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

Civil Suit 379 of 2004

ANTHONY AMBAKA KEGODE……..……..…….....….....1ST PLAINTIFF

UHAI LIMITED…….....…..……..……...2ND PLAINTIFF

VERSUS

FOUR NINETY INVESTMENT LIMITED.…….....…….1ST DEFENDANT

ADAM CRAIG OGDEN …….....……..…….2ND DEFENDANT

EAST AFRICAN SAFARI LIMITED …….....……3RD DEFENDANT

EAST AFRICAN SAFARI AIR EXPRESS LTD….....……..4TH DEFENDANT

R U L I N G

This is an application expressed to be brought under Order 41 Rule 4, Order 50 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. It is seeking a stay of taxation of the 1st and 2nd defendant's Bill of Costs pending the hearing and determination of an intended appeal. The primary reasons for the application are that the applicants being aggrieved by the ruling of Lady Justice Kasango dated 22.12.2006 dismissing the suit against the 1st and the 2nd defendants intent to appeal against the said ruling and for that purpose, a Notice of Appeal has been lodged. The applicants contend that their appeal has high chances of success and if the taxation is allowed to proceed, the intended appeal will be grossly prejudiced. They further contend that the 1st defendant has no known assets within the jurisdiction of the court and the 2nd defendant is a foreigner also with no known assets with in the jurisdiction of the court. In the premises, the applicants pray that the taxation be stayed. There is an affidavit in support of the application sworn by the 1st applicant which elaborates the said grounds.

When the application came up for hearing on 28.6.2007 Mr. Gachuhi, Learned counsel for the 1st and 2nd defendants attended and I allowed him to respond to the application even though the respondents had not responded by way of replying affidavits or Grounds of Opposition. Counsel for the 1st and 2nd defendants orally undertook to reimburse the plaintiffs costs if the same are paid and their appeal eventually succeeds.

I have considered the application, the supporting affidavit and the oral opposition to the application by counsel for the 1st and 2nd defendants. Having done so, I take the following view of the matter. It is now settled that taxation of costs is the preserve of the taxing officer of this court by dint of the provisions of

the Advocates' (Remuneration) Order. With regard to matters of taxation, a Judge of the High Court has jurisdiction on a reference from a decision on taxation by the taxing offer. That jurisdiction is conferred by Rule 11 of the said Order. This application is not a reference from an order of taxation.

The reasons given by the plaintiffs justifying this application are not close to the matters that the court would consider even if the matter was properly before the court. The plaintiffs brought the 1st and 2nd defendants before the court. They must have known their circumstances when they instituted these proceedings against them. It is not open to them to now say that they will be prejudiced if the respondents costs are taxed.

The applicants acknowledge that an order of costs has been made against them in favour of the 1st and 2nd respondents and the latter's Bill of costs has been lodged and is pending taxation. The taxing officer of this court is accordingly properly siezed of the matter. All that he/she will do is to tax the Bill and no more. If the applicants are apprehensive that proceedings for recovery of those costs may be commenced, counsel for the respondents has given his undertaking to reimburse the same in the event that the intended appeal succeeds and costs have been paid in which event the applicants stand to suffer no prejudice if the taxation proceeds.

In any event the Court of Appeal has expressed doubt as to whether an order of costs can be stayed. See **Francis Kabaa – vs – Nancy Wambui & Another C.A. No.298 of 1996 (UR).**

In the end, the plaintiffs' application dated 16.4.2007 and filed 18.4.2007 is dismissed with no order as to costs.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Gichuhi for the 1st and 2nd defendants and Ocharo holding brief for Mume for the plaintiffs.

F. AZANGALALA

JUDGE

21/9/07