



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 783 of 2007

KAGWIMI KANG'ETHE & Co. ADVOCATE S..... PLAINTIFF

VERSUS

MIT'S ELECTRICAL COMPANY DEFEDANT

JOINT RULING

The applicant came to this court armed with an advocate's bill for taxation. The bill came to Kshs 2,358,951. The proceedings on the record show that on 14.12.2007 Counsels for both parties appeared before the Senior Principal Deputy Registrar. Representations were made on the bill, by either side and a ruling reserved for 16.1.08 on which date it was delivered allowing the bill at 1,530,951.00 less 100,000.00 leaving a balance of Kshs 1,430,951.00.

According to the relevant rules as per applicants submissions any party aggrieved of that decision had 14 days within which to seek reasons for any items disagreed upon from the taxing master and there after if not satisfied with the reasons, file a reference to the High Court.

The court has been informed that the Respondent/applicant did not avail itself of these two procedural avenues to redress any grievances they may have had as regards the taxation. This paved the way for the applicant namely Kagwimi Kang'ethe & Co. Advocates to file an application by way of notice of motion dated 8th day of February, 2008 and filed on 15th February 2008. The prayers sought are three namely:

- (1) That judgment be entered against the Respondent for the sum of Kshs 1,430,951. in terms of the certificate of taxation dated 25th January 2008 together with interest thereon at court rates from 16th January 2008 until payment in full.
- (2) That the applicant be at liberty to execute against the respondent.
- (3) That the costs of the application be borne by the respondent.

There is on record a return of service sworn on 19th February, 2008. It is deponed in paragraph 3 of the said affidavit that the respondent who are the current applicants were served on the same date at 1.44 p.m, the same date the application was filed.

A perusal of the record reveals that on 4.3.2008 the original applicant's application for the enforcement of the taxation order came up before Khamoni J. for disposal. A consent was entered between the parties disposing it off. This reads:

“By consent notice of motion dated 8.2.2008 be and is hereby allowed as prayed.

(2) There be a stay of execution for 21 days from today.

It is after the said execution orders were given, and the lapse of the 21 days stay that the current applicant who was the respondent to the execution application, moved to this court by way of notice of motion dated 5th may 2008 and filed on 5th May 2008. Prayer 1 is spent the other prayers left for consideration are:

(1) That this honourable court be pleased to stay the execution of the decree herein pending the hearing and determination of a reference prayed by the client/applicant against the ruling on taxation by this honourable court's Senior Principal Deputy Registrar delivered on 16th January 2008.

(2) That this honourable court be pleased to stay execution of the decree herein and/or all further proceedings pending the hearing and determination of this application inter-parties

(3) That this honourable court be pleased to make such further orders to meet the end of justice.

(4) That costs of this application be in the said reference.

The application is brought under order XLI rule 4(1) and order L rule 1 Civil Procedure Rules and section 3A and section 63(e) of the Civil Procedure Act and all other enabling provisions.

On the same 5th may 2008 the original applicant who is the decree holder filed an application by way of chamber summons dated 2nd May 2008. It is brought under order XX11 rules 1(1) and 1A of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap.21 Laws of Kenya. The heading indicates Kagwimi Kang'ethe & Co. Advocates as applicants, Mits Electrical Company Ltd as the Respondent and Co-operative Bank of Kenya Ltd as the first Garnishee, Development Bank of Kenya Ltd as the second Garnishee and Equity Bank, as the 3rd Garnishee. Prayer 2 reads that all funds now being held or hereafter to be held by the Cooperative Bank of Kenya, Cooperative house bank, Nairobi account No. 200052722200, Development Bank of Kenya Loita Street Branch Nairobi. Account No. 0200772008 and Equity Bank Ltd Cooperative Branch Nairobi A/C. No. 0201200713 (herein after called the Garnishee) and are due and owing or are to be due and owing to Mits Electrical Company Ltd the judgment Debtor in this suit be attached to answer a decree of the Court given on 7th march 2008 in the sum of Kshs 1,495,848.94/= together with interest at Court rates until payment in full and which decree the Respondent has failed and or neglected to satisfy.

(4) That the Garnishees named to attend the judge in chambers on a date to be specified by the Court for reach of them to show cause why each of them should not pay and or deposit all the monies due and owing to the Respondent with the applicant in satisfaction of the decree and costs of the Garnishee proceedings.

