



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

**Civil Suit 1262 of 2005**

**FRANCIS NJUGUNA MWANGI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JOSEPH MAHURO  
MAINA.....DEFENDANT/APPLICANT**

**RULING**

1. This case is concluded. On 29/09/2008, the Plaintiff's Bill of Costs was taxed at Kshs.144,644/= only. A Certificate of Taxation to that effect was issued on 16/01/2009. By his application dated 19/02/2009, the Defendant, through the firm of J.M. Njenga & Co. Advocates, moved the court for the following orders:-

1. ***THAT the instant application be certified urgent and be heard ex parte in the first instance.***
2. ***THAT there be a stay of execution of the decree and judgment herein delivered on 15/11/07 as it relates to the payment of costs of the suit pending the hearing and determination of an intended reference against the taxation orders issued on 29/9/08.***
3. ***THAT warrants of attachment of the defendants property dated 13/2/09 and issued to Galaxy Auctioneers be lifted forthwith and unconditionally.***
4. ***THAT pending the hearing of this application interpartes, there be an interim order in terms of prayer 2 above.***
5. ***THAT costs of this application be provided for.***

2. The Plaintiff has objected to the Defendant's application on the following grounds:-

1. ***THAT the application is misconceived, frivolous and is an abuse of the process of court, and does not lie.***
2. ***THAT the application is incurably defective and bad in law and ought to be struck out.***

3. The Preliminary Objection was argued before me on 29/04/2009. During the arguments, Mr. Mutubwa, learned counsel for the Plaintiff/Respondent contended that the Defendant's Chamber Summons application dated 19/02/2009 is expressed to be brought under a non-existent Order 91 of the Civil Procedure Rules. Mr. Mutubwa argued that any intended references against a taxation should normally be brought under the self-executing Advocates (Remuneration) Rules and in particular Rule 11

thereof. Rule 11 reads as follows:-

**11 (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 his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.**

**(3) -----**

**(4)-----**

4. Referring to rule 4 of Order 47 of the Civil Procedure Rules, Mr. Mutubwa submitted that since taxation matters and any intended references thereto are governed by the Advocates (Remuneration) Order, no other rules of the Civil Procedure should be engaged by an Applicant seeking to file or bring a reference against any taxation. Rule 4 of Order 47 is in the following words:-

**“Any special rules of procedure not contained in these Rules which may have been or may be made by the High Court shall, where they conflict with these rules, prevail and be deemed to govern the procedure in the matter therein mentioned.”**

5. Mr. Mutubwa further argued that the Advocates (Remuneration) Order does not in fact contemplate stay of execution except through a reference filed by the aggrieved party in accordance with the Advocates (Remuneration) Order. He argued that if the Defendant wanted a stay, she should have done so under the provisions of Order 41 of the Civil Procedure Rules since he has already filed a Notice of Appeal. Mr. Mutubwa said that it is only through an application for stay pending appeal under Order 41 of the Civil Procedure Rules that this court can grant the order sought by the Defendant herein.

6. Mr. Mutubwa also argued that even if the court were to find that this application is properly before it, it would still have to find that this purported reference is not a reference at all and that no proper notice of objection was filed by the Defendant.

7. The Defendant said that he had to bring the instant application for reasons that though he filed a Notice of Objection against the taxation orders, the taxing master was yet to furnish the Defendant with the reasons for the taxation. The Defendant also averred that he filed a Notice of Appeal against the judgment herein though the appeal was compromised by agreement of the parties herein dated 5/03/2008 which agreement also compromised the entire suit and interests of the parties once and for all. The Defendant further averred that the Plaintiffs attempts to execute for costs was a double jeopardy against the Defendant and that the Defendant can only have his voice heard on this issue on an application such as the one that is now before me.

8. The Defendant stated in his affidavit in support of the application that having received the purchase price in compliance with the agreement dated 5/03/2008 and duly executed the Sale Agreement between the parties herein, then he is estopped from executing for costs or any other legal remedies in connection with this case. For these reasons, Mr. Mutubwa asked the court to strike out the Defendant's application on grounds of incompetence and incurability for failing to comply with rules of procedure.

