



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

Civil Case 128 of 2006

W. E. TILLEY (MUTHAIGA) LIMITED PLAINTIFF

- Versus -

- 1. DEVJI MEGHJI & BROTHERS LTD 1ST DEFENDANT**
- 2. ELDORET PACKERS LIMITED 2ND DEFENDANT**
- 3. KENYA REVENUE AUTHORITY 3RD DEFENDANT**

R U L I N G

The plaintiff/applicant seeks from the court the following two substantive orders:-

1. *That taxation of the bill of costs filed by the 2nd defendant be stayed; and*
2. *That execution by the 2nd defendant for costs be stayed pending hearing and determination of the intended appeal by the plaintiff.*

The application is brought by a Notice of Motion dated 6th February, 2008, and made under Section 3A of the Civil Procedure Act, O.XXI rule 22 and O. XLI rule 4 of the Civil Procedure Rules.

The application is supported by the annexed affidavit of William Kinyanyi, the operations manager of the plaintiff company. It is premised on the grounds that:-

- (a) *The 2nd defendant has filed a bill of costs.*
- (b) *Unless the intended execution is stayed, the plaintiff stands to suffer substantial loss.*
- (c) *The plaintiff “intends to appeal against that decision” (sic) and has lodged a Notice of Appeal dated 23rd October, 2007.*
- (d) *It is in the interest of justice “that this Honourable Court to issue” (sic) stay of execution.*

In opposition to the application, the 2nd defendant filed the following grounds of opposition:-

1. *The application is incompetent, misconceived, bad in law*

and an abuse of the process of the court because:

- a) *Order XXI rule 22(1) has no application as execution has not issued.*
 - b) *The plaintiff has not given and/or offered any security for the due performance of such decree or order as may ultimately be binding upon it.*
 - c) *It is an application for stay of a non-existent decree or order.*
 - d) *The supporting affidavit is incompetent, bad in law and fatally defective because:-*
 - (i) *The affidavit violates and offends the peremptory provisions of O.XVIII rule 3(1) of the Civil Procedure Rules.*
 - (ii) *It is an affidavit based on understanding which is unknown to law.*
 - (iii) *The averment in paragraph II of the affidavit is meaningless, incomprehensible and infructuous as identical facts cannot be verified on information, belief, and on understanding.*
 - (iv) *The averments in paragraph 8 are scandalous, irrelevant or oppressive and contrary to law, being mere speculations, guess work, assumptions and suppositions.*
2. *Taxation is a preserve of the taxing officer for assessment of quantum of costs and cannot be stayed.*
 3. *It is a confused application for stay of taxation of the 2nd defendant's costs on grounds for staying an apprehended execution of the order for payment of costs.*
 4. *The applicant does not disclose or demonstrate how the plaintiff will suffer any loss or prejudice if the 2nd defendant's costs are taxed.*
 5. *The applicant does not demonstrate how the plaintiff will suffer any loss or prejudice if the 2nd defendant's costs are taxed.*
 6. *The applicant does not demonstrate that there is sufficient cause to warrant stay of execution.*
 7. *The alleged substantial loss is not even quantified and an ascertainment of the 2nd defendant's costs cannot occasion any or any substantial loss to the plaintiff.*
 8. *The application is without legal or factual basis as:-*
 - (a) *An intended execution is not capable of being stayed.*
 - (b) *The alleged substantial loss would consist of the 2nd Defendant's costs which are yet to be ascertained.*
 - (c) *The applicant is no in a position to furnish the requisite security for payment of costs which are yet to be quantified.*
 9. *Having chosen to sue the 2nd defendant and then proceed to withdraw the claim against the 2nd Defendant, it is not open for the plaintiff to now say that it will suffer substantial loss if the 2nd Defendant's costs are taxed.*
 10. *There has been inordinate delay in bringing this application and the said delay is calculated to deny the 2nd Defendant the fruits of its judgment.*

During the oral canvassing of the application, Mr. Kinyua appeared for the applicant and Mr. Bowry appeared for the respondent. Mr. Kinyua told the court that the grounds on which the application is based are stated on the Notice of Motion. He contended that he only needed to stress that the plaintiff/applicant had launched a Notice of Appeal against this court's ruling, and the plaintiff will suffer irreparable loss unless the bill for taxation amounting to Kshs. 7 million is stayed. The second defendant had not sued the plaintiff except for costs, and is not being driven away from any seat of judgment.

