

REPUBLIC OF KENYA

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

Civil Case 91 of 2004

WILLIAM MUTHEE MUTHAMI.....PLAINTIFF

VERSUS

BANK OF BARODA (K) LIMITED.DEFENDANT

RULING

The present application is made by the plaintiff which is by Notice of Motion dated 1st November 2006. The application is brought under Order XLI rule 4 of the Civil Procedure Rules. The plaintiff seeks stay of execution in respect of costs that were awarded to the defendant pending an appeal. The affidavit in support of the application is sworn by the plaintiff. He deposed that his claim was dismissed by this court on the 25th of July 2005. That he was dissatisfied with that dismissal and therefore filed an appeal, **Civil No. 21 of 2006**. That in the meanwhile the defendant proceeded to tax costs for kshs 1, 244, 522.66/-. The Certificate of Taxation was issued on the 18th of April 2006. The plaintiff deposed that he could not raise the money which is demanded in respect of that taxation. He stated that he had no property since he lost the only asset he had when this case was dismissed. He said that he was subsequently served with a Notice to Show Cause why he should not be committed to civil jail. That if the defendant is not restrained by the court it will commit him to jail and therefore will curtail his freedom and as a consequence he will suffer irreparable loss which will be impossible to compensate. The defendant by a replying affidavit sworn by the Manager stated that the plaintiff was refunded the purchase money of the property the subject of this suit, namely kshs 15 million. He deposed that the plaintiff failed to explain where that money was. Further the deponent stated that the plaintiff had been represented by counsel throughout the proceedings and that the counsel had intimated that objections would be raised to the taxation. That, that objection was not followed through with an application. That replying affidavit provoked the plaintiff to swear a further affidavit. In the further affidavit the plaintiff stated that at the time he raised the kshs 15 million the purchase money shillings he was only twenty years old. That he raised that money from a loan from his father who was to be repaid from the rental income. That when the cheque of ksh 15 million was refunded to him once it cleared through his account, he paid over to his father kshs 14, 957, 000/-. He therefore concluded that he is not a man of means and that he would greatly suffer if stay is not granted.

The plaintiff in making the present application does not claim that the defendant would be unable to refund the money if the appeal was successful. The plaintiff has stated that he borrowed money from his father to purchase the suit property. He fails to explain why, if he has access to loans he is unable to borrow in respect of the costs of the defendant. The plaintiff in his further affidavit annexed his Bank Statements to show that on the cheques of kshs 15 million being cleared, an amount was debited from his account. That statement does not show where that money went to although he says he paid it to his father. It is possible that the amount may have been credited into another account owned by the plaintiff since the plaintiff has not shown before court any other evidence. That as it may be, I am of the view that in respect of taxed costs there cannot be a stay of execution for I am of the view that Civil Procedure Rules do not apply to the Advocates Act. I have had occasions to so find in the case of **Sande Investment Ltd & 3 others V Kenya Commercial Finance Corporation & 5 others** where I made the following finding:-

“The Civil Procedure Act does not apply to the Advocates Act and the Advocate Act does not provide for stay of taxed costs. Moreover costs being what they are that they are awarded to a

party who either succeeds in its claim before court or a party who succeeds to have a claim dismissed. In the courts view it is not just for the court to stay execution of such costs. Such a party having so succeeded should not be prevented from being compensated or from enjoying the said compensation”.

In making that finding I was guided by a decision of a Court of Appeal namely: *FRANCIS KABAA – NANCY WAMBUI & ANOTHER, CIVIL APPEAL NO. 298 OF 1996*. In that case the Court of Appeal had the following to say about stay of taxed costs:-

“The application according to the Notice of Motion is to stay the order of Amin J, in which he dismissed the applicant’s suit then before him. Before us the applicant says that what he wants is a stay of an order that he should pay costs. But this is not really what the order of Amin, J was all about. In any case, even if that were so, the appellant, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs.”

Having in mind what is stated hereinbefore, I am of the view that there is no merit in the plaintiff’s application dated 1st November 2006 and the same is hereby dismissed with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 19th day of February 2007

MARY KASANGO

JUDGE