



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA OF KISII**

**Miscellaneous Civil Case 4 of 2008**

**In the matter of Obaga & Company, The Advocate**

**AND**

**In the matter of Taxation of Advocate/Client Bill of Costs**

**BETWEEN**

**OBAGA & COMPANY ADVOCATES ..... THE ADVOCATES/APPLICANT**

**VERSUS**

**KIPKEBE LIMITED ..... THE CLIENT/RESPONDENT**

**RULING**

On 30<sup>th</sup> June, 2009 this court dismissed an application by Kipkebe Limited seeking enlargement of time to lodge a notice of objection to taxation concerning taxation of Advocate/Client bill of costs. The bill was taxed on 30<sup>th</sup> June, 2008 in the sum of Kshs. 111,226/= and a certificate of costs issued thereafter.

Being dissatisfied with the said ruling, the client filed a Notice of Appeal to the Court of Appeal. The same was filed on 2<sup>nd</sup> July, 2009.

The client has now filed an application for stay of further and/or other proceedings pending hearing and determination of the intended appeal.

The application was made on grounds that:

- **The client will be prejudiced if the advocate's application dated 20<sup>th</sup> April, 2009 seeking entry of judgment in accordance with the taxed costs is heard and disposed of prior to the intended appeal.**
- **The client wishes to pursue the intended appeal.**
- **That this court's decision sought to be appealed against meted punishment upon the**

**client without determination of the issues in dispute on merit.**

- **That the application is intended to ensure that judicial time is properly spent because if the intended appeal is allowed the hearing of the pending application will be unnecessary.**
- **The Advocate will not suffer any prejudice if the status quo is maintained.**

The said application was supported by an affidavit sworn by Mwikali Muthoka, the Client's Legal Officer.

The Advocate filed grounds of opposition and stated, *inter alia*:

- **The application is incompetent, misconceived and otherwise an abuse of the court process.**
- **The Advocate stands to suffer prejudice if the application is granted.**
- **The application is intended to delay or deny the Advocate enjoyment of her taxed costs.**
- **The application does not satisfy the conditions set out under Order XLI rule 4 (1) and (2) of the Civil Procedure Rules.**
- **The intended appeal will not be rendered nugatory if the orders sought are granted.**

Mr. Oguttu for the applicant/client made brief submissions in support of the application. He made reference to several authorities, a list thereof is on record.

Miss Obaga for the advocate/respondent opposed the application and equally made brief submissions reiterating the aforesaid grounds of opposition.

This is an application for stay of proceedings pending appeal and not an application for stay of execution pending appeal. The two are different. Stay of execution pending appeal cannot be granted unless the applicant satisfies the court that he will suffer substantial loss if stay is not granted and such security as the court may order has been provided. The application should also be made without undue delay.

On the other hand, an application for stay of proceedings pending appeal is not restricted to the above conditions, that is, **Order XLI rule 4 (2)** of the **Civil Procedure Rules**. A close reading of **Order XLI rule 4 (1)** shows that in considering an application for stay of proceedings pending appeal the court merely exercises its judicial discretion without the mandatory restrictions spelt out under **Order XLI rule 4 (2)**. The discretion is unfettered but has to be exercised judicially and not whimsically. As stated by Ringera, J. (as he then was) **IN THE MATTER OF GLOBAL TOURS AND TRAVELS LIMITED**, winding up **Course No. 43 of 2000 at Milimani Commercial courts** **“the sole question is whether it is in the interest of justice to order a stay of proceedings and, if it is, on what terms it should be granted.”**

In this application, the client's desire is that the advocate should not proceed to obtain judgment for the taxed costs amounting to Kshs. 111,226/= until the intended appeal is heard and disposed of. It is not for me to speculate about the chances of success of the intended appeal. What I think is important to consider is whether:

- (i) **The intended appeal will be rendered nugatory if stay of proceedings is not granted.**

(ii) **The applicant will suffer prejudice or hardship if the order sought is not granted and contrast that with any prejudice or hardship that may be suffered by the Advocate if stay of proceedings is granted.**

The applicant did not demonstrate to this court that its intended appeal will be rendered nugatory if the application is not allowed. If the intended appeal is successful, the Court of Appeal will enlarge the time for the applicant to file a Notice of Objection to the taxation of the Advocate/Client bill of costs. The applicant will then move to the High Court and file the Notice of Objection. The same will be listed for hearing and may be allowed or disallowed.

If the application for stay of proceedings is not allowed, the Advocate will apply for judgment to be entered in terms of the certificate of taxation. She will then apply for execution unless the judgment sum is paid. The applicant has not demonstrated that it will suffer hardship or prejudice if it pays a sum of Kshs. 111,226/=. If the applicant succeeds in its objection proceedings it can recover that sum or any other amount that it will have paid to the advocate. It has not been shown that the advocate is incapable of paying back that amount if she is so ordered.

On the other hand, grant of stay of proceedings pending hearing and determination of the intended appeal will mean that the advocate may have to be kept out of her fees for a considerable period of time considering the time it will take for the intended appeal to be heard and determined which will in turn pave way for the objection proceedings to be lodged, heard and finalized. I agree with Kuloba, J. (as he then was) in MACHIRA t/a MACHIRA & CO. ADVOCATES –VS- EAST AFRICAN STANDARD (NO.2) [2002] 2 KLR 63, that a successful party at whatever stage should have access to the consequences of that judicial finding and decision. Any subsequent decision which tends to impede the normal flow of justice by suspending the enjoyment of the consequential orders can only be rendered in exceptional circumstances.

For these reasons, I am not persuaded that I ought to exercise my discretion in favour of the applicant. I dismiss the application with costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 3<sup>RD</sup> DAY OF DECEMBER, 2009.**

**D. MUSINGA  
JUDGE.**

**3/12/2009**

Before D. Musinga, J.

Mobisa – cc

Ms Obaga for the Advocates

Mr. Oguttu for the Client

**Court:** Ruling delivered in open court on 3<sup>rd</sup> December, 2009.

**D. MUSINGA**

JUDGE.