

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
MISC CIVIL CASE NO. 862 OF 2003

IN THE MATTER OF ADVOCATES ACT
and
IN THE MATTER OF THE TAXATION OF COSTS BETWEEN
ADVOCATE AND CLIENT

S. GICHUKI WAIGWA.....ADVOCATE

VERSUS

NINA MARIE LIMITED.....CLIENT

R U L I N G

The client in the bill of costs has moved the court under chamber summon dated 28.4.2005 under Rule 11 of the Advocates Remuneration Order, Section 3A of the Civil Procedure Act and Order 41 Rule 4 of the Civil Procedure Rules.

The client seeks stay of proceedings in execution of costs taxed on 18th March 2005 pending the reference to the High Court against that taxation and a ruling that was delivered on 28.10.2004 by the taxing master.

The client filed a notice of its objection to the said taxation on 31st March 2005 against the said taxation, and in that regard requested a copy of the taxing master's reasons. The client to date has not been supplied with those reasons.

The plaintiff is fearful that if stay is not granted the advocate will proceed with execution process.

Client's learned counsel Miss Kethi Kilonzo argued that under section 51 (2) of the Advocate's Act the advocate can obtain judgment on the taxed costs, where as the client had exercised its right to object to the taxation. Despite that objection the client would not be able to use it as a defence to a recovery process by the advocate. She submitted that the client should be given an opportunity to have the order of the certificate of costs stayed.

Learned counsel Mr. Gichuki Waigwa appeared in person, as the advocate in the bill. He relied on the grounds of opposition and expounded them thus; that the court does not have jurisdiction to hear the present application seeking stay; that the reference from the taxing master to the High Court was not an appeal and consequently the client could not rely on order 41 Rule 4; the certificate of costs, issued after taxation was not a decree that could be taxed, and for the advocate to recover the costs there was need to file another suit; that this court at this stage ought not to bother itself with the merits of the proposed references by the client.

Counsel for the client responded by saying that it is clear that a certificate of costs is binding on both parties until it is set aside and accordingly if stay was not granted the client would be prejudiced. She finally said that if the court was to find that Order 41 Rule 4 is not applicable, the client had come under section 3A of the Cap 21, and the court could invoke its inherent jurisdiction in favour of the client.

Having summarized the arguments brought before me this now is my response.

Indeed it is correct to state that a certificate of taxation once issued is final and binding on the parties

unless it is set aside or altered by the court. What that means is that if the advocate was to start execution for those costs the client would not have a defence. It therefore follows, that to afford the client measure of protection, it is necessary for stay of execution of those costs, to be granted. I accept the advocate's argument that I should not concern myself with the merits or demerits of the client's proposed reference, but on the other hand, it is necessary for the client to show this court, cause why stay should be granted. To back track a little, the court does accept the advocates argument that Order 41 Rule 4 cannot be invoked in a case of reference because a reference is not an appeal. The client has invoked, and correctly so, section 3A of Cap 21, and the court can on that basis grant a stay. Getting back to the merits, the client has raised issues, which I believe ought to be ventilated at a reference for a final decision. For the client to be able to ventilate those issues I find that a stay should be granted. The issues I have in mind are, whether the advocate's bill of costs was amended after filing and if so whether that amendment invalidated the bill; whether the taxing master failed to deduct kshs 500, 000 paid to the advocate; whether the advocate and the client had an agreement on fees; and whether the suit had been prepared by the advocate for trial.

As a consequence of my findings herein before I find and I hold that the client's application is merited. The orders of this court are: -

- (1) That this court does hereby stay recovery and execution of taxed costs of kshs 2, 661, 168. 54 pending the hearing of the intended reference from the ruling of the taxing master given on 28th October 2004 and from the taxation dated 18th march 2005.**
- (2) The advocate is granted liberty to apply to vacate the aforesaid stay in (1) above, if the client does not exercise due diligence in prosecution of the intended references after a period of two months.**
- (3) The costs of the application dated 28th April 2005 shall be in the cause of the intended references.**

Dated and delivered at NAIROBI this 18th May 2005.

MARY KASANGO

JUDGE