



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

**Miscellaneous Civil Application 767 of 2006**

**FIRESTON E.A. (1969) LTD.....APPLICANT**

**VERSUS**

**MOHAMED GANDANI.....RESPONDENT**

**RULING**

The background information to this ruling is that on 22/02/08 this court, made the following orders on an application for leave to appeal out of time among others:-

1. For the reason given the court, is inclined ..... to give the applicant 45 days from the date of the reading of this ruling to file an appeal out of time.
2. ....the temporary stay granted herein will only last for 45 days from the date of the reading of this ruling, during which time the applicant is expected to file an appeal and then seek stay from the court appealed to.
3. The respondent will have costs of the application.

The court, has been informed that appeal number 88/2008 has already been filed and orders annexed to this application as DO 5. Of importance to this ruling is order no 3 and 4. They read:-

*“3 That there be a stay of execution of the judgement decree and order delivered on 9<sup>th</sup> May 2006 pending the hearing and determination of the defendants appeal herein.*

*4. That the sum of Kenya shillings Four hundred seventeen thousand six hundred Forty Eight (Kshs. 417,648) be deposited in the joint interest earning account in the name of Christine Oraro and Company Advocates and F.N. Wamalwa and Company Advocates at E.A.B.S Bank, Fedha Towers in A/C NO. 01-50103174 be deemed as security to continue to be held in the said account until final determination of this appeal.*

In the meantime the respondent who was successful in the ruling delivered by this court, on 22/02/08 filed his bill of costs, which was taxed, by the D/R on the 30/09/08 in the sum of Kshs. 83, 646/= all inclusive. The DRS orders prompted the respondent/applicant to come to this court, vide an application dated 5/12/2008 and filed the same date. It is by way of chamber summons brought under order XXI rule 1 (c) and 25 of the CPR section 3A of the CPA cap 21 laws of Kenya and all other enabling provisions of the law. 5 prayers are sought namely:-

1. Spent

2. *spent*

3. *That there be a stay of execution of the orders by Honourable Muya (DRY) pending hearing and determination of NBHCCA NO 88 of 2008.*

4. *That the taxed costs of 83,646/= be deposited in a joint interest earning account in view of orders of Honourable lady justice Okwengu of 17<sup>th</sup> March 2008 granting stay of execution in NB1-HCCA No 58 of 2008.*

5. *That the costs of this application be provided for”*

The grounds in support are set out in the body of the application, supporting affidavit, annexures and written skeleton argument. The sum total of the same in a summary form is to the effect that:-

- This court made orders granting leave to appeal.
- In pursuance to the said leave granted, appeal number HCCC A 88/08 has already been filed.
- There is an order for execution to the tune of Kshs. 83,646/= herein.
- Maintain the said taxation order is related to the appeal filed.
- That in the appeal filed, the lower court judgement is being challenged.
- The decretal sum has been secured in a joint deposit, and it is only proper that the amount of taxed costs also be secured.
- The reason for securing the taxed costs is because the pecuniary means of the respondent are unknown and as such it will be difficult to recover that amount should the applicant succeeded on his appeal.
- The respondent has not demonstrated the loss he will suffer if the amount is deposited.
- That the opposition is incompetent as the respondents have filed both grounds of opposition and a replying affidavit and in the absence of an election as to which process to be relied upon, the application is to be deemed as being unopposed.

The respondent to this application filed a replying affidavit sworn by Fred Erick N. Wamalwa on the 9<sup>th</sup> day of December 2008 as well as grounds of opposition dated the same 9<sup>th</sup> day of December 2008 and filed the same date. As submitted by the applicants counsel, the Respondents response was made under order L rule 16 CPR by virtue of which the respondent was expected to have made an election to either file a replying affidavit or grounds of opposition but not both. This court, has construed this provision severally in the discharge of its judicial function, and arrived at the conclusion that there is a mandatory requirement that an election be made and where no election has been made both applications stand faulted and a proper candidate for striking out. Herein the court, has perused the record and the submissions of the respondents and no where is there an election made. As such both the replying affidavit and grounds of opposition have been faulted and are struck out. The striking out does not leave the respondent remediless. There is room to oppose the application points of law. The respondent has filed written skeleton arguments. It means that only points of law will be taken into consideration when disposing off this application. The major ones are as follows:-

-Since the application giving rise to the taxation order herein was made under order XLIX rules 5, order L rule 1 CPR, section 99 G and 3A of the CPA, it amounts to a suit in terms of the definition of the said word.

-In this courts', ruling of 22/2/2008, the court, made it clear as to which of the two parties was to meet costs of the other.

-By reason of that finding the miscellaneous proceedings commenced herein have been finally concluded and determined.

-Matters being concluded and determined cannot be reopened except for appeal and review purposes. No such appeal, or review which has been preferred against this courts', ruling.

-Contrary to the submission of the applicants counsel, it is the lower court decree which is the subject of HCCA NO 88 of 2008 and not the ruling which gave rise to the taxation.

-No reference has been made against the taxation order and as such its payment cannot be stopped in the manner sought.

-The provisions of section 3A of the CPA have no application herein.

-If any stay order is made, herein, it will be oppressive and against a just order of this court, made for reasonable course.

-Denial of the respondent to be heard on the grounds of opposition and replying affidavit filed herein would be tantamount of a denial of a rights of being heard under section 77 (g) of the constitution of Kenya.

-Asking this court, to deal with the matter in the manner sought would be nothing but to ask this court, to sit on its own appeal.

-This court, can only revisit that issue if it can be demonstrated that it is intended for purposes of giving effect to its orders.

