



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

Misc. Civ Appli. 862 of 2003

S. GICHUKI WAIGAWA.....ADVOCATE

VERSUS

NINA MARIE LIMITED.....CLIENT

RULING

This action involves an advocate and client taxation.

Previously the client was granted stay of execution to enable it proceed with an intended reference under paragraph 11 of the Advocates (Remuneration) Order.

The advocate thereafter successfully applied for the vacation of the stay orders and for entry of judgment for the taxed costs. A decree was issued in that regard on 17th February 2006.

The client has now moved this court with two applications both dated 27th February 2006. One seeks stay of execution of the judgment and decree of this court; whilst the other seeks that, (i) leave be granted for the client to file and to have determined its reference notwithstanding non-receipt of certified copy of taxing master's reasons, (ii) the decision of the taxing master taxing the costs at kshs 2, 661, 168. 54 to be set aside and (iii) the decision of the taxing master given on 28th October 2004 be set aside.

This court by its ruling delivered on 9th February 2006 stated:

“.....there is no sufficient reason shown by the client why judgment should not be entered in the instant case, where the certificate of cost which binds all the parties, has not been set aside or altered.”

The court proceeded to enter judgment in favour of the advocate.

In view of that finding the court is of the view that it cannot now entertain the prayers that, the setting aside of taxation of the bill of costs, or the setting aside of the decision of the taxing master of 28th October 2004 whereby the taxing master refused to entertain a preliminary objection to stop taxation

The court is of the view that those prayers can only be entertained once the judgment of 9th February 2006 is set aside and the certificate of taxation dated 12th April 2005 is also set aside.

Accordingly the only application, which the court can entertain, is the one seeking stay of execution of the judgement of 9th February 2006 pending appeal.

Client's learned counsel submitted that the advocate has started to execute the decree by giving a statutory Notice for winding up the client, which is a Limited Liability company. That the client, who was aggrieved by the judgement of this court, had filed a notice of appeal with the intent of appealing thereof. That if stay was not granted the intended appeal would be rendered academic and nugatory. That the threat of winding up the client company, would adversely affect its operations. Client's counsel said that the law relating to taxed costs between advocates and clients was an area laden with contradictions which needed to be resolved by the court of appeal; for example she said there is need to resolve the conflict between section 51 and section 48 of the Advocates Act. Counsel quoted various authorities, which showed the divergent decisions on this area.

The application was opposed. The advocate argued that the client applicant had failed to invoke the procedural law it relied upon. That the certificate of costs had not been set aside. That the court had no jurisdiction to entertain an application for stay since there was no power to stay execution of costs under the Advocates (Remuneration) Order. Finally that if stay is granted it be on condition that an amount of kshs 1, 100, 735 is deposited in interest bearing account.

The court accepts the submissions of the advocate that there is no specific power to stay execution for costs, pending appeal, provided for in the advocates Act or in the Advocates (Remuneration) Order. I am of the view since no such power is to be found, thereof, a party ought to move the court of appeal for stay. The legislature having not provided such power to stay, to this court, the court cannot enter into the realm of creating legislation. The court cannot, in my view, fill the gap so left, by invoking its inherent power.

The court's finding is that

(1) The Notice of Motion dated 27th February 2006 and the chamber summons dated 27th February 2006 are hereby dismissed with costs to the Advocate with the bill.

MARY KASANGO

JUDGE

Dated and delivered this 28th March 2006

MARY KASANGO

JUDGE