(5) That costs of the application be paid for by the judgment debtor.

On 5.05.08 parties appeared before the duty judge and took direction to the effect that both applications be heard simultaneously.

The first to be argued is the application for stay. The grounds in support are those set out in the body of the application, Supporting affidavit, further supporting affidavit and oral submissions in court. The points stressed by the applicant are:-

(1) That application for taxation was made on 9.10.2007, taxation done on 14.12.07 and the ruling on taxation given on 16.1.08 where as Judgment on taxation was entered by consent on 4.03.08 by the advocates.

(2) They asked for reasons for taxation in time.

(3) The applicant contents that they are entitled to credit to the tune of Kshs 529,000.00 on the basis of which they seek fresh orders on taxation.

(ii) That they have strong points to raise on taxation.

(iii) They have genuine fear that execution is imminent unless stayed.

(4) The client has offered security of the entire sum in the form of insurance guarantee.

(5) Failure to ask for the credit to be reflected in the bill is the mistake of Counsel, and that should not be visited on the client.

In reply Counsel for the respondent to the application for stay relied on the grounds in the replying affidavit and he stressed the following grounds.

(1) That the application for stay of execution is just a ploy to delay the execution of the decree on taxation.

(2) That the Court has no jurisdiction to entertain the application because it is not properly seized of that matter as no reference has been filed yet.

(3) It is only after leave to file a reference has been given that the applicant can avail themselves of the order 41 procedures.

(4) Application has been overtaken by events because the applicants Counsel, participated in the taxation as well as the enforcement proceedings which were allowed by consent.

(5) By their conduct, they have compromised the proceedings under the advocates Act.

(6) The counsel has not given an affidavit to show that he had no instructions to enter into the consent in the manner he did.

(7) If applicants are sincere then they should seek stay only for the 529,000.00 which they intend to stay and then allow the undisputed amount to proceed to execution.

(8) They maintain that there is no ground laid for a stay order but should the court be inclined to grant the same, then they ask that the amount be secured by a bank guarantee or be deposited in an interest earning account in the joint names of counsels for both parties.

In response Counsel for the applicants reiterated the earlier responses and then stated that they have already filed an application to seek enlargement of time to file a reference and set aside the order on taxation.

(2) They contend that payments should have been disclosed.

(3) That this court can exercise its inherent jurisdiction for ends of justice to be met.

(4) That there is a genuine mistake on the part of the Counsel.

The second application was presented by the original applicant who is now the decree holder. It is for

Garnishee orders in the manner sought. This is an *ex parte* application. The sole submitter on it, is the beneficiary and all that he said was that if the court rules that the stay orders are not available to the respondent/applicant, then the Garnishee orders will automatically be granted.

On the Courts assessment of the facts herein, it is clear that the current applicant seeks to access, the relief sought via the provisions of order XLI rule 4(1), Section 3A and 63(e) of the Civil Procedure Act. These provisions provide:-

“Order XLI 4(i) 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 but application shall in every case be made in the first instance to the court from whose decree or order the appeal is taken 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 orders set aside.

Sec. 3A Civil Procedure Act. Nothing in this Act shall limited or otherwise affect the inherent power of the court to make such orders as may be necessary for ends of justice or prevent abuse of the process of the court.

Sec. 63(e) Civil Procedure Act. In order to prevent the ends of justice from being defeated the court may if so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

The ingredients to be satisfied by an applicant wishing to avail himself /herself itself of the relief availed by the provisions of order XLI rule 41(1) in this courts own opinion are:-

- (1) The stay sought must be for purposes of stay of execution or proceedings under a decree or order.
- (2) The said decree or order must have been appealed against.
- (3) The addressee of the application should be either the court, appealed from or the court, appealed to.

When these ingredients are married to the reliefs being sought by the applicant in their application dated 5th May 2008, and filed the same date, it is clear that prayer 1 is spent as it merely related to a prayer for urgent certificate which was granted. Prayer 2 is also spent as it sought stay pending hearing inter parties. The court is left with prayer 3,4,and 5 to consider. Prayer 5 is simply for costs and prayer 4 is for any order of the court to meet the ends of justice in the matter. Prayer 3 is the central prayer. It seeks stay of execution of the decree herein pending the hearing and the determination of a reference preferred by the client/applicant against the ruling on taxation by this honourable courts Senior Deputy Registrar delivered on 16th January 2008.

