



REPUBLIC OF KENYA

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

Civil Case 370 of 2003

MOHAMMED KISABULI

(Suing as the administrator of the Estate of the late

HALIMA WAMUKOYA KISABULI(DECEASED)..... PLAINTIFF

VERSUS

ORIENTAL COMMERCIAL BANK LTD(FORMERLY DELPHIS BANK LTD).....1<sup>ST</sup>  
DEFENDANT

CITY CHEMISTS (NBI).....2<sup>ND</sup> DEFENDANT

R U L I N G

Pursuant to an application made by Mohammed Kisabuli, the plaintiff in this suit in **Nairobi HCC Misc.Application No. 279 of 2008** this court granted the plaintiff extension of time pursuant to **Paragraph 11 (1)** of the **Advocates (Remuneration) Order**. The plaintiff was granted fourteen (14) days in which to file objection to the taxation of the 1<sup>st</sup> defendant's bill of costs made by the taxing officer of this court. The plaintiff was granted an order staying execution of the certificate of costs issued in favour Oriental Commercial Bank Ltd (*formerly Delphis Bank Limited*) for a further period of fourteen (14) days. The said order was issued by this court on 19<sup>th</sup> May 2008. In compliance with the order of the court, the plaintiff did on 22<sup>nd</sup> May 2008 file objection to taxation of various items in the 1<sup>st</sup> defendant's bill of costs. Pursuant to **Paragraph 11 (2)** of the **Advocates (Remuneration) Order**, the plaintiff requested the taxing officer to give reasons for his decision. On 29<sup>th</sup> May 2008, the plaintiff filed an application to this court seeking an order staying the execution of the said certificate of costs issued on 5<sup>th</sup> February 2008 pending the hearing and determination of the reference filed before this court.

On the date scheduled for the hearing of application for stay of execution, the 1<sup>st</sup> defendant raised preliminary objection to the application on the grounds that the issues raised in the application were substantially the same issues which had been raised by the plaintiff in **Nairobi HC Misc. Application No. 279 of 2008**. It was the 1<sup>st</sup> defendant's contention that the issue regarding stay of execution that the plaintiff seeks to canvass before this court had been considered and a decision rendered by this court. The 1<sup>st</sup> defendant was of the view that the issues raised by the plaintiff in the present application were, in the circumstances, *res judicata*. The plaintiff opposed the preliminary objection. The plaintiff argued that the issues raised in the present application were dissimilar to the matters in issue in **Nairobi HCC Misc. Application No.279 of 2008**.

The issue for determination by this court is whether the issues raised in the present application are similar to the issues raised by the plaintiff in the previous suit (i.e. **Nairobi HCC Misc. Application No.279 of 2008**). For a subsequent suit to be said to be *res judicata*, it must be established that the issues in the previous suit were substantially the same issues as the present suit. It must further be established that a court of competent jurisdiction heard and determined the matters in issue in the previous suit (see **Ukay Estate Limited & Anor vs. Shah Hirji Manek & 2 Others [2006] eKLR**). In the previous application, the plaintiff sought leave of the court to be granted extension of time to enable him file reference to this court against the decision of the Taxing Officer. Pending the hearing of the said application, the plaintiff

sought temporary stay of execution of the certificate of cost awarded in favour of the 1<sup>st</sup> defendant. That stay expired when said the application was heard and determined by this court.

The plaintiff was granted a further fourteen (14) days upon which to make an appropriate application moving this court to grant him another order of stay of execution pending the hearing and determination of the reference filed to this court. It was therefore clear that the stay of execution granted in the miscellaneous application was spent when the application for extension of time was granted. The present application for stay of execution is dissimilar to the application for stay of execution which expired upon the determination of the application for extension of time as provided in **Paragraph 11(1)** of the **Advocates (Remuneration) Order**.

The preliminary objection raised by the 1<sup>st</sup> defendant therefore is misconceived. The plaintiff was entitled to secure his interests pending the hearing and determination of the reference which he intends to file to this court upon the taxing officer giving reasons for his decision. By applying to stay the execution of the certificate of costs issued in favour of the 1<sup>st</sup> defendant, the plaintiff desired the *status quo* as is existing now to be preserved pending the hearing and determination of the reference. If the plaintiff did not apply to stay execution of the costs awarded to the 1<sup>st</sup> defendant, his reference would be rendered nugatory. This court has not heard or determined any application regarding whether the plaintiff should be granted stay of execution pending the hearing of the reference. That is the application that is now pending determination by this court. That application is not *res judicata*.

The preliminary objection lacks merit and is hereby dismissed with costs.

**DATED** at **NAIROBI** this 7<sup>th</sup> day of **OCTOBER, 2008**.

**L. KIMARU**

**JUDGE**