



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI**

**Civil Case 22 of 2002**

**DANSON MUNENE KIBETU.....PLAINTIFF**

***Versus***

**ELIUD NGARE MURAGE**

**SOLOMON JACOB MUREU.....  
.....DEFENDANTS**

**R U L I N G**

This is an application by Solomon Jacob Mureu (*Solomon*) under Order XLIV rules 5 of the Civil Procedure Rules, rule 11 (1) & (4) of the Advocates (Remuneration) order and Section 3A of the Civil Procedure Act for essentially three orders, namely, extension of time within which Solomon may object to the taxation made by the Deputy Registrar on 17<sup>th</sup> June, 2009, stay of execution of the respondent's taxed costs pending the hearing and determination of the intended objection and costs of the application.

The application was advanced on the grounds that fourteen days had gone by since Danson Munene Kibetu's (*Danson*) Bill of costs had been taxed pursuant to a judgment delivered in his favour herein on 14<sup>th</sup> May, 2009. The taxed costs came to Kshs.324,577/= . Aggrieved by the said taxation, Solomon instructed the firm of Messrs Kamau Kuria & Kiraitu Advocates in place of Messrs Lucy Mwai & Company Advocates hitherto on record for him to file an objection under rule 11(1) of the advocates Remuneration order. Messrs Kamau Kuria & Kiraitu Advocates subsequently filed an application on 24<sup>th</sup> June, 2009 seeking leave of court to come on record for Solomon which application was heard and allowed on 31<sup>st</sup> July, 2009. In the meantime Danson commenced execution proceedings by obtaining a notice to show cause why Solomon should not be committed to civil jail. Solomon is apprehensive that unless a stay of execution is granted his intended objection will be rendered nugatory. Danson will not however suffer any prejudice if the orders sought are granted and in any event the application had been made without undue delay.

The application was further supported by an affidavit sworn by Solomon. That affidavit merely reiterates and expounds on the grounds on which the application is anchored as aforesaid. Suffice to add that Solomon has since been advised by his advocates now on record that the taxed costs were manifestly excessive, that under rule 11(1) of the Advocates Remuneration Order, if any party wishes to object to the decision of the taxing master, he has within 14 days after such decision give notice in writing to the taxing master of the items of taxation he objects to. Thereafter the taxing master shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within 14 days from receipt of the reasons aforesaid apply to a judge by chamber summons setting out the grounds

of his objection. Solomon now intends to object to the aforesaid taxation through his advocates on record. That it would be in the interest of justice therefore that he be granted an opportunity to challenge the said taxation. Unless a stay of execution is granted, his intended objection would be rendered nugatory which eventuality would cause him irreparable loss and damage as the amount allowed by the taxing master was quite substantial.

As expected that application was opposed through a replying affidavit sworn by Danson. In the main he deponed that the application was calculated to delay and frustrate the enjoyment of the fruits of his judgment and that there was a similar application dated 23<sup>rd</sup> June, 2009. In any event he was able, ready and willing to refund any of the sums found due to Solomon in the unlikely event of his success and that there cannot be stay of execution on costs owed to a successful party. Finally he deponed that the application was incompetent, abuse of the process of court and fatally defective.

At the hearing of the application Ms Mwai, Learned counsel for Solomon orally submitted that the reason for the delay in bringing this application was because the applicant changed advocates after judgment. The delay was thus not deliberate. It was excusable and none of the parties would suffer any prejudice. In support of her submissions, counsel relied on the following authority – Milimani HCCC No.2335 of 1997 Motichand Virpal shah & others Vs Investment & Mortgages Bank Ltd & Others (UR).

Mr. Nderi, learned counsel for Danson countered Ms Mwangi's submissions aforesaid in this manner; that the application was incompetent as it ought to have been filed as a Notice of Motion, that the application was made in bad faith since Solomon had by an application dated 25<sup>th</sup> May, 2009 obtained interim stay orders on the decree which excluded costs. That the taxation complained of was done on 17<sup>th</sup> June, 2009, yet the instant application was filed on 20<sup>th</sup> August, 2009. Thus the application was prompted by execution proceedings. Solomon had not shown that Danson was a man of straw who will be unable to repay the taxed costs in the event that he succeeds in objection. Justice is a two way sword and cuts both sides. Concluding his submissions, counsel stated that there can be no stay over taxed costs.