9. The Defendant was represented by Miss Mambo of M/s J.M. Njenga & Co. Advocates. While conceding that the rules under which the application was brought were wrong, she submitted that the error was a mere typing error which was curable under the rules. Miss Mambo intimated that she would wish to amend the application but she did not pursue her request. Miss Mambo also submitted that the Advocates (Remuneration) Order does not provide for stay of execution of costs and further that they could not have proceeded under Order 41 of the Civil Procedure Rules because they did not have the certified copies of proceedings and order giving rise to the decree. She also submitted that they were still

waiting for the taxing master's reasons for the decision he made on items 1 – 15. The “**Notice**” to the taxing master is a letter dated 6/10/2008 by which the Defendant's counsel informed the Deputy Registrar that the Defendant was dissatisfied with the taxation of certain items of the Plaintiff's Bill of Costs. The Defendant's advocates also said that if the Deputy Registrar was satisfied that the reasons they now sought were contained in Ruling already made, then they should be supplied with a certified copy of the said ruling, which ruling was apparently not supplied.

10. In reply, Mr. Mutubwa submitted that the Advocates Act and the Advocates (Remuneration) Order are clear in their provisions that a stay of execution cannot issue in the manner envisaged by the Defendant in his present application, and that the proper remedy available can only be sought under Order 41 of the Civil Procedure Rules. Mr. Mutubwa also submitted that the letter dated 6/10/2008 written on behalf of the Defendant does not constitute a notice of objection under the Advocates Remuneration Order, which notice should have been filed within 14 days of the Date of Taxation.

11. A look at the record shows that the Defendant has attempted to take a two-pronged approach to the issues facing him. He has filed a Notice of Appeal dated 13/12/2007, though there is no indication that he obtained an order of stay of the judgment of Ang'awa J delivered on 15/11/2007. The Notice of Appeal in itself does not serve as an automatic stay. In the meantime, the Plaintiff filed his Bill of Costs which was taxed on 29/09/2008. Both parties were represented at the taxation.

12. Having now considered the preliminary objection and the application as filed, and after carefully considering the submissions made to me by both counsel, the issue that arises for determination is whether the admitted mistake committed by the Defendant on its application is excusable. In light of the submissions and the rules both under the Advocate's (Remuneration) Order and the Civil Procedure Rules, it is my view that the Applicant's application dated 19/02/2009 is incurably defective and ought to be struck out. I am not persuaded that the admitted error is merely a typing error. There are clear provisions of the law under which a party who intends to appeal can get relief from execution of a judgment or decree. This is Order 41 of the Civil Procedure Rules. It is also clear that objections to taxation must be lodged in accordance with the Advocate's (Remuneration) Order and not otherwise. The Defendant in this case has moved flat footedly on both accounts and for this reason his application seeking a stay of execution order under a non-existent Order 91 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act cannot stand. The court is of course aware of the wide powers conferred upon it by Section 3A of the Civil Procedure Act, but in the circumstances of this case, the Defendant ought to have lodged a proper Notice of Objection under the Advocates Remuneration Rules, and in particular Rule 11 thereof.

Alternatively, the Defendant should have brought his application, under Order 41 of the Civil Procedure Rules since there is already on record his Notice of Appeal against the judgment of Ang'awa J delivered on 15/11/2007.

13. In the result, I uphold the Plaintiff's preliminary objection and strike out the Defendant's application dated 19/02/2009 with costs to the Plaintiff's/Respondent. However, if the Defendant is still desirous of pursuing his quest for stay, he is granted leave to file appropriate applications within 30 days from the date of this ruling.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of July, 2009.**

**R. N. SITATI**

**JUDGE**

Delivered in the presence of:

Mr. Mbogo for Mutubwa (present) for the Plaintiff/Respondent

Mr. M. Akhan for Mambo for the Defendant/Applicant

Weche- court clerk