

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1356 of 2007

MULONDO OUNDO MURIUKI & CO. ADVOCATES APPLICANT

VERSUS

ARMICK LTD RESPONDENT

RULING

1. The Chamber Summons dated 25th March 2010 seeks for orders for stay of execution, setting aside of the judgment entered in favor of the applicant on 14th January 2010 and the applicant be given leave to apply for reasons of taxation and file a reference from the taxation of 8th February 2008. This application is brought under the provisions of **Order XXI Rule 22 order IXA Rules 10 and 11 of the Civil Procedure Rules and paragraph 11(4) of the Advocates Remuneration Order**. It is predicated on the grounds that when the default judgment was entered, the respondent was not aware that an application had been filed against it thus the respondent was denied an opportunity to oppose the application.
2. This application is also supported by the affidavit of **Rosaline Wambui Mbugi**. It is contended that the ruling of taxation delivered on 7th February 2008 was done in the absence of the respondent. The respondent learned about it on 3rd March 2008, that is when it filled an application seeking for extension of time within which to file the reference. The application was heard by **Hon. Lady Justice Mwilu** who was transferred to Eldoret and the ruling was delivered on 19th November 2009 in the absence of the respondent. It is further contended that the application for entry of the judgment by the taxing officer was also not served upon the respondent. For those reasons the respondent is seeking for the judgment to be set aside and they be granted leave to file an objection.
3. This application was opposed by the applicant; reliance was placed on the replying affidavit sworn by **Vincent Mulondo** sworn on 9th April 2010. This application was faulted for relying on order XXI rule 22 which is irrelevant and has no application to the orders sought. Similarly order IXA does not apply because this was not a default judgment but a declaratory judgment. Even the affidavits in support of the application are also faulted because they were sworn on 26th March 2010 while the application they purport to support is dated 25th March 2010. Apart from those defects it was also submitted that the prayers seeking for extension of time is **res judicata** because that is what was determined by **Mwilu J**. The applicant can only appeal but cannot re agitate for the same orders.
4. It was further submitted that the notice of motion dated 13th November 2009 was duly served upon the

firm of **Alphone Mutinda** and Company Advocates on 4th December 2009. They acknowledged receipt and affixed their stamp. There is an affidavit of service by **Andrew Ondongo** who confirmed that he effected service of the notice of motion on the respondents Advocates. According to the applicant they too did not receive the notice informing them about the ruling by the taxing master however they were vigilant and made enquiries from the court and find out that the ruling was delivered on 8th February 2008 pursuant to a notice which was posted on the notice board outside the court and on the court door. The respondent has been aware of the ruling as they made an application which was dismissed by **Mwilu J.**

5. Both counsel for the respondent and the applicant made extensive submissions. The application seeks for the setting aside of my order made on 14th January 2010 on the grounds that the notice of motion dated 30th November 2009 was not served upon the respondent. This ground does not hold because annexed to the affidavit of Vincent Mulondo is a copy of the application which was duly served upon the respondent's counsel that is the firm of **Alphone Mutinda and Company Advocates**. The Advocates acknowledged receipt and when the matter came up for hearing on the 14th January 2010 the court was satisfied that the application was served upon the respondent as per the affidavit of service sworn by **Andrew Ondongo** on 13th January 2010. For that reason there is no basis for this court to set aside that order of 14th January 2010. It also follows that there is no substratum upon which an order of stay of execution can issue.

6. The other prayer by the applicant is stay of execution and extension of time for the applicant to file a reference. As stated above, there is a ruling on record by **Mwilu J** in which the applicant applied for extension of time and the application was dismissed. In my view the applicant cannot re agitate for the same order before a court of coordinate jurisdiction.

For the aforesaid reasons this application lacks merits and it is dismissed with costs to the applicants.

RULING READ AND SIGNED ON 23RD JULY 2010 AT NAIROBI

**M.K. KOOME
JUDGE**