



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
MISC APPLI 426 OF 2006

EDWARD MWANGI MACHARIA..... APPLICANT

V E R S U S

REGISTRAR GENERAL..... RESPONDENT

R U L I N G

Before me is a Chamber Summons dated 16th February, 2009 filed by M/s Maina & Maina advocates for the respondents/applicants. The application was brought under section 3A of the Civil Procedure Act (*Cap. 21*) and Order XLI rule 4 of the Civil Procedure Rules, and paragraph 11(4) of the Advocates Remuneration Order under the Advocates Act (*Cap. 16*).

The application seeks for six orders, two of which have been spent, that-

1..... (*spent*)

2. *Leave be granted to the Applicant to object to the ruling of the bill of costs dated 28th February, 2008 delivered by the Honourable Taxing Mater on 13th October, 2008 out of stipulated time.*

3. (*spent*)

4. *This Honourable Court may order a stay of execution ensuing from the certificate of taxation dated 11th November, 2008 pending hearing and determination of the intended reference against the ruling delivered on 13th October, 2008.*

5. *Such other order and/or relief may be issued as the Court may deem fit under the circumstances.*

6. *The costs of this application be provided for.*

The application was filed with a supporting affidavit sworn by the applicant **EDWARD MWANGI MACHARIA** on 16th February, 2009. In the supporting affidavit, it is deposed that a ruling on taxation

was delivered on 13th October, 2008, and the applicant was dissatisfied with the same. His advocate on 15th October, 2008 wrote a letter requesting for the reasons for the said ruling. It is deposed that at one time the court file could not be traced. When the same was later traced, it was discovered that warrants of attachment together with warrants of sale had already been issued by the court. It was deposed that the applicant was apprehensive that the respondent would execute any time.

The application was opposed and heard inter-partes. At the hearing, Ms. Mumbi, for the applicant submitted that the amounts in the items as taxed were excessive. Counsel submitted that, at one point, the court file could not be traced, and that the present counsel for the applicant actually came on record in February, 2009. On the stay orders requested, reliance was placed on the case of **KASSAM KHIMJI LTD. –VS- MERIDIAN PROPERTIES LTD. – Nairobi HCCC No. 757 of 1994** wherein stay was granted by Ochieng J. Reliance was also placed on the case of S. **GICHUKI WAIGWA -VS- NINA MARIE LTD. Milimani High Court Civil Case No. 862** of 2003 wherein Kasango J. granted stay. Lastly, reliance was placed on the case of **SHAH & PAREKH –VS- APOLLO INSURANCE CO. LTD. [2005] eKLR**, wherein Ransley J. granted a stay.

The application was opposed. Mr. Njenga for the respondent submitted that stay of execution cannot issue on a certificate of costs. Counsel distinguished the case of **SHAH & PAREKH (supra)**, on the ground that in that case it was a client advocate bill of costs. Counsel also argued that no reference was brought within 14 days as required by law. In fact the response from the Registrar to the letter of applicant's Counsel dated 15/10/08 showed that the applicant provided the wrong case number. Therefore, the negligence of the applicant or his counsel could not be used to call upon this court to exercise its discretion.

It was also contended that, in law, this court did not have jurisdiction. It was firstly contended that the applicants filed an application and on the basis of the said application, the respondent incurred costs. Therefore, the applicant could not prevent the recovery of such costs. Reliance was placed on the case of **FRANCIS KABAA –VS- NANCY WAMBUI & ANOTHER – Nairobi Civil Application No. 298 of 1996 (113/96 Unreported)** – Wherein the Court of Appeal on 11th December, 1996 held that stay cannot be granted in respect of costs. Reliance was also placed on the case of **ELKANA MUKUNDI GATIMU & ANOTHER –VS- JOHN B. MUYA & 3 OTHERS [2006] eKLR**, wherein Azangalala J. held that stay of execution on costs cannot be granted.

It was in addition, contended that the application was brought under Order 41 rule 4 of the Civil Procedure Rules for stay pending appeal. Counsel argued that there was no appeal filed. Therefore the orders sought could not be granted. Counsel also relied upon the case of **OWINO OKEYO & CO. ADVOCATES -VS- PELICAN ENGINEERING & CONSTRUCTION COL LTD.** – High Court Miscellaneous Application No. 156 of 2003 wherein Azangalala J. refused to grant stay because the applicant had not demonstrated that the appeal would be rendered nugatory if stay was not granted.

