



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**MISCELLANEOUS CIVIL APPLICATION 40 OF 2007**

**M/S BEHAN & OKERO ADVOCATES .....APPLICANTS**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED .....RESPONDENTS**

**RULING**

In this application dated 13<sup>th</sup> March 2008, the applicant is the National Bank of Kenya Ltd through the firm of Ojiambo & Co Advocates while the respondent is the law firm of Behan & Okero Advocates.

The application is by notice of motion and is made under Section 3A and 63 (e) of the Civil Procedure Act (CPA) and Order XXI Rule 25 and Order L Rules 1 & 2 of the Civil Procedure Rules (CPR). It is for the basic order that the ex-parte order made by the Taxing officer allowing conversion of the costs into a decree be annulled or set aside in its entirety (prayer 3) and in the alternative the execution be stayed, lifted or stopped pending the hearing and determination of the intended reference to the judge

There are thirteen grounds in support of the application. These are contained in the body of the appropriate notice of motion and are enhanced by the facts contained in a supporting affidavit deposed by the applicant's Kisumu branch manager dated 13<sup>th</sup> March 2008. A preliminary objection to the notice of motion was filed by the respondent on the 20<sup>th</sup> March 2008, and was based on the grounds that the court had no jurisdiction to entertain a matter arising from the decision made by the Deputy Registrar without a reference having been filed and that the only mode of challenging a decision of the Deputy Registrar is by way of a reference.

On the 26<sup>th</sup> March 2008, the parties agreed and acknowledged before Justice Mwera that the objection of Taxation had already been filed and what remained for consideration by the court is the present notice of motion. A replying affidavit of motion was deposed by the respondent's counsel. It is dated 19<sup>th</sup> March 2008 and was filed herein on the 20<sup>th</sup> March 2008.

On due consideration of the application and the submission made by the learned counsels for the applicant and the respondent it is apparent that the issues for determination are three fold viz:-

- (a) Whether the Deputy Registrar acting as the taxing officer had the jurisdiction to hear and grant orders ex-parte to the effect that the taxed costs be converted into a decree or judgment.**
- (b) Whether such orders are capable of being annulled or set aside at this juncture**

**(c) Whether, in any event, the applicant is entitled to an order of stay of execution pending hearing and determination of the intended reference to the judge.**

Regarding the first issue, there were several Bills of costs presented to the court for taxation by the Deputy Registrar. The Bills numbered eighty four (84) and were presented by the law firm of Behan & Okero Advocates (respondent herein). On the 20<sup>th</sup> August 2007, the Bills under went the process of taxation conducted by the Deputy Registrar in the presence of Mr. Ojiambo for the respondent therein and Mr. Odunga for the applicant therein.

After the exercise, the Deputy Registrar's ruling was set for 27<sup>th</sup> July 2007 as shown in the record. However, the date may have been an error because a ruling could not arise prior to the taxation. Also, paragraph 6 of the supporting affidavit dated 13<sup>th</sup> March 2008, shows that the ruling was set for 27<sup>th</sup> September 2007, while in a letter dated 6<sup>th</sup> December 2007 to the Deputy Registrar the date of ruling is given as 29<sup>th</sup> November 2007, by Behan & Okero Advocates. Be that as it may, the record shows that the ruling of the Deputy Registrar was delivered on the 21<sup>st</sup> February 2008. This was six to seven months since the taxation process conducted on 20<sup>th</sup> August 2007.

The ruling was delivered in the presence of Mr. Odunga, for the applicant Behan & Okero Advocates. The respondent therein was not present at the time and by this application it's advocate Mr. Ojiambo complained that he had not been notified of the date of delivery of the Ruling. His arguments in respect thereof did cast aspersion on the conduct of the applicant's advocate in having prior knowledge of the date of ruling and appearing alone before the Deputy Registrar.

