



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 673 of 2004

TERA WAIGWA WAIHENYA.....1ST PLAINTIFF
DAN KAMUNYA WAIHENYA.....2ND PLAINTIFF
VERSUS
THE CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

This is an application brought by the Defendant pursuant to the provisions of Section 63(e) of the Civil Procedure Act, as well as Order 21 rule 22(1) of the Civil Procedure Rules. Through this application, the Defendant hopes to obtain an order for the stay of execution of the Certificate of Taxation pending the hearing and determination of the reference which the defendant hopes to lodge against the taxation.

For a better understanding of the matters in contention, it is important to first set out a brief history of the litigation herein.

On 15th December 2004 the Plaintiffs filed this suit, seeking an injunction to restrain the Defendant, permanently, from unlawfully interfering with and/or alienating in any way whatsoever the land parcel L.R. No. 8152 (I.R. 9193), Nyeri District. The basis for that prayer was that the Defendant had failed to issue a valid notice, as the only notice had been issued to the Plaintiffs, whose only connection with the suit property was the fact that they had taken out temporary letters of administration over their late mother's estate; the said letters were limited to the filing of these proceedings.

Simultaneously with the Plaint, the Plaintiffs filed a Chamber Summons, under a certificate of urgency. The said application sought an injunction to restrain the Defendant from interfering and/or alienating the suit property pending the hearing and determination of the suit.

The 2nd Plaintiff swore an affidavit in support of the application. In the said affidavit he said that the Plaintiffs received a notice from Watts Enterprises, a firm of auctioneers, in mid – October 2004. The Plaintiffs felt aggrieved with the notice, and thus applied to the court for letters of administration ad litem, to enable them file this suit.

The 2nd Plaintiff emphasized that although the said notice was purportedly served upon them, in their capacity as the administrators of the estate of their later mother, the Plaintiffs were not the administrators of the said estate. It was their position that although their mother, Lydia Kagechi Waihenya, passed away on 30th March 1999, nobody had yet been appointed an administrator to her estate.

Having heard the Plaintiff's application exparte, in the first instance, Mutungi J. granted an interim injunction on 15th December 2004. That order served to put on hold the sale which had been scheduled for 17th December 2004.

Thereafter, no challenge was mounted against either the application or the suit. Instead, on 12th May 2005, the parties filed a consent letter dated 9th May 2005, in which the following order was recorded:-

“By consent this suit H.C.C.C. No. 673 of 2004 be and is hereby marked as settled with costs to the Plaintiff.”

That consent order was followed in quick succession with the filing of the **“Applicants Bill of Costs”**, on 2nd June 2005. The taxation of that Bill of Costs was conducted on 17th June 2005 and 23rd June 2005. Thereafter, the learned Taxing Master delivered his Ruling on 7th July 2005, in which he, **inter alia**, taxed the instruction fees in the sum of Kshs.299,900/=.

The applicant herein felt aggrieved at the decision of the Taxing Master, and filed a Notice of Objection thereto, on 11th July 2005. By the said Notice of Objection, the applicant also asked for the reasons which formed the basis for the decision of the learned Taxing Officer.

In the meantime, on 12th July 2005, this court issued a Decree. On that same day, the court issued a Certificate of Taxation. On the next day, 13th July 2005, the Plaintiffs applied for execution.

By 14th July 2005, the court had issued warrants for the attachment of the Defendant’s assets. The court brokers who were appointed to execute the warrants were Messrs Virmir Auctioneers. The said court brokers moved swiftly to carry out their mandate, and proclaimed the Defendant’s property on 15th July 2005. It is that action which prompted this application.

In canvassing the application, Mr. Ohaga, advocate for the Defendant, pointed out that the Plaintiff did not disclose any value for the subject matter of the suit. He also pointed out that, even though the claim had not specified a value for the subject property, the Plaintiffs’ Bill of Costs had mentioned a sum of Kshs.17,380,001.25. That sum was, however, not the value of the subject matter of the suit, but the balance of the debt which the Defendant was seeking to recover by realising the security.

It is therefore the applicant’s contention that the Taxing Master erred, in principle, by basing his calculation of the instruction fees on the sum of Kshs.17,380,000/=. That is the basis of the reference which the applicant intends to file. However, the said reference can only be filed after the Taxing Master provides his reasons for arriving at the sum which he awarded as instruction fees.

In the meantime, as the applicant awaits the reasons from the Taxing Master, the Plaintiff was proceeding to carry out execution to recover the disputed costs. It is for that reason that the applicant requests the court to issue a stay of execution. The said order for stay is said to be outside the realm of Order 41 of the Civil Procedure Rules, although the Defendant concedes that the court, may, in its discretion, impose conditions for such stay.

In response to the application, the Plaintiffs point out that it is not the same thing as the reference. They say that the merits of the intended reference were irrelevant to the application. It is submitted that, in any event, as the learned Taxing Master had not yet given his reasons for the decision being challenged, the Defendant would be merely speculating about the merits of the intended reference.

I fully appreciate that the learned Taxing Master has not yet given his reasons for the decision he arrived at, in respect of the instruction fees. However, I nonetheless do not believe that it would be an exercise of idle speculation to say that the instruction fee was calculated on the basis of Schedule VI paragraph 1 (9) of The Advocates (Remuneration) Order. It would not amount to speculation, as the learned Taxing Master expressly held as follows, in his Ruling:-

“Item 1 is taxed under Schedule 6 1A and is taxed at Kshs. 299,900/=.”