Reference was made to the case of **MANSION HOUSE LIMITED VERSUS JOHN STANSBURY WICKINSON (1954) 21 EAC 98** where it was held inter alia that A suit is any civil proceeding commenced in any manner prescribed by the rules made by the rules committee to regulate the procedure of courts', order civil procedure ordinary section 81, and an application otherwise commenced in the supreme court, is only a suit if a local or special law so provides.

The case of **LAKHAMSHI BROTHERS LIMITED VERSUS B. RAJA AND SONS (1966) EA 313** where it was held inter alia that the court, has an inherent jurisdiction to recall its judgement in order to give effect to its manifest intention or what clearly would have been the intention of the court, and some matter not been inadvertently committed, but it would not sit on appeal against its own judgement in the same proceedings.

On the courts', assessment of the facts herein, it is common ground that indeed this court, gave an order in its ruling of 22/02/08 that the respondent to that application was to be paid the costs of those proceedings. The proceedings that had given rise to that ruling were commenced by way of a Miscellaneous application whose control prayer was to seek leave to appeal out of time against a judgement emanating in the lower court. It is common ground that, that control prayer was granted and it's by product is the filed appeal No HCCC A 88/2008. This being the case, it is therefore correctly submitted by the respondents counsel, respondent to the application subject of this ruling that the proceedings herein stand determined and concluded.

It is to be noted however that, what gave rise to this ruling is the order for the payment of costs which costs have been taxed by the taxing master of this court. The applicant to this application subject to this ruling seeks an order that payment of the said costs be stayed pending the determination of the appeal filed because according to them, the two are inter related.

The stand of the respondent is however different. It is to the effect that the proceedings herein are distinct to those of the lower court, which have been appealed against in HCCC A 88/08 and in the absence of any appeal or review pending against the orders of this court, made on the 22/2/2008, there is no way the order on costs can be stayed.

It is noted from the grounds and submissions of the applicants that they did not address this court, on the effect of the provisions of section 51 (2) of the advocates Act in so far as it relates to the enforcement of an order on payment of costs by a successful party. The section reads

*“Section 51(2) The certificate of the taxing officer by whom any bill has been taxed shall unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court, may make such order in relation there to as it thinks fit including in a case where the retainer is not disputed an order that the judgement be entered for the sum certified to be due with costs.”*

The court, appreciates that it has not been called upon to determine whether the payment of costs is to be enforced or not, but whether the order can be stayed. However construction of the said provision by this court, will lead to the same results as to whether the stay order was to issue or not, with the ultimate result being an issue as to whether the successful party is to enjoy the fruits of the taxation order. This is so because if the order is not stayed then the enforcement follows.

The above finding leads the court, to determine under what circumstances taxed costs can be withheld where the proceedings in which the order has been made are determined. Herein the proceedings are determined as all that the original applicants wanted to reap from the court, Via them was an order to file an appeal out of time which has been realized. In numerous own ruling, this court, has ruled that the only instances when realization of the fruits of a taxation order can be put on hold is when the rule 11 and 12 of the Advocates Remuneration order procedures are set in motion. These are the procedures whereby the aggrieved party wishes to have the taxation order interfered with by the superior court.

In the case of **OTIENO ODEK ND COMPANY ADVOCATES VERSUS ORBIT CHEMICAL INDUSTRIES LIMITED NAIROBI HCCC MISC APPLICATION 222 OF 2006** decided by this court. on the 23<sup>rd</sup> day of March 2007, the reasoning of this court, running from pages 3-4 of the said ruling was to the effect that it is only the setting in motion of the rule 11 and 12 of the Remuneration order procedures which can put on hold the realization of the fruits of a taxation order. The same stand was taken by this court, in **WAKAHU MBUGUA AND COMPANY ADVOCATES VERSUS VICTOR NJENGA WANJIKU NAIROBI MISC APPLICATION NO. 30 OF 2004** decided by this court, on the 30<sup>th</sup> day of March 2007 among many others.

This court, has applied the above constructions in own ruling cited above, revisited the said construction and it agrees with the stand of the counsel for the respondent herein that a stay order is not maintainable herein as it will not serve any purpose by reason of the fact that proceedings herein have become finally determined and are distinct from the lower courts', proceedings giving rise to the pending appeal HCCC A 88/08. More so when the applicant has already benefited from the fruits of the orders in respect of which they were ordered to pay costs.

For the reasons given in the assessment the applicants application dated 5<sup>th</sup> December 2008 and filed on the same date is refused and the same is dismissed for the following reasons:-

1. The proceedings herein are distinct from the lower court proceedings which gave rise to appeal No. 88/2008.
2. A reading of section 51 (2) of the Advocates Act cap 16 laws of Kenya together with rules 11 and 12 of the Advocates Remuneration order reveals that the only circumstances under which realization of the fruits of a taxation order can be put on hold is when the rule 11 and 12 procedures are set in motion. The applicants herein has not set in motion those procedures.
3. The proceedings herein were initiated solely for purposes of seeking stay and enlargement of time

within which to file an appeal, which orders were granted and the applicant therefore benefited from those orders as the appeal has been filed and stay obtained, there is no other subsequent proceedings pending herein which can put on hold the realization of the taxation order. The order on costs was meant to compensate the respondent for being brought into the participation in these proceedings.

The respondent is therefore entitled to realize those costs.

4. The respondent will also have costs of proceedings leading to this ruling.

DATED, READ AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2009.

**R.N. NAMBUYE**

**JUDGE**