



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

**Civil Case Misc 632 of 2004**

**MACHARIA NJERU**

**t/a MACHARIA NJERU ADVOCATES.....APPLICANT /ADVOCATE**

**VERSUS**

**LONDON DISTILLERS (K) LIMITED.....RESPONDENT/CLIENT**

**R U L I N G**

On the 16<sup>th</sup> March 2006, Emukule J. delivered a ruling in which He upheld a decision made by the Deputy Registrar on 2<sup>nd</sup> December 2004, dismissing a preliminary objection raised by the respondent/client, London Distillers (K) Limited, to the taxation of the advocate/client Bill of Costs filed by the applicant/advocate, Macharia Njeru t/a Macharia Njeru Advocates.

Being aggrieved by the ruling made by Emukule J., the respondent/client has now moved the court under Order XLI Rule 4 (1) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, seeking an order for stay of taxation of the advocate/client's Bill of Costs dated 23<sup>rd</sup> August 2004, pending an intended appeal against the ruling of 16<sup>th</sup> March 2006, to the Court of Appeal, notice of which was filed on the 20<sup>th</sup> March 2006.

The respondent/client through his advocate, contends that it will raise very important issues of law in the intended appeal. Examples of such issues have been given as: -

- (i) Conflicting decisions on the same point by Judges of concurrent jurisdiction;
- (ii) Ratio decidendi – what was the substance of the decisions in each of the cases where there were conflicting findings;
- (iii) Stare decisis – how far are decisions of the court binding it. Can a judge of concurrent jurisdiction overrule another on a matter of law;
- (iv) Interpretation of statutes how should the conflict on interpretation of paragraph 62A of the Advocates (Remuneration) order be settled;
- (v) Should the Advocate/Applicant's bill of costs be taxed before the main suit is concluded.

The respondent/client maintains that there are special circumstances which necessitate an order for stay of the taxation of the Bill of Costs pending appeal and that if such an order is not granted, the

intended appeal may be rendered nugatory as the Bill of Costs involves a substantial sum of Kshs.3,777,053/90. Relying on the case of **Baringila vs Nandlal [2006] I E A 24**, and, offering to provide reasonable security, the respondent/client urged the court to grant the order for stay of execution.

In response to the respondent/client's application, the advocate/applicant has raised the following grounds of opposition: -

- (i) That this court has no jurisdiction to order a stay of proceedings before the Deputy Registrar during taxation.
- (ii) That there is no judgment or decree to be stayed.
- (iii) That the stay orders sought, if granted, shall prejudice the Advocate.
- (iv) That there is no chance that the intended appeal by the Advocate shall be rendered nugatory.
- (v) That no sufficient grounds or reasons have been laid down for the grant of the orders sought.
- (vi) That the application before court does not lie.

It is submitted by the advocate that the court has no jurisdiction to order a stay of execution as requested as there is nothing being executed in respect of the orders made by Emukule J. on 16<sup>th</sup> March 2006. It is contended that taxation is merely assessment of costs, and that there was no adverse action against the client/respondent as assessment of costs was not going on at this stage. Relying on the case of **Anthony Ambaka Kegode & Another vs Four Ninety Investments Limited & 3 Others HCCC No.379 of 2004 (Milimani)**, it was submitted that the decision of the taxing master will not *per se* prejudice the client, and that in any case the court has no jurisdiction to stay an order for costs.

To the above submissions the client/respondent countered, that the provisions of Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, gives court jurisdiction to determine this matter as Order XLI Rule 4 of the Civil Procedure Rules relates to stay of proceedings from a decree or order of a court pending appeal. Counsel for the client/respondent found support for his contention that this court is properly seized of this matter, in the case of Anthony Ambaka Kegode (supra). He contended that the advocate was not likely to suffer any prejudice if an order of stay of proceedings is granted, whereas if no order of stay is granted, if the court upholds the respondent/client's appeal, any taxation that may have been done would be an exercise in futility and a waste of precious judicial time.

