REPUBLIC OF KENYA

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IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 757 OF 1994

KASSAM KHIMJI LTD …….. PLAINTIFF

VERSUS

MERIDIAN PROPERTIES LTD ……. DEFENDANT

R U L I N G

This is an application brought pursuant to the provisions of paragraph 11 (4) of the Advocates (Remuneration) Order, Order XXI rule 22 (1) and section 3A of the Civil Procedure Act.

By the said application, the Plaintiff (applicant) is seeking enlargement of time to file the Notice of Objection in respect of the Defendant's getting-up costs, as taxed on 6th October 2003. The applicant also seeks orders for the Stay of Execution of the Decree arising out of the Taxation, pending hearing and determination of this matter.

The application is supported by the affidavit of Mr. Andrew Wandabwa, advocate. By his said affidavit, Mr. Wandabwa explains that the taxation proceeded exparte on 6th October 2003, as he had failed to attend, due to overwhelming pressure of work. It is the applicant's contention that the Taxing Officer was wrong to have assumed that the value of the subject matter of the suit was Kshs 17 million, whereas it actually was Ksh 3.1 million. The applicant is further aggrieved by the fact that the taxing officer doubled the basic sum in respect of the instruction fees. By so doing, the taxing officer is faulted for not exercising his discretion judicially. It is therefore the applicant's view that it has good prospects in its intended appeal. For those reasons, the applicant requests that an order for stay of execution do issue, alongside an order for the enlargement of time within which to file an objection.

The application has been strongly opposed by the Defendant (respondent), who is critical of the applicant's failure to explain the reasons for the failure of their advocate to attend the taxation session. As far as the respondent is concerned, it is awfully inadequate for the applicant's advocate www.kenyalawreports.or.ke 3 to state that he failed to attend court due to "overwhelming pressure of work". The respondent has invited the court to reject this blanket phrase, as advocates always work under pressure. I must say that I am inclined to agree with the respondent. I believe that it is wrong for an advocate expect the court to accept as an adequate explanation, such a generalized phrase. The proper manner of explaining oneself is by providing facts, such as , the advocate was engaged in another case that was going on at the same time as the case in issue.

I hold the view that if the court were to accept the explanation put forward by the applicant, it would imply that it was alright for an advocate to fail to attend court, by choice, if he felt that he should attend to some other matter which he deemed to be more important. Obviously that cannot be an acceptable

conduct on the part of the advocate, and he should therefore not be allowed to set aside orders which were made in his absence, in such circumstances. I was therefore, happy to note that in his reply to the respondent's submissions, Mr. Wandabwa advocate readily conceded that the court was not wrong to have proceeded with taxation of the Bill of Costs.

The main thrust of the application is that the applicant is aggrieved by the manner in which the taxation was carried out. The applicant therefore wishes to appeal against the perceived wrong exercise of the discretion available to the Taxing Officer. The first step in that regard is to give a Notice of Objection. But that ought to have been given within 14 days of the Ruling of the Taxing Officer. As the applicant did not give the said Notice within the stipulated period of time, it has now come to court seeking an extension of time to do so.

By virtue of the provisions of paragraph 11 (4) of the Advocates (Remuneration) Order, this court is empowered to enlarge the time allowed to a party to give notice of objection to the taxing officer, in respect of his decision. This right is recognized by the respondent, but it complains that the applicant is guilty of delay in bring this application. It is pointed out that the Ruing in issue was delivered by the taxing officer on 8th October 2003, whereas this application was only filed on 4th December 2003.

In my calculations, the applicant could have filed its notice of objection on or before 22nd October 2003. Any date after that would have been late. But the applicant did dnot bring this application until 42 days later, on 4th December 2003. Clearly, the application was not filed at the earliest opportunity. And I also note that the applicant has not offered an explanation for the apparent delay in bringing this application. But I nonetheless do not consider the period of delay to be so inordinately long as to be capable, by itself, of becoming a bar to an order for enlargement of time.