While it might not have been extra ordinary or unlawful for the Deputy Registrar to have delivered his ruling in the absence of one party it was prudent for each and every party involved in the taxation to have been informed by notice of the date of the delivery of the ruling and more so if the ruling had previously been adjourned. This is why on the 6<sup>th</sup> December 2007, Behan & Okero Advocates wrote a letter to the Deputy Registrar requesting that a written notice of the date of the delivery of the ruling be issued in terms of Order XX Rule 1 CPR which provides that:-

**“ In suits where a hearing is necessary the court after the case has been heard shall pronounce judgment in open court either at once or within 42 days from the conclusion of the trial of which due notice shall be given to the parties or their advocates”**

Notice imputes information and most likely the applicant herein was not informed of the date of delivery of the Deputy Registrar's ruling.

Nonetheless, the Deputy Registrar delivered his ruling on 21<sup>st</sup> February 2008 and thereafter Mr. Odunga for the applicant therein applied for a certificate of costs and applied for the same to be deemed as a decree of the court.

The Deputy Registrar granted the application to the effect that the certificate of costs was deemed as a decree of the court. It is this order that has so much aggrieved the applicant herein. It's counsel Mr. Ojiambo argued that the order by the Deputy Registrar offended the law in that the proceedings were turned into undefended proceedings and that the Deputy Registrar took upon himself power not granted to him by entering judgment on the awarded costs. Mr. Ojiambo further argued that the Deputy Registrar acted in excess of jurisdiction as the powers to convert an award of costs to a judgment lies with a judge and that the function of a Deputy Registrar ends with his signing of a certificate of taxed costs after the reading of Bills of costs. Therefore, the decree that arose on the 21<sup>st</sup> February 2008 was without jurisdiction and a nullity in so far as it went contrary to the Advocates Act (Cap 16 laws of Kenya). Mr. Ojiambo contended that the powers of the Deputy Registrar are donated by Rule 13 (A) of the Advocates Remuneration Order and cannot go beyond that. On his part, Mr. Odunga for the respondent argued that prayer (3) of the application is misconceived in that any decision of the Deputy Registrar can only be challenged by way of a reference.

After the ruling of the Deputy Registrar on the 21<sup>st</sup> February 2008 a certificate of costs was issued and duly signed on the 27<sup>th</sup> February 2008. A decree based on the certificate of costs was also issued on the 27<sup>th</sup> February 2008. Armed with the decree, the respondent applied for execution and obtained warrants of attachment and sale of property against the applicant.

A firm of auctioneers went into action and this prompted the present application being made under Section 3A and Section 63 (e) of the Civil Procedure Act and Order 21 Rule 25 and Order 50 Rules 1 and 2 of the Civil Procedure Rules. Needless to state that Section 3A and Section 63(e) of the CPA provide for the court's inherent powers while Order 21 Rule 25 CPR provides for stay of execution. The term jurisdiction connotes the legal authority to act in the first place. It also connotes a court's power to decide matters presented to it and to enforce its decision. The Deputy Registrar in this cause had the power to hear issues raised and make a decision on the Bills of costs presented to him on the 20<sup>th</sup> August 2007. His decision was made on the 21<sup>st</sup> February 2008 and was followed by a certificate of costs issued on the 27<sup>th</sup> February 2008. To enforce his decision on the taxed costs the Deputy Registrar made an order upon application by the respondent herein to the effect that the certificate of costs be deemed as a decree.

Taxation being a judicial exercise, the Deputy Registrar as a taxing officer exercised wide discretion guided, of course, by principles of justice, fair play and reason. But what are the duties or functions of a taxing officer? The answer is provided by Rule 13A of the Advocates (Remuneration) Order which provides that:-

“For the purpose of any proceeding before him the taxing officer shall have power and authority to summon and examine witnesses to administer oath to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him”.

The proceedings before the taxing officer would be the Taxation of costs as between advocates and client on application of either party in terms of Rule 13(1) of the aforementioned Remuneration Order. Rule 11(1) of the same order provides for objection to decision on taxation as follows:-

**“ Should any party object to the decision of the taxing officer, he may within fourteen (14) days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects”.**

Rule “(2) provides that:-

“ The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen (14) days from the receipt of the reasons apply to a judge by Chambers Summons which shall be served on all the parties concerned setting out the grounds of his objection”

This rule (Rule 11(2) indicates the extent to which the taxing officer may go in addition to what is provided for under Rule 13(1) and 13(A). In general the aforementioned Rules do prescribe the jurisdiction of the Deputy Registrar in taxation matters. One may ask what about Section 51(2) of the Advocates Act which provides as follows:-

**“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 thereto as it thinks fit including in a case where the retainer is not disputed an order that judgment be entered for the sum certified to be due with costs”.**

The Deputy Registrar as an agent of the court in the taxation proceedings is not empowered under Section 51(2) of the Advocates Act to enter judgment or issue a decree for certified costs. The court under the Advocates Act (Cap 16 law of Kenya) means the High Court.

