sup>th</sup> August, 2003 at Ksh. 1,892,239.75. A certificate of costs dated 9<sup>th</sup> October, 2003 was then issued. Thereafter the respondent, through counsel, commenced the process of execution by way of a Notice to show cause exhibited herein. The said execution was halted by an order arising from the Notice of Motion dated 2<sup>nd</sup> March, 2007. The application was determined in favour of the applicant.

The application is brought in bad faith because the court record clearly shows that the taxing officer gave reasons for the decision on 27<sup>th</sup> February, 2009 within a period of 14 days. That being the case, it lies ill in the mouth of the applicant to seek to stop the sale 8 months later. The delay is thus inordinate. The application has thus been brought merely to obstruct the respondent from recovering costs legally due to them.

Last but not least that the application is an abuse of the court process by reason of the circumstances disclosed hereinabove.

Order XX1 Rule 25 of the Civil Procedure rules provides thus:

***“Where a suit is pending in any court against the holder of a decree of such court in the names of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”***

In my view that order cannot avail the applicant. I presume the applicant wanted to invoke the provisions of order XX1 Rule 22 which provides:-

***“22 (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution for such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.***

(2) ***Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.***

(3) ***Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.”***

Accordingly, the applicant have not invoked my jurisdiction to enlarge time. By rule 25 of order XXXI the applicant is merely asking for a stay of execution at the decree. But that presupposes that there is a pending appeal. It is clear to me from the perusal of the court file that there is no pending appeal. There is merely a dispute over taxed costs.

I have also been asked to extend or enlarge time within which the applicant/1st defendant should file a reference to the High Court.

Rule 11 of the Advocates (Remuneration) Order amended by Legal Notice No. 73 of 6 May, 1982 provides as follows:-

**“(1) should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.**

**(2) the taxing officer shall forthwith record and forward to the objector the reasons for the decision on those items and the objector may within 14 days from the receipt of the reasons apply to the judge, by chamber summons, which shall be served on all parties concerned setting out the grounds of the objection.”**

The objector complied with Rule 11 aforesaid by giving a notice dated 19<sup>th</sup> February, 2009 and filed on 14<sup>th</sup> October, 2009. From annexure “AN1” of the applicant it is common ground that this Registry minuted the notice of objection to the Deputy Registrar on 24<sup>th</sup> February, 2009. It is equally common ground that on 27<sup>th</sup> February, 2009 the Deputy Registrar endorsed on the notice thus:

**“FIND REASONS IN THE RULING, NO FURHTER REASONS AVAILABLE.”**

On the basis of the foregoing, by 27<sup>th</sup> February, 2009 the applicant was aware that the Deputy Registrar had given her reasons. Even though she appears uncooperative. The applicant should have taken steps to file an appropriate application to force the Deputy Registrar to give reasons in line with Rule 11 of the Advocates (Remuneration) order. The applicant took eight (8) months to file the current application. The delay in this particular instance is disturbing. It is inordinate and unexplained. I would be failing in my duty if I were to extend or enlarge time for the applicant after such a prolonged and unexplained delay. In this regard I call in aid the binding authority of **DEVSHI V. DIAMOND CONCRETE CO. LTD. (C.A) Civil application No. 16 of 1974.**

Quite apart from the foregoing, the chequered history of this case is worth noting. In passing, the subject bill is dated 6<sup>th</sup> August, 2003 and was filed in court on the same day. It was taxed for the first time on the 9<sup>th</sup> day of October, 2003. The said taxation was set aside by an order of Hon. Justice Ochieng on 15<sup>th</sup> October, 2007. It was re-taxed inter-partes for the second time on 11<sup>th</sup> February, 2009 as per exhibits “AAM1” and “AAM 2”.

The first taxation came up with a figure of Ksh. 1,892,239/75. The second taxation came up with a figure of Ksh. 1,699,767.

Even the background of the taxation as aforesaid, I would agree with the respondent’s assertion that this application has actually been brought to scuttle the execution which is imminent. It is thus brought in bad faith.

The second taxation was done and certificate of costs arising therefrom is dated 20<sup>th</sup> February, 2009. The decree sought to be executed was issued on 6<sup>th</sup> November, 2003 (if the application for execution filed in court on 17<sup>th</sup> February, 2009 is anything to go by). Accordingly the decree is more than one year old.

Order XX1 Rule 18 of the Civil Procedure Rules provides:

**“18. (1) where an application for execution is made**

(a) *More than one year after the date of the decree; or*

(b) *Against the legal representative of the party to the decree; or*

(c) *For attachment of salary or allowance of any person under rule 43,*

*the court executing the decree shall issue a notice to the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.”*

*Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him;*

*Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is cause solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.*

(2) *Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.*

(3) *Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.”*

It is not disputed that no notice to show cause was taken out notwithstanding the fact that the application for execution was made more than one year after the date of the decree. The notice to show cause was necessary since more than one year had elapsed between the date of the decree and the date the application for execution was made. That is the only ground upon which this application can succeed.

Being of the persuasion that order XX1 Rule 18 was not complied with by the respondent, I find that the application must succeed. The warrant of attachment and sale issued on 18th September, 2009 be and is hereby declared null and void. There shall be no orders as to costs.

Dated and delivered at Kitale this 3<sup>rd</sup> day of March, 2010.

**N.R.O. OMBIJA.**

**JUDGE.**

Mr. Njoroge for Samba for plaintiff.

Mr. Ingosi for Mbinde for 1<sup>st</sup> defendant.