Accordingly, I do therefore exercise my discretion, and grant an order extending the time within which the applicant may file a Notice of Objection to the decision made by the taxing officer on 8th October 2003. The applicant is allowed a period of 21 days from today to file and serve its notice of objection.

Over and above the foregoing, the applicant has also asked that this court should stay execution. I think that it would be instructive to set out herein the terms of the prayer sought by the applicant in this regard. It reads as follows;

> "THAT this Honourable Court may be pleased to grant a stay of Execution of the Decree arising out of the Taxation pending the hearing and determination of this matter".

It is not readily evident what the scope of the prayer is, as it might be capable of being interpreted in more than one way.

The order for stay might be intended to remain in force until this particular application is heard and determined. Although, I must say that that interpretation would be overly simplistic, and impractical: But nevertheless it is a possible interpretation. The other possible interpretation is that the stay of execution should be in force until the suit is Heard and Determined. I believe that this latter interpretation is what the applicant is seeking.

However, it is also noteworthy that the order for stay is in relation to the "Execution of the Decree arising out of the Taxation".

In my considered opinion, a Decree cannot stricto sensu, arise out of the Taxation. That which arises out of a process of taxation is a Certificate of Taxation. However, the court does recognize that execution can issue in respect of a Certificate of Taxation. Therefore, if the applicant were to satisfy the requirements for the grant of an order for stay of execution, the court would grant it.

In an endeavour to persuade the court to grant the order for stay of execution, the applicant cited 2 authorities. I will now analyse the applicability of the said authorities, and the statutory provisions, to this case.

The applicant has cited Order 21 rule 22(1) as the authority upon which this application for stay of execution is founded. That rule reads as follows;

> "The court to which a decree has been sent for execution shall upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto".

My reading of this rule is that it is intended to be used by an applicant seeking interim relief, before he can file a substantive application for stay of execution. I honestly do not see its applicability to the matter before me. No material has been put before the court to warrant the exercise of my discretion to grant a stay of execution for a reasonable time, to enable the applicant make another substantive application for stay of execution.

It is to be noted that in Milimani Commercial Courts Misc. Case No. 427 of 2000 In the Matter of Central Bank of Kenya and Reliance Bank Limited, which was cited by the applicant, the application for stay of execution was made, correctly, under the provisions of Order 41 of the Civil Procedure Rules.

But even if the application is assessed under the provisions of Order 41, I note that the applicant did not give evidence of substantial loss which would result if the stay of execution was not ordered by this court. I say so because the provisions of Order 41 rule 4 are worded in a manner that makes it impossible for an applicant to get orders for stay of execution until and unless he complied with the conditions specified in that rule.

In HCCC No. 520 of 1997 (Milimani Commercial Courts) Standard Chartered Bank V The Law Society of Kenya and Another, Ringera J. granted a stay of execution. The order was made in relation to a process of execution flowing directly from a Certificate of Taxation. It is significant that the order in that case was made on an application brought under Order XXI rule 22 (1) and rule 91 of the Civil Procedure Rules, Section 31 of the Civil Procedure Act, and sections 31 and 40 of the Advocates Act.

I have set out the provisions under which the application therein was made because it is the same as that in this case, [i.e. Order XXI rule 22 (1)]. However, it must be emphasized that in that case the costs were awarded by the Court of Appeal, and the same were in the process of being executed through the High Court. Therefore, in my view, the unique facts of that case, properly brought into play the provisions of Order XXI rule 22(1).

In contrast, the costs in issue in this case emanate from the High Court. The process of execution in respect of such costs would also be carried out by the same said High Court. I therefore reiterate the view that the provisions of Order XXI rule 22 (1) are not applicable to this case.

Finally, I do conclude that the applicant has failed to persuade me that it is entitled to the Orders for stay of execution. This decision is arrived at on the merits of the application, although I have also noted in passing that the application had been brought under the wrong provisions of the law.

In conclusion, prayer 4 is granted, whilst prayer 5 of the chamber summons dated 4th December 2003 is dismissed. The applicant will pay the costs of this application.

Dated at Nairobi this 15th day of March 2004.

FRED A. OCHIENG

Ag. JUDGE