Having considered the application, I am of the following views.

I will firstly deal with the issue of whether stay is available with regard to award of costs. In the case of **FRANCIS KABAA (Supra)** – the Court of Appeal stated-

“Before us the applicant says that what he wants is stay of an order that he should pay costs. But this is not what the order of Amin J. was all about. In any case, even if that were so, the appellant if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay orders can be granted in respect of costs. The applicant has also not given any cogent reason why he should be granted stay.”

The above case was followed in the case of **ELKANA MUKUNDI GATIMU –VS- JOHN MUYA** (Supra) by Azangalala J, when the learned Judge stated-

“However, as the Court of Appeal appears to hold a different view, the Plaintiff's application appears doomed to fail on the basis that there is no jurisdiction to entertain an application for stay of

execution of an order of taxation only made pursuant to the provisions of the Advocates Remuneration Order.”

In my view, the Court of Appeal did not say exactly what Azangalala J. stated. In my respectful view, the Court of Appeal stated that there was no stay for an order that someone should pay costs. It did not go to the extent of saying that there could be no stay of execution of an order from the taxation of costs. In my view a request for stay of an order to pay costs, is different from a stay of execution of the certificate issued following taxation of costs. I would agree with what was stated by Ochieng J. in the case of ***KASSAM KHIMJI LTD –VS- MERIDIAN PROPERTIES LTD*** – Nairobi High Court Civil Case No. 757 of 1994, thus-

“In my considered opinion, a decree cannot strictor sensu, arise out of the taxation. That which arises out of a process of taxation is a Certificate of Taxation. However, the court does recognize that execution can issue in respect of a Certificate of Taxation. Therefore, if the applicant were to satisfy the requirements for the grant of an order for stay of execution, the court would grant it.”

In my view therefore depending on circumstances, and also coming to court through the correct procedure, stay of execution of a certificate of taxation can be granted.

In our present case taxation of party and party costs appears to have been done on 14th October, 2008, at a figure of Kshs.174,499/= which was the taxed costs. From the documents filed, the applicant was actually represented by counsel at the taxation. On 15/10/2008 M/s Maina & Maina advocates (***not the advocates then on record***) wrote a letter to the Deputy Registrar asking for the reasons for decision, but provided a different case number 426 of 2007 instead of 426 of 2006. These advocates were firstly not on record, and secondly, they quoted a wrong case file number. The Deputy Registrar responded to them by letter dated 24th October, 2008 informing them that the subject file belonged to other parties. There appears to have been no response to the Deputy Registrar’s letter, except that by a letter dated 13th November, 2008 the same firm of advocates wrote another letter to the Deputy Registrar quoting the same wrong case number and stating that they could not trace the court file in order to come on record. What happened above is not helpful to the applicant, with regard to the request for stay.

In the first place, there is no explanation as to why new advocates surfaced after the taxation and engaged in correspondence instead of the advocates on record. Secondly, the said advocates persistently quoted the wrong court file number and no explanation has been given on that error to date. It is also noteworthy that no explanation has been given as to whether the said advocates received the Deputy Registrar’s letter of 24th October, 2008, and what action they took in its regard. In view of these unexplained shortcomings, I do not see how this court will exercise its discretion to grant a stay.

On the leave to object to the ruling in taxation, I observe that there was a delay between 13th October, 2008 when taxation was done to 16th February, 2009 when this present application was filed. That is a period in excess of four (4) months. That is a long time of delay. However, with the apparent confusion arising from the matter being handled by fresh advocates, I will give the benefit of doubt to the applicant, and allow him to challenge the ruling in taxation. The applicant will however pay the costs of this application.

Consequently, and for the above reasons I order as follows-

- 1. I allow the applicant up to 10th of June, 2009 to file an objection to the Taxing Master’s Ruling delivered on 13th October, 2008.***
- 2. I decline to grant stay of execution.***
- 3. The applicant will pay the respondent’s costs of this application.***

Dated and delivered at Nairobi this 26th day of May, 2009.

George Dulu

Judge.

In the presence of-

Mr. Momanyi for the applicant

Kevin - Court clerk.