Counsel further argued that he was served with the grounds of opposition on 20th February, 2008, the day before the hearing of the application, which was contrary to O. L rule 16(1) which requires that he should have been served at least three clear days before the hearing date. He also stated that he himself had served Mr. Bowry on 8th February, 2008. For these reasons, he submitted that his application was unopposed.

On his part, Mr. Bowry for the Respondent argued that he was first served on 8th February but the application did not have a hearing date. He told Mr. Kinyua that he would be available on 21st February, 2008. His chambers were thereafter served at 4.00pm on 15th February, 2008, the Friday before the hearing date, and he had copies of both the dated and undated documents. He urged the court to deal with the matter on the basis that the application was served on 15th February, 2008, which was the date on which he knew when the application would be coming for hearing. He also contended that Mr. Kinyua received the grounds of opposition on 19th and not on 20th of February, 2008, and since that was the only ground on which he was relying, he had not prosecuted his application.

Coming to the application itself, Mr. Bowry submitted that the same does not lie with O.XXI rule 22(1). He also submitted that the supporting affidavit was wanting, and that regard the referred to paragraphs 8 and 11 thereof. He submitted that a taxation matter cannot be stayed, and referred the court to ANTHONY AMBAKA KEGODE & ANOR v. FOUR NINETY INVESTMENT LTD & 3 ORS [2007] e KLR and DEPOSIT PROTECTION FUND v. ROSALINE NJERI MACHARIA [2006] e KLR. On those submissions, he urged the court to dismiss the application.

In a short reply, Mr. Kinyua submitted that his affidavit of service shows that Mr. Bowry was served on 8th February, 2008. He also submitted that the issue of stay is discretionary to the court.

I have considered the application, the supporting affidavit, the grounds of opposition and the rival submissions of counsel. The two main issues for determination are whether the application is unopposed, and, if not, whether the plaintiff/applicant is entitled to the orders sought.

As to whether the application is unopposed or not, I would start by confirming that there is on record grounds of opposition filed on 18th February, 2008. But Mr. Kinyua for the plaintiff contends that he was served with those grounds on 20th February, 2008, whereas the application was set down for hearing on 21st February, 2008. Consequently, he maintains that he was not accorded three clear days as mandated by O.L rule 16(1) of the Civil Procedure Rules. For this reason, he submits that his application is unopposed. On the other hand, Mr. Bowry for the respondent states that he was served at 4.00pm on 15th February, 2008, which was a Friday. The earliest day when he could have filed the grounds of opposition was Monday, 18th February, 2008, which he did and served those grounds on 19th February, 2008.

However, Mr. Kinyua maintains that he was served on 20th February, 2008, the day before the hearing of the application, and that his affidavit of service will show that he served Mr. Bowry on 8th February, 2008. All these exchanges took place on the floor of the bar. Unfortunately for Mr. Kinyua, his affidavit of service if there was one, is not on record. In the absence of some acceptable evidence, there is no proof that Mr. Bowry was served on 8th February, 2008. Mr. Bowry's contention that he was effectively served on 15th February, 2008, he could not have filed his grounds of opposition earlier than 18th February, 2008. And having filed those grounds on that day, he could not possibly have beaten the rule as to service thereof not less than three clear days before the date of hearing.