Paragraph 1(a) of Schedule VI provides for the manner in which the instructions fees is to be calculated. It reads as follows:-

“The fee for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it:

(a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defence or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgement or settlement between the parties”

In my understanding, the learned Taxing Master is supposed to peg his calculations of the instruction fee on the value of the subject matter. And, the value of the subject matter is supposed to be derived from either the pleadings, the judgement or the settlement between the parties. That, as I understand it, is the basis of the current complaint by the Applicant.

It’s position is that the value of the subject matter has not been specified in the pleadings or settlement. Having perused the said two documents, I am satisfied that that complaint is merited. Indeed, it appears to me that the learned Taxing Master may have applied, as the value of the subject matter of the suit, the amount which had been cited as the debt recoverable from the mortgagor. That sum may be the balance of the loan which the Defendant is seeking to recover, but it does not have any connection at all with the value of the property which is the subject matter of the suit.

In fact, the only place from which I have been able to find reference to anything which might be deemed to be relevant to the value of the subject matter is in the Proclamation dated 8th October 2004, by Watts Enterprises. In the schedule to that Proclamation, the market value of the property is cited as Kshs. 3,200,000/=, whilst the forced sale value is placed at kshs. 2,000,000/=.

Having arrived at that conclusion, it does appear to me that, even though it is not for me to make a decision on the yet to be filed reference, the applicant may be well justified to complain about the instruction fee as taxed.

That notwithstanding, the respondents submit that the applicant had no good reason to fear that if the taxed costs are paid to the respondents, they would be unable to repay the same, in the event that the reference were to succeed. In that regard, the 2nd Plaintiff has deposed that for a stay to issue, the Defendant should have demonstrated that if the money was paid the Plaintiffs would be unable to repay it, But, as far as the Plaintiffs were concerned, the Defendant did not even make an attempt to fulfil that obligation. Indeed, the 2nd Plaintiff said that he demonstrated that he would be capable of repaying the money, if the Plaintiffs were later called upon to do so. He did so by producing a Trade Licence for **“Lake Chemist”**, Naivasha.

However, as the Defendant, correctly observed, the Trade Licence did not list the 2nd Defendant as the proprietor thereof. Indeed, it is true that the proprietor is listed as **“Lake Chemists NSA Limited.”**

The 2nd Plaintiff also produced copies of Title Deeds for two properties which are registered in his name. According to the 2nd Plaintiff, the said properties are worth over Kshs. 2,000,000/=.

Whilst I note that the Defendant did not make any comment about the said properties, I nonetheless also noted that the 2nd Plaintiff did not produce any valuation reports to verify the value which he attributed to the properties. In my considered view, the only way to verify the value of property, is by having the same valued by professionals, and adducing the valuation reports in evidence.

But whether or not the Plaintiffs would be in a position to refund the money, in the event that the intended reference was successful, would that be a factor in determining if there should be a stay of execution of the Certificate of Taxation?

To my mind, there is no clear-cut answer to that question. I think that each case should be determined in its own circumstances. There might be cases in which the ability of the successful party

may be very significant. But, there might also be instances in which the totality of the circumstances would help determine the justice of the case.

In this instance, the Plaintiffs say that they do have the financial ability to repay the costs if the reference was finally to succeed. On the other hand, the Defendant also says that it is a bank, and thus more than able to pay any costs that may ultimately be payable to the Plaintiffs, after the reference is determined. Given that scenario, I do not think that the ability to pay or to repay can therefore be the determinant factor in determining this application.

I find that the probability of success of the intended reference herein should be the determining factor. I have already held that, in my view, the learned Taxing Master appears to have erred in principle. If that be the case, I do not see why the applicant should be compelled to pay out money, which would most probably have to be repaid to it, to a large measure. Accordingly, I hold that the best way of ensuring that justice is done, in this case, is by granting an order for stay of execution of the Certificate of Taxation, until the hearing and determination of the intended reference. I therefore grant an order to that effect.

Now, I must consider whether or not to order the Applicant to provide security for the due performance of the order which may ultimately be binding on it. The Applicant says that this application is not pursuant to the provisions of Order 41 of the Civil Procedure Rules, and that therefore the Applicant should not have to put down any security. But, the respondent feels that the intended reference was in the nature of an appeal, and that therefore the applicant should be compelled to put down security, in the event that an order for stay of execution was granted.

In **NYAKUNDI & COMPANY ADVOCATES V KENYATTA NATIONAL HOSPITAL BOARD, HCCC NO. 416 of 2004**, Ringera J. (as then was) tackled a similar point, in the manner following:-

“In my mind there cannot be any doubt that Rule 4 of Order 41 of the Rules has application only where an appeal or second appeal has been filed. The very opening words of subrule (1) of the Rule says 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 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 *mutatis mutandis*.”

In my considered view, the views expressed by Ringera J., above, is reflective of the correct legal interpretation. I therefore adopt it in full. Having done so, I hold that simply because I have ordered that a stay of execution would issue is not in itself reason enough to warrant the imposition of security.

In any event, it is my considered view that the Defendant, being a bank of no mean repute, should have little difficulty in paying such costs as may be ultimately payable to the Plaintiff. In the circumstances, I find no reason to compel the Defendant to come forward with security as a precondition to the orders for stay of execution.

In conclusion, I now direct that there shall issue an order for stay of execution of the Certificate of Taxation until the hearing and determination of the Defendant’s intended reference under Rule 11 of the Advocates (Remuneration) Order, in respect to the Ruling delivered on 8th July 2005.

The Defendant is awarded the costs of this application.

Dated and Delivered at Nairobi this 27th day of September 2005.

FRED A. OCHIENG

JUDGE