I have perused the ruling delivered by Emukule J. on 16<sup>th</sup> March 2006. It is evident that serious issues of law were considered. The following extract from the ruling underscores the need for appellate consideration of the issues raised: -

***“In the matter at hand therefore and in light of the High Court’s conflicting interpretation of paragraph 62 A of the Advocates Remuneration Order (prohibiting the bringing of Bills of Costs before final determination of the suit), the taxing officer is in my opinion bound to follow the preponderance or majority opinion of the High Court until the Court of Appeal expresses itself authoritatively on the true construction of the said paragraph 62A of the Advocates Remuneration Order, and for that matter rule 108 of the Court of Appeal Rules, and paragraph 16 of the Court of Appeal Taxation of Costs Rules, on whether or not an Advocate/Client Bill of Costs can be brought by an advocate whose services and engagement with a client have been terminated in the pendency of the suit.”***

Thus it is apparent that there are substantial issues of law to be raised in the intended appeal, and that the appeal would be a matter of public interest as it is likely to resolve moot legal issues.

It is also evident that the intended appeal relates to taxation of an advocate/client's Bill of Costs for sum of over 3.7 Million which is no small amount.

The question is whether this court has jurisdiction to grant the order for stay of taxation of the advocate/applicant's Bill of Costs dated 23<sup>rd</sup> August 2004 pending the determination of the client/respondent's intended appeal to the Court of Appeal.

Order XLI Rule 4 (1) of the Civil Procedure Rules states as follows: -

***“4 (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”***

***a. No order for stay of execution shall be made under subrule (1) unless -***

***i. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***ii. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

In my understanding that Rule empowers this court to order stay of execution or proceedings pending an appeal against a decree or order of this court as long as this court is satisfied that: -

***(1) There is sufficient cause for granting the order of stay;***

***(2) That substantial loss may result to the applicant unless the order for stay is granted;***

***(3) That the application for stay has been made without undue delay;***

***(4) That the applicant has given security for the due performance of any decree or order as may ultimately be binding against him.***

The argument that the orders of stay sought by the client/respondent cannot issue as the orders issued by Emukule J. is not capable of execution cannot hold. The effect of the order made by Emukule J. dismissing the preliminary objection is that the taxation of the advocate/client Bill of Costs filed by the applicant can proceed. Indeed on 27<sup>th</sup> July 2007, the advocate filed an amended Bill of Costs in readiness for that exercise. The client/respondent is specifically seeking to stay the proceedings subject of that taxation as the taxation, is what He was objecting to in the preliminary objection subject of the ruling at the heart of the intended appeal.

Thus the client/respondent is not seeking to stay “execution” pending appeal but is seeking to stay proceedings pending appeal and such an order is available under order XLI. Rule 4 (1) of the Civil Procedure Rules, provided that the conditions laid down for granting such an order have been met. Moreover, as was rightly pointed out the respondent/client is not seeking to stay an order for costs as no costs have been certified. The case of ***Francis Kabaa v Nancy Wambui & Another***, is therefore distinguishable.

As observed above the intended appeal relates to substantial issues of law, of concern to the public. There is therefore sufficient cause for granting the order for stay of the proceedings to enable the client/respondent pursue the intended appeal. If the order for stay of proceedings is not granted the taxation of the advocate/client's Bill of Costs filed by the advocate, will proceed and the appeal will be a mere academic exercise. I concur with the client/respondent that should the order of stay not be granted, and the appeal be successful any taxation done will have to be set aside leading to unnecessary waste of

judicial time. Moreover, as noted earlier the Bill of Costs is for a sum of over 3.7 Million and it would cause undue hardship and loss to the client/respondent a Trading Company, to have such an amount tied up.

Finally, the order sought to be appealed against was made on 16<sup>th</sup> March 2006, barely 12 days before the client/respondent brought his application for stay of execution. The application has therefore been brought with appropriate promptitude.

In the above premises, I am satisfied that the client/respondent's application is in compliance with Order XLI Rule 4 (1) and (2) of the Civil Procedure Rules save for the requirement for the provision of security.

Accordingly, I do grant the order for stay of taxation of the advocate/client's Bill of Costs dated 23<sup>rd</sup> August 2004 or any other Bill of Costs filed by the advocate/applicant pending the determination of the client/respondent's intended appeal, on condition that the client/respondent shall provide security from either a reputable financial institution or Insurance Company, within 10 days from the date hereof, for the payment of the costs ultimately certified to be due to the advocate/client. Costs to be in the cause.

***Dated, signed and delivered this 22<sup>nd</sup> day of January 2008.***

**H. M. OKWENGU**

**JUDGE**