In such circumstances, it would be untenable and unacceptable to suggest that an application is unopposed. Unless the rules of procedure are to become mistresses of justice and not its hand maidens, procedural lapses such as this one should not be allowed to rule. If the applicant was served too late to prepare for the hearing of the application, the most appropriate course to take would be for him to seek an adjournment. Many are the times when respondents have been granted leave to file replying affidavits out of time. For these reasons, and seeing especially that there are grounds of opposition of the record, this court will not be dissuaded by procedural lapses but will now proceed to determine the application on its merits.

The application seeks to stay the process of taxation before the taxing master. It is brought under, inter alia, Order XXI rule 22 and Order XLI rule 4 of the Civil Procedure Rules. Order XXI rule 22(1) states as follows:-

“The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

It is clear beyond controversy that this subrule does not and cannot apply to the situation at hand. The application is not made in reference to any decree. Indeed, there is no decree in the matter under consideration. The applicant therefore set out on the wrong footing, and the court has no jurisdiction to stay taxation under this subrule. Subrules (2) and (3) simply have no application to this matter. Since the court lacks jurisdiction to stay execution under the rule invoked by the applicant, the order sought cannot be granted.

In any case, taxation and execution are different kettles of fish. Taxation, per se, cannot harm anyone, and the application herein cannot claim to be prejudiced by the impending taxation. Unless such prejudice can be established, then a party may not be restrained from taxing its bill of costs. That message was sent out clearly from DEPOSIT PROTECTION FUND v. ROSALINE NJERI MACHARIA [2006] e KLR, and ANTHONY AMBAKA KEGODE & ANOR. v. FOUR NINETY INVESTMENT LTD & 3 ORS [2007] e KLR. Although both authorities are High Court decisions, I find them authoritatively persuasive, and I associate myself with the legal sentiments expressed therein. The taxing officer should therefore be allowed to proceed with the taxation, and as of now there is no decree or order to be stayed.

The applicant’s second prayer is that execution by the 2nd defendant for costs be stayed pending the hearing and determination of the intended appeal by the plaintiff. The prayer is based on O.XLI rule 4 of the Civil Procedure Rules. Rule 4(1) provides that the court appealed from may “*for sufficient cause*” order stay of execution of a decree or order passed by it. Subrule (2) thereof then provides:-

“No order for stay of execution shall be made under subrule (1) unless:-

(a) 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

(b) 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.”

Although in paragraph 7 of the supporting affidavit Mr. Kinyanyi deposes that the applicant would suffer substantial loss if the application is not allowed and execution issues, he doesn’t explain how that substantial loss will come about. If anything, his fears seem to be founded on speculative apprehension as exemplified in paragraph 8 of the aforesaid affidavit wherein he avers, inter alia:-

“... It is doubtful whether the 2nd defendant still exists or will exist with assets sufficient to refund the

costs upon the success of the appeal.”

To say the least, this statement is not factual. It is purely speculative. It also offends rule 3(1) of Order XVIII which requires that affidavits be confined to such facts as the deponent is able of his own knowledge to prove. The applicant herein has engaged itself in speculation which does not satisfy the court that the applicant will suffer substantial loss if an order of stay is not granted.

Secondly, subrule (2) (a) requires that the application be made without unreasonable delay. The order which precipitated the filing of the bill of costs was made on 19th October, 2007. It was followed by the filing of the bill of costs on 31st October, 2007. This application was filed thereafter on 8th February, 2008. Even after giving an allowance for the period from 21st December, 2007 to 6th January, 2008 in obedience to O. XLIX rule 3A of the Civil Procedure Rules, there is still an unexplained delay of some 80 days. That was an unreasonable delay.

Finally, the applicant has not made any offer for security in terms of subrule (2) paragraph (b). While the court can sort than one out, the grant of the order sought is still impeded by the applicant's failure to make the application without unreasonable delay, and to satisfy the court that it will suffer substantial loss if stay is not granted.

For these reasons, this application is hereby dismissed with costs.

Dated and delivered at Mombasa this 28th day of April, 2008.

L. NJAGI

JUDGE