I have carefully considered the application, the rival affidavits plus the annexures thereto, the oral submissions made by counsel and the authorities cited. It is now well settled that the decision whether or not to extend time is essentially discretionary. That discretion must of necessity be exercised judicially and not capriciously. In the exercise of such discretion the court must consider the length of the delay, secondly, the reason for the delay; thirdly the chances of the intended objection succeeding if the application is allowed; and fourthly, the degree of prejudice to the respondent if the application is granted. However, that list is not exhaustive. To limit consideration to only those four issues would indeed fetter the unlimited and inherent discretion conferred to the court when dealing with such applications.

It is not disputed that the taxation was conducted on 17<sup>th</sup> June, 2008. By then Solomon was being represented by Messrs Lucy Mwai & Company Advocates. It is also not disputed that seven days later on 24<sup>th</sup> June, 2009, Solomon changed advocates and instructed Messrs Kamau Kuria & Kiraitu advocates to hitherto act for him in this matter. As the said advocates were coming on record after judgment, they were under the rules required to apply to court for leave to so act. That application was indeed made on the same day of 24<sup>th</sup> June, 2009. However, the same was not heard and allowed until 13<sup>th</sup> July, 2009. The instant application was then filed on 14<sup>th</sup> August, 2009 a month or so later. The delay aforesaid is in my view not inordinate considering the circumstances of the case. It was also not deliberate but was caused by legal requirements which perhaps were beyond the control of Solomon. Indeed the delay is excusable. I have also considered the arguability of the intended objection. I have looked at the filed request for reasons for taxation of certain items in the bill of costs and I am satisfied that there are discernable valid grounds of objection and therefore the intended objection proceedings ex-facie do not appear to be frivolous. Finally, I am satisfied that no prejudice will be occasioned to Danson if time is extended to enable Solomon to contest some times in the taxed bill of costs. For all the foregoing reasons I would allow the 3<sup>rd</sup> prayer in the application.

I am not inclined however to grant prayer 5 of the application. To do so would be tantamount to putting the cart before the horse. There is no basis upon which this court can stay execution of the taxed costs. Such an application can only come under consideration once Solomon has commenced the objection proceedings pursuant to the extension of time hereby granted. As of now and in the absence of objection proceedings, there is no substratum upon which a stay order can be hoisted.

In the event that I am wrong in my aforesaid holding, I would still have denied Solomon prayer 5 of the application on the ground that the execution being undertaken is in the nature of a money decree. In Kenya Shell Ltd V Kibiru & Another (1986) KLR 410, the court of appeal held that normally a stay of execution would not issue in money decrees. However, recent decisions of the same court seem to have qualified that general proposition of the law. The qualification is to the effect that in certain cases, an appeal against a money decree, if successful, may be rendered nugatory. In such cases however, the court balances two parallel positions. First, that a litigant if successful should not be deprived of the fruits of a judgment in his favour without just cause. The second factor is that, if the execution of the decree will render the proposed appeal nugatory, the court will be inclined to grant a stay, may be on terms. See Nation Newspapers Limited V Peter Baraza Rabando, Civil Application number 1 of 2007 (UR).

In this matter, Solomon has not stated that the Danson is such a man of straw that in the event he was compelled to pay over the taxed costs on the pain of taxation, Danson may not be in a position to refund the same to him in the event that he successfully objects. On the other hand, Danson has categorically deponed that he is a man of means and that if he is paid the amount and in the unlikely event that Solomon succeeds in his endeavours he will be able, ready and willing to refund any of the sums found to be due to him. That deposition has not at all been challenged. Finally, there can ordinarily be no stay on costs owed to a successful litigant.

That being my view of the matter I make the following orders on this application:

- (1) I allow prayer 3 of the application with costs however to Danson. Solomon has seven (7) days from the date hereof to object to the taxation made by the Deputy Registrar on 17<sup>th</sup> June, 2009.
- (2) Prayers 1 and 2 and 4 in the application are no longer available to Solomon as they have been overtaken by events.
- (3) Prayer 5 is denied.

*Dated and delivered at Nyeri this 8<sup>th</sup> day of October, 2009.*

**M.S.A. MAKHANDIA**

**JUDGE**