A reading of prayer 3 presupposes the existence of a decree and a threat of execution. It is common ground that indeed there is a decree, on taxation, in favour of the original applicant who is the current respondent to the application subject of his ruling. They are a beneficiary of a taxation order which has already been converted into a consent judgment giving rise to a decree which is now ripe for execution and which execution the consent applicant has come to court to fore stall for the reasons given.

It should be noted that the stay of execution sought is not for purposes of an appeal, and that the forum to which the application is addressed does not fall into the category of the court appealed from and the Court appealed to.

The scenario has arisen because the proceedings emanate from a specialized procedure under the advocates remuneration order under the Advocates Act cap 16 (o1). It therefore follows that the

jurisdiction of this court which has been involved is not an appellate jurisdiction.

This finding necessitates this court to determine whether its intervention has been properly invoked and that it has jurisdiction to intervene. This leads the Court to the examination of the procedure on how its intervention can be invoked on a matter emanating from a taxation order. Bearing in mind that the stay of execution is sought pending the hearing and determination of a reference preferred by the client/applicant against the ruling on taxation by this honourable courts Senior Deputy Registrar delivered on 16th January 2008.

Prayer 3 presupposes the existence of a ruling by the Senior Principal Deputy Registrar dated 16.1.08 on the one hand and the existence of a reference filed by the court against that ruling. It is common ground that indeed there is a ruling by the Senior Principal Deputy Registrar dated 16.1.08 which has already been made a judgment of the court. What is in issue is the existence of a reference.

Existence of a reference presupposes the following of the procedure laid down in rules 11 and 12 of the advocate's remuneration order. It therefore follows that in order to succeed the applicant has to establish that they have followed that procedure and there is a reference in place. These rules provide:-

"11(1). Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) 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 days from the receipt of the reasons apply to a judge, by chamber summons which shall be served on all the parties setting out the grounds of his objection"

A reading of rule 11 (1) and (2) states clearly that existence of a reference is demonstrated by:-

- (a) existence of a ruling by a taxing officer on taxation.
- (b) existence of a notice of objection by an aggrieved party to the taxing officer requiring the taxing officer to give reasons for his taxation on the items objected to.
- (c) The existence of a response by the taxing officer on the aggrieved partys notice where by the taxing officer has given reasons as to why he allowed the figures against the items objected to.
- (d) The existence of a dissatisfaction of the reasons given by the taxing officer on the items objected to which dissatisfaction forms the basis of the reference.

The time frame provided within which to move by the addressees in those rules is:-

- (a) 14 days by the aggrieved when seeking reasons
- (b) Forth with by the taxing master.
- (c) 14 days by the party who is aggrieved by the reasons given by the taxing master. This is the time frame within which to move to the high court.

This court has combed the entire record in general, and the annexures to the application and it has failed to trace:

- (1) notice to the taxing officer requiring him to give reasons for the taxation on any of the items objected to which was served on the taxing officer within 14 days from the date of delivery of the ruling on 16.1.2008.
- (2) Has not traced reasons given by the taxing officer in response to the request for reasons by the aggrieved party.

(3) Has not traced any reference to the high court by any aggrieved party arising from the reasons given by taxing officer as in number 2 above.

The foregoing being the position there is no way this court can give a stay pending determination of a reference which has not yet been lodged. Granting such an order will be making an order in vain or in anticipation. To confirm that this will be an order in anticipation, is evidenced by the presence of the second application by the same applicant dated second May 2008 and filed the same 5th May 2008, seeking enlargement of time within which to apply, to the judge, objecting to taxation herein and secondly for he setting aside of the taxation orders.

In view of the aforesaid matters the court makes findings that this court is not in a position to issue stay orders in the manner sought because:-

(1) Order 41 rule 4(1) applies to appeals and this court's jurisdiction has not been invoked in its appellate jurisdiction by the applicant. There is no appeal lying to it from any court or from it to any court.

(2) There is no reference to this court .

For this reason prayer 3 of the application under review cannot stand.

