



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

**Misc. Case 122 of 2006 (OS)**

**ROCKY DRIVING SCHOOL .....PLAINTIFF**

**VERSUS**

**AGIMBA ASSOCIATES ADVOCATES .....DEFENDANT**

**R U L I N G**

Notice of motion dated 30/6/08 brought under **Section 3, 3A, 28, 34 and 44 1(ii) Civil Procedure Act and Order XX rule 7, Order 41 rule 4, Order LII rule 4(3) and Order L rule 1, Civil Procedure Code.**

Orders sought that execution proceedings being undertaken in these proceedings and the proclamation by Keysian auctioneers dated 17/6/2008 be annulled.

That there be a stay of execution orders made on 15/4/08 pending determination of appeal. The costs be paid by the plaintiff.

The grounds upon which the application is based are stated mainly that notice of appeal has been filed against orders entered on 14/4/2008 and that the respondent has embarked on execution of the orders in breach of the provisions of **Section 94 of Civil Procedure Code and Order XX rule 7.** It also complained that the orders were made on a mention date and are in conflict with prior orders made by a Judge of concurrent jurisdiction.

The supporting affidavit was sworn on 30/6/2008 by Thomas Agimba, an advocate and associate in the defendant firm in Originating Summons dated the 16<sup>th</sup> February 2006. His firm was ordered by Justice Azangalala to file Bill of Costs for taxation and upon taxation this suit could be finalized.

In pursuance to that order the respondent filed Bill of Costs in:

- 1. In HCC Misc. No.38/2008**
- 2. In HCC Misc. No.33/2008.**

However, the matter came up before the Hon. Warsame, J. on 31/1/2008. That court made an order that the defendant do file an account. On a date fixed for mention on 15/4/2008 the said Justice Warsame ordered that the defendant firm do pay Kshs.550,000/= into court within (10) ten days and in default judgment be entered for that sum against the defendant.

The defendant has filed a notice of appeal against that Judge's decision. In the meantime, the firm was on

25/6/2008 served with a Proclamation dated 17/6/2008. The decree was not approved as provided under **Order 20 Civil Procedure Code.**

On a written application of Ms. Betty Rashid, the court registry prepared the decree and sent it to her firm without seeking applicant's advocate approval.

The suit is not finalized and final decree should not have been issued. The orders made by Hon. Justice Warsame are not in accordance with the prayers in the Originating Summons. This irregular order should not be allowed to be executed as it is oppressive and unreasonable.

And finally the proclamation attaches all items of office furniture and tools of trade, the defendant being a firm of advocates. The respondent in the replying affidavit states that on 15/4/2008 the matter was coming for rendering account by the defendant and court after hearing both parties ordered the deposit of Kshs.550,000/= within 10 days in default judgment to be entered against the defendant. The order was in presence of Counsel for defendant who addressed the court.

From what applicant states that he has filed a Notice of Appeal to Court of Appeal. What is the purpose of this application is to obtain a stay of execution pending the appeal.

It is therefore sufficient to comply with provisions of **Order 41 rule 4. Rule 4 (1)** requires that applicant do show sufficient cause to warrant such an order. **Rule 4 (2)** provides: No order for stay of execution shall be made unless the court is satisfied that substantial loss may result unless order is made and that such security as the court orders has been given by the applicant.

This Originating Summons is brought under **Order 52 Civil Procedure Rules.** From the record directions given on 9/7/2007 was that the Originating Summons be heard by way of affidavits.

On 20/9/07 Hon. Azangalala, J. ordered:

**“In the interim to the respondent to file his Bill of Costs for taxation by the Taxing Officer.”**

After some delay the matter came up for hearing on 31/1/08 as ordered by Judge on 31/1/08 and Mrs. Rashid argued the application, urging the court to order payment of Kshs.500,000/=.

Mr. Mutuli appeared for the defendant. He opposed application. He pointed to court that there was an order to file bills of taxation. He admitted the money had been received in 2006 and that the advocate had a lien until his fees are paid and/or taxation is completed.

After hearing the arguments the Hon. Warsame, J. ordered the defendant to render an account on the two suits in dispute within 21 days. By 15/4/08 when the matter came before court, both parties represented, the court orders:

**“In order to protect both parties” – that a sum of Kshs.550,000/= to be deposited by the defendant within the next 10 days failure of which there shall be judgment in favour of the applicant herein against the respondent.”**

This court cannot sit on appeal against an order of a Judge of concurrent jurisdiction. Therefore, it is my duty only to consider the application for stay of execution.

Upon considering the arguments on both sides my opinion is it would be substantial loss for an advocate's furniture and other items in his office to be auctioned. However, it is proper to order security to comply with **Rule 4 (2)** and I order that stay is granted upon the applicant/defendant deposits in court the sum of Kshs.550,000/= within the next 21 days from the date hereof.

These orders made are pending appeal which the applicant shall prosecute within the next 6 months failing which the stay shall lapse.

Costs of this application shall be in the cause.

It is so ordered.

**DATED** and **DELIVERED** at Nairobi this 6<sup>th</sup> day of February 2009.

**JOYCE N. KHAMINWA**

**JUDGE**