



NDUNGU NJOROGI & KWACH ADVOCATES APPLICANT

VERSUS

KAMCONSULT LIMITED DEFENDANT

RULING

Application dated on 7/7/2009 brought under **Orders IXB Rule 8 Civil Procedure Code, XXI Rule 25 Civil Procedure Code, L Rule 17 Civil Procedure Code, Section 3A and Section 63 e of Civil Procedure code** seeking orders:-

- 1. Proceedings and order of 22nd May 2009 be set aside;***
- 2. Court do enlarge time within which to file and serve their response to the notice of motion dated 12/2/2009;***
- 3. The applicant be granted leave to challenge the decision of Taxing Master out of time.***

The grounds upon which the application is based are set out in the

application. The supporting affidavit is sworn by Peter Kamau Ikigu described as Managing director of the applicant company. He swears that his advocate, Mr. Khalwale informed him that he was not aware of any judgment entered against the applicant but that on 1/7/2009 the advocate perused court file and found that on 22/5/2009 the matter was in court and respondent's application was granted when the matter proceeded ex parte and judgment was entered in favour of the respondents in the sum of Kshs.3,959,634/75 with interest at court rates.

Notice of hearing on 22/5/09 was not received. However, it is admitted that on 20/3/2009 the advocate instructed to appear in court was Ms. Jelangat, who apparently recorded in her diary that the matter was scheduled for hearing on 22/7/09. However, the record for 20/3/09 when the lady advocate appeared, the hearing date was adjourned to 22/5/09 clearly. On that date (20/3/09) M/S Khalwale were given leave to file replying affidavit within 14 days. Court ordered parties to file written submissions for highlighting on 22/5/09.

By 22/5/09 no replying affidavit or written submissions had been filed. And the applicants were not present. Consequently, at the application of respondent, counsel and in view of the fact there was no opposition, the application was allowed and judgment entered against applicant. The decision as to the amount of judgment was made by Taxing Master in **Misc. Application No. 1237 of 2007** on 2/2/2009.

The certificate of taxation was issued after hearing before Taxing Officer. The taxation was not challenged by the applicant. No steps were taken to refer the matter to High Court. It is too late now and an abuse of court process to seek leave to challenge the taxation after inordinate delay.

There is allegation that the applicant has paid to respondent. The respondent denies this allegation and states that the payment was not alleged before the Taxing Officer as would have been the case. Regarding the application under **Order 21 Rule 25** the court may on such terms as to security or otherwise as it thinks fit stay execution of decree until the pending suit has been decided. This power is discretionary and the court is required to exercise discretion judicially.

No security is offered and there is delay involved. The suit which is said to be pending was filed on 23/6/2008. Defence was filed on 1/8/2008. The pleadings have long been closed and there is no evidence as to the progress of the proceedings. Stay would only delay the applicant indefinitely. It is rejected.

On the issue of enlarging time to the applicant to file their response, leave has already been given on 20/3/09. The applicant failed to comply with court order. The present application is an abuse of court order. Similarly, the application for leave to challenge the decision of Taxing Master is not supported by any grounds and the same is calculated to delay the payment of decree. It is an abuse of court process.

I therefore find that there is no reason to warrant an order for setting aside the court order made on 22/5/2009. The whole application is aimed at delay of the payment of taxed costs to the respondent and it is an abuse of court process.

The application is dismissed with costs to respondent.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 30th day of October, 2009.

JOYCE N. KHAMINWA

JUDGE