The jurisdiction to issue a decree or enter judgment for certified costs lies with a judge of the High Court and not the Deputy Registrar of the High Court. Therefore, this court fully concurs with the applicant's contention that the Deputy Registrar had no jurisdiction to convert taxed costs into a decree or judgment. The Deputy Registrar's jurisdiction is limited to hearing and determining matters pertaining to Taxation of Bills of costs and does not extended to enforcing his decisions by way of a decree. A party may apply for a decree for the taxed costs in terms of Section 51 (2) of the Advocates Act or the court may on its own enter judgment or issue a decree for the costs.

Regarding the issue whether the order made by the Deputy Registrar to convert taxed costs into a decree is capable of being annulled or set aside at his juncture the contention by the respondent is that any decision of the Deputy Registrar can only be challenged by way of a reference. In a case cited by the respondent i. e. [In the matter of winding-up of leisure lodges Ltd and In the matter of the companies Act (Cap 486 law of Kenya) -Winding up cause Number 28 of 1996 at the High Court Nairobi]. The court stated that in exercising their jurisdiction in taxation, taxing masters are the agents of the High Court and that the wards "*decision of the taxing officer of the items " in paragraph 11 of the Advocates (Remuneration) Order includes decisions on the legal validity of those items ( i.e. whether the items singly or the whole should be included in the bill of costs) and / or the correct quantum of costs in respect thereof.....*"

The decision of the taxing officer as defined hereinabove would invariably exclude any other decision by the Deputy Registrar such as to convert the certificate of costs into a decree.

Consequently, a party aggrieved by such decision may move the court to exercise its inherent jurisdiction to annul or set aside the unlawful decision for the ends of justice and to prevent abuse of the process of the court. The applicant was well within its right to move the court at this juncture for the appropriate orders. Again in winding up cause No. 28 of 1996 (supra) it was held that a party who is aggrieved by any decision of the taxing officer whether interlocutory or final and whether it be on the quantum awarded on the bill as a whole or any items thereof or on the validity of the bills as a whole or any items thereof has a recourse to the High Court by way of a reference under paragraph 11 of the Advocates (Remuneration) order. **In Machira & Co Advocates =v=s Magugu [2002] 1 EA.428.** It was held that the Deputy Registrar jurisdiction as a taxing officer is limited to taxing the bill of costs and giving reasons for taxation. It is decisions arising from such jurisdiction that may be referred to the judge of the high court and not decisions in excess of jurisdiction and therefore null and void "**ab initio**".

The decision of the Deputy Registrar to convert taxed costs into a decree was null and void "**ab initio**" and ought in the interest of justice and fair play be annulled and set aside together with all consequential orders. In the event, there would be no need to consider and determine the third issue whether the applicant is entitled to an order of stay of execution pending hearing and determination of the intended reference to the judge.

However, this court would hold the view that in such an application the provisions of Order 41 of the Civil Procedure Rules would not apply in the circumstances and as long as there is sufficient cause a stay of execution would be granted to the applicant in the interest of justice. Herein, an unlawful order relating to the issuance of an unlawful decree was made and it resulted to an irregular and unlawful execution of the decree, would a court of law and equity sit back and allow such abuse of its process?. The court would not allow such abuse and would issue an order of stay of execution to prevent further abuse and to allow the offended party to pursue the ends of justice.

The present application is granted in terms of prayer (3) in that the ex-parte order made by the taxing officer allowing conversion of the costs into a decree be and is hereby annulled and set aside in its entirety. The applicant shall be entitled to the costs of the application.

**Dated, signed and delivered at Kisumu this 30<sup>th</sup> day of April 2008**

**J. R. KARANJA**

**JUDGE**