



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (COMMERCIAL DIVISION, MILIMANI)

CIVIL CASE NO. 416 OF 2004

NYAKUNDI & COMPANY ADVOCATES.....PLAINTIFF

VERSUS

KENYATTA NATIONAL HOSPITAL BOARD.....DEFENDANT

**R U L I N G**

On 23rd July, 2004 the Plaintiff herein filed suit against the Defendant for Kshs.68,724,035/00, the same being their advocate's costs duly taxed in respect of professional services rendered to the Defendant. The Defendant filed defence and pleaded, inter alia, that the suit was premature as the taxation had been duly challenged. It also pleaded a set-off of Kshs.1,465,000/00, the same being money already paid to the Plaintiff towards his fees.

On 16th August, 2004 the Plaintiff filed notice of motion dated 13th August, 2004 seeking summary judgment under Order 35, Rule 1 of the Civil Procedure Rules (the Rules). Before this application was fixed for hearing the Defendant filed notice of motion dated 15th September, 2004 seeking stay of any further proceedings herein pending hearing and determination of the Defendant's challenge to the taxation. On 16th September, 2004 the court ordered that this application be heard first before the application for summary judgment. I heard the application on 23rd November, 2004.

The application is essentially brought under Order 41, Rule 4 of the Rules. Order 50, Rule 1, Section 3A of the Civil Procedure Act and ***“all other (unstated) enabling provisions of the law”*** are also quoted. The grounds for the application as stated on the face thereof are that the Defendant has an arguable challenge to the taxation with a high probability of success; that unless stay is granted the Plaintiff may proceed to obtain final orders on the basis of the certificate of costs; that it would be unconscionable and inequitable for the Plaintiff to obtain final orders before the Defendant's challenge to the taxation has been heard and determined as the reference would thereby be defeated and rendered nugatory, in which case the Defendant would suffer irreparable loss; that the Defendant has a good defence against the Plaintiff's claim; that the application has been made without any unreasonable delay and will not occasion any prejudice to the Plaintiff; and that the order sought ought to be granted in the interests of justice. There is an affidavit sworn by one NZUKI MWINZI, Senior Legal Officer of the Defendant, in furtherance of those grounds.

The Plaintiff opposes the application and has filed a lengthy replying affidavit. That affidavit is essentially a narration of the services rendered by the Plaintiff to the Defendant for which his costs were taxed. There is also in the affidavit the plea that the Defendant has no defence to the Plaintiff's claim. But during arguments learned counsel for the Plaintiff advanced the following grounds against the application. Firstly, the application is premature, there being no apprehension of any imminent danger to

the Defendant as there is no judgment yet that can be executed. Secondly, the jurisdiction of the court is wrongly invoked and the application is thus incompetent as Order 41, Rule 4 of the Civil Procedure Rules has application only where an appeal is pending. Thirdly, no steps have been made towards filing a reference under Rule 11 of the Advocates (Remuneration) Order. There would thus be no justification to order stay as the Defendant is not pursuing any course of action that could alter the respective positions of the parties. And finally, there will be no arguable reference as the judge cannot be the taxing officer.

I have considered the arguments of the respective learned counsels. They quoted a number of cases. I will refer to some of them that I consider relevant to the issues before me. I will state at the outset that had there been a reference duly filed under Rule 11 of the Advocates (Remuneration) Order, I would have been inclined to stay the proceeding herein pending disposal of the reference. This would have been necessary and just for reasons of expediency and to ultimately save the court's time. Had there been such a reference it would be conceivable that an alteration of the figure of the taxed costs is possible or probable, or even a setting aside of the entire taxation with directions for a fresh taxation. In that event it would be necessary to alter or vacate altogether any judgment already entered upon the certificate of costs. But in the instant case there is no such reference duly filed. From arguments placed before me it appears that it will be a hotly contested issue whether in the circumstances of this case a proper reference under Rule 11 (2) of the Advocates (Remuneration) Order can be filed. So, why should the Plaintiff be prevented from proceeding with his suit in these circumstances?

In any event, assuming that the Plaintiff eventually gets judgment, what is to prevent the Defendant from then seeking stay of execution, especially if it will by then have duly filed a reference in challenge to the taxation? The Defendant would then, unlike now, be in imminent danger of execution of decree and the court would most likely consider favourably an application for stay of execution in the face of a reference already duly filed. But as things now stand, what is the imminent danger facing the Defendant that ought, in the interests of justice, to be prevented by an order of stay? I find none. And what course of action is the Defendant now pursuing that may ultimately alter the respective positions of the parties? Right now there is none as no reference under Rule 11 aforesaid has been filed. What I have already said is enough to dispose of the application. But the issue of jurisdiction has been raised, and I will discuss it briefly. In my mind there cannot be any doubt that Rule 4 of Order 42 of the Rules has application only where an appeal or second appeal has been filed.

The very opening words of subrule (1) of that Rule say so:-

***“4. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except....”***

To give this rule operation outside of appeals and second appeals would be to give the rule a meaning and scope that flies in the face of its plain wording. That is why I respectfully disagree with the holding of the Hon. Mwera, J. in **HIGH COURT, MILIMANI, CIVIL CASE NO. 427 OF 2000, IN THE MATTER OF CENTRAL BANK OF KENYA AND RELIANCE BANK LIMITED**, to the effect that a reference under Rule 11 of the Advocates (Remuneration) Order is as good as an appeal and that therefore Order 41 of the Civil Procedure Rules should apply to it mutati's mutandis. In my respectful view, is as much as the application purports to be brought under Rule 4 of Order 41 of the Rules it is incompetent, and I so hold. But, again in my respectful view, the inherent jurisdiction of the court is wide enough to provide relief, in appropriate cases, where none is directly provided for in any particular provision of the Rules or other law.

It is apparent that stay of proceedings such as is sought in the present application is not provided for in the Rules or in the Advocates (Remuneration) Order. I see no difficulty at all, in an appropriate case, in the court giving such relief under its inherent jurisdiction. Hon. Ringera, J., as he then was, was similarly inclined in the case of **FIRST AMERICAN BANK OF KENYA LTD –VS- GULAB P. SHAH & OTHERS, HIGH COURT, MILIMANI, CIVIL SUIT NO. 2255 OF 2000**, when he said, after discussing the inherent power of the court:-

***“.....I find that there is jurisdiction in this court to entertain an application for stay of execution of an order of taxation duly made pursuant to the provisions of the Advocates (Remuneration) Order.”***

Learned counsels made other arguments which tended towards the merits or otherwise of the reference, yet to be filed. It would be pre-emptive to consider those arguments, and I will not do so. In the first part of this ruling I had already strongly indicated that the application

has no merit. It is hereby dismissed with costs. Order accordingly.

**DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF FEBRUARY,  
2005.**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED THIS 11TH DAY OF FEBRUARY, 2005.**