



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Appli 444 of 2004
(IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT
IN HIGH COURT MISC. CAUSE NO. 2892 OF 1997)

MUSYOKA & WAMBUA,ADVOCATES.....ADVOCATES/APPLICANTS

VERSUS

AFRICAN BANKING CORPORATION LTD.....CLIENT/RESPONDENT

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

By ruling dated 15th and delivered on 17th March, 2006, the court allowed the Advocates' application herein for judgment for taxed costs, and judgment was entered in the sum of KShs.1,114,732/00 plus interest and costs against the Client.

The Client has come back to court by notice of motion dated 23rd March 2006 seeking the following main orders:-

1. That leave be granted to the Client to appeal against the order of 17th March, 2006.
2. That there be stay of execution of the judgment given on 17th March, 2006 pending hearing and determination of the intended appeal.

The grounds for the application appearing on the face thereof are, *inter alia*:-

1. That the Client wishes to appeal against the decision of the court, and leave of the court to appeal is necessary.
2. That due to inadvertence leave to appeal was not sought when the decision was delivered on 17th March 2006.
3. That grant of leave to appeal will not occasion the Advocates any prejudice.

4. That execution is likely unless stay is granted.
5. That there is also pending a reference challenging the taxation.
6. That the intended appeal has good prospects of success.
7. That the Client is ready and willing to provide security as the court may order.
8. That the application has been made without delay.
9. That it is in the interests of justice that the orders sought be granted.

The application is made under Order 41, rule 4 of the Civil Procedure Rules (the Rules). There is a supporting affidavit sworn by one CAROLINE MBENGE, a legal officer with the Client.

The Advocates have opposed the application as set out in the replying affidavit sworn by WILLIAM MUSYA MUSYOKA, a partner in the firm, and filed on 30th March, 2006. The grounds of opposition emerging therefrom are, *inter alia*:-

1. That the Client has not shown good faith in this matter.
2. That there is no application for stay of further proceedings herein.
3. That the taxation has not been challenged and there is no reference in that regard pending.
4. That the Client has not met the conditions for grant of stay of execution pending appeal.
5. That the Client will not suffer substantial loss as the Advocates' firm has a solid financial base and shall refund to the Client any sum that may be directed to be refunded.

I have considered the submissions of the learned counsels appearing, including the cases cited. The application for leave to appeal is not opposed, and I will grant it. It is desirable that the Court of Appeal do rule on whether judgment for taxed costs can be properly obtained under section 51(2) of the Advocates Act, Cap. 16, without the necessity of filing suit by plaintiff.

Regarding stay of execution of decree pending appeal, the conditions for granting the same are set out in subrule (2) of rule 4 aforesaid. The application must be made without unreasonable delay. The applicant must also demonstrate that he stands to suffer substantial loss unless the order of stay is granted. Finally, the applicant must be prepared to give such security as the court may order for the due performance by him of such decree or order as may ultimately be binding on him.

I am satisfied that the application has been made without unreasonable delay. What about substantial loss? At paragraph 9 of the supporting affidavit there is the bare assertion that substantial loss will be occasioned to the Client unless stay is granted. It has not been explained what this substantial loss might be or how it might be occasioned. There is no allegation that the Client will be unable to recover, or recover only with much difficulty, such costs paid to or recovered by the Advocates as may ultimately be found not to be due to them. On the other hand, the Advocates have asserted that their firm has a solid financial base and that they will make such a refund. They have even offered to give such security as may be directed by the court.

There is thus no appropriate proof of substantial loss. It was incumbent upon the Client to place before the court such material as would tend to establish that it is likely to suffer substantial loss unless stay of execution is granted.

In the event, and for the above reason, I must refuse the application by notice of motion dated 23rd March, 2006. It is hereby dismissed with costs to the Advocates. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 7TH DAY OF SEPTEMBER, 2007