Prayer 4 seeks any other relief that the court may deem fit to grant. This is a prayer which can be seen to be an anchor on Section 3A and 63(e) of the Civil Procedure Act seeking intervention of the Court through the courts inherent powers. It is now trite law that these powers cannot be invoked where there is adequate provisions for the relief sought.

Herein what is in issue is stay pending initiation of the reference procedures. Neither rules 11 of the Advocates remuneration order or order XLI rule 4(1) provide for such a situation. This is therefore a proper candidate for the exercise of such a jurisdiction.

The above notwithstanding this court has judicial notice of the fact that principles established by case law of which this court has judicial notice of, state that the inherent powers of the court can only be invoked where the court has jurisdiction to hear the matter in which the jurisdiction is invoked. This court is of the opinion that it is properly seized of the matter as the enforcing court of a decree arising from a taxation under the Advocates Act.

This court also has judicial notice of the fact that this jurisdiction can only be invoked for purposes of preventing injustice to either litigant and for ends of justice to be met to both parties. The injustice that has been put forward by the applicant is that, the bill, did not give credit to an amount of kshs 529,000.00 which the applicant had paid to his advocates prior to the taxation. That the counsel then appearing for the applicant did not bring that to the attention of the taxing officer who only gave a credit of 100,000.00. A number of copies of cheques have been annexed to the application as well as accompanying bank statements as annexure SG 2A,B, 3A-B 4A-B 5A-B, 6A-B, 7A-B, 8A-B, C, 9A-B, 10A-B, 11A-B, C. The Court has totalized them and they total Kshs 557,096.00. The Court also notes that annexures SG 2A, 3A, 4A, 5A, 6A, 7A bear the names of the decree holders advocates firm. Annexure 8B to the tune of Kshs 150,000.00 and 9A to the tune of Ksh 55,000.00 by cheque and cash of 5,000/= - bear other persons names though there are notes to show that they were paid to the said firm of advocates. The resultant figures exceeds what was given to the client as credit.

It therefore follows that if the client is indeed entitled to the said credit and yet he was not given, failure to allow him an avenue to challenge the same will occasion injustice to them more so when the annexures have not been denounced by the Counsel. In fact in paragraph 15 of the replying affidavit it, is deponed that the decretal sum of Kshs 1,495,848.94 where as the disputed sum is Ksh 529,569.60.

It is therefore the finding of this court that justice demands, that the interests of both parties be considered. This would mean that there would be no need to withhold the undisputed amount from being realized by the beneficiary while the disputed amount is deferred for further consideration.

This would then call for a conditional stay where by the beneficiary will be allowed to proceed to realize the undisputed amount of Kshs 966,279.34 where as the disputed amount will be ordered to be held in neutral grounds to await an amicable settlement of the same or a determination on the issue by the court.

In view of the fact that it is the fault of the applicant that they did not raise this at the time of taxation, and entry of consent on the same they will be required to move within a particular time frame so that they do not unreasonably withhold the successful party from the enjoyment of the fruits of his judgment.

As for the Garnishee proceedings, these will be allowed to proceed limited to the undisputed figure of Kshs 966,279.34.

For the reasons given in the assessment above the court makes the following orders:

(1) That stay of execution be and is hereby granted solely under the inherent powers of the court and is solely meant to avoid injustice and hardships to be suffered in so far as the disputed amount of Ksh s529,569.60 is concerned.

(2) The said stay is conditional to:

(a) depositing the said amount in a joint interest earning account in the joint names of both counsels within a period of 60 days from the date of the reading of the ruling.

Or alternatively upon furnishing of a bank guarantee for the said amount from a reputable bank to be approved by the respondent within the same period of time.

(b) That the applicant do process and set down the objection proceedings for disposal within the same 60 days from the date of the reading of this ruling.

(3) In default of compliance with number 2(a), 2 (b) above the stay order to stand discharged.

(4) A Garnishee order Nisi be and is here by granted in terms of prayer 2 of the application dated 2nd May 2008 and filed on 5th may 2008.

(5) An order in terms of number 4 above shall be extracted and served forthwith.

(6) That the Garnishee so named are to show cause within 14 days from the date of service upon them of this order to show cause why they should not meet the said indebtedness to the decree holder that is the undisputed amount of Kshs 966,279.34.

(7) Costs of the application to the decree holder.

(8) There will be liberty to apply.

DATED, READ AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE 2008.

R.N.NAMBUYE

JUDGE