



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISCELLANEOUS APPLICATION 1236 OF 2003**

**TRANSCOM SACCO SOCIETY LTD .....APPLICANT**

**V E R S U S**

**1. ALFRED O. NYANDIEKA**

**(T/a Nyandieka & Associated Advocates)**

**2. JESSE M. GITAU**

**(T/a Gallant Auctioneers)**

**3. SOLOMON IRUNGU MWANGI..... RESPONDENTS**

**R U L I N G**

This is an application (by chamber summons dated 22<sup>nd</sup> November, 2007) seeking stay of execution for costs awarded to the 1<sup>st</sup> Respondent on 18<sup>th</sup> February, 2005. Those costs were taxed on 18<sup>th</sup> October, 2007 at KShs. 95,615/00. The Applicant then duly filed a notice of objection to the taxation on 25<sup>th</sup> October 2007 under paragraph 11(1) of the Advocates (Remuneration) Order. Stay of execution is sought pending disposal of the intended reference against the taxation. No reference has been filed yet because, the Applicant says, it has not yet been supplied with reasons for the taxation despite a request for the same made on 18<sup>th</sup> October, 2007, the very date of the taxation. The application is essentially brought under section 3A of the Civil Procedure Act, Cap. 21. There is a supporting affidavit sworn by one DAN AUMA, the manager of the Applicant.

No papers were filed in response to the application. The application is therefore technically unopposed; but at the hearing thereof I permitted the Respondents' counsel to submit on any point of law. He urged that since there is no reference filed yet the stay sought cannot be granted in law. He quoted no authority.

I have considered the submissions of the learned counsels. As already pointed out, it is the inherent

jurisdiction of the court that has been invoked as there is no provision in the Advocates (Remuneration) Order for stay of execution for taxed costs. The court's inherent power will be exercised to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. In the present case there is no allegation of abuse of the process of the court. Do the ends of justice then require that an order of stay of execution be made?

To answer that question some assistance may be derived from the requirements for stay of execution pending appeal under Order 41, rule 4 of the Civil Procedure Rules. Subrule (2) thereof demands that the court be satisfied that substantial loss may result to the applicant unless the order is made, and that the application has been made without unreasonable delay. The applicant must also be prepared to give such security as the court may order for the due performance of such decree or order as may ultimately be binding upon him. I find no reason to demand any less of the Applicant in the present case.

I will start with the issue of security. Indeed the Applicant has already deposited the taxed costs in court. That is sufficient security. Was there unreasonable delay in making the application? The taxation was on 18<sup>th</sup> October, 2007. The present application was made five (5) days later on 23<sup>rd</sup> November, 2007. There was no delay at all.

That leaves only the issue of substantial loss. I have closely read the affidavit sworn in support of the application. The issue of substantial loss is not broached at all. There is not any allegation that the 1<sup>st</sup> Respondent may be unable to refund to the Applicant any costs paid should the intended reference succeed. All that the affidavit has dwelt on is to show that the intended reference is arguable. The essence of the exercise of the discretion to stay execution is to prevent any substantial loss that the applicant might suffer unless the stay is granted. No such loss has been demonstrated by the Applicant herein.

In the result I must refuse this application. It is hereby dismissed with no order as to costs. It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL, 2008**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED AT NAIROBI THIS 25<sup>th</sup> DAY OF APRIL, 2008**