



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT BUNGOMA  
MISC APPL. NO. 147 OF 2003**

**KENYA BUS SERVICES LTD ..... APPLICANT**

**VS**

**NYAMOGO & NYAMOGO ADVOCATES ..... RESPONDENT**

**R U L I N G**

The motion before me is said to be commenced under the Provisions of Order XLI rule 4 and Order XXI rule 22 of the Civil Procedure rules and Sections 3A, 15, 18 and 6 of the Civil Procedure Act. The motion is supported by the affidavit of Onyancha Bw'omote sworn on 18th July 2003. In the motion the applicant sought for three main prayers namely:

*(i) An order of stay of execution in Busia H.C. Misc. Appl. No. 45 of 2003 from the taxation therein against the objector Kenya Bus Services Ltd in the sum of Ksh.160,868/00 pending the filing and determination of the objector's objection proceedings.*

*(ii) The objector be allowed to file its reference by way of objection proceedings in the High Court Registry at Bungoma where there is a resident Judge.*

*(iii) There be such further order as may meet the interest of justice in this case.*

The Respondent firm of advocates opposed the motion by filing grounds of opposition and a replying affidavit.

When the matter came before me at the interpartes stage the applicant chose to concentrate on the reasons advanced in support of the prayer for an order of stay of execution of the decree in Busia H.C. MISC APPLICATION No. 45 of 2003. It is basically a dispute which arose out of a taxation before the Deputy Registrar acting in her capacity as the taxing officer.

It is said that the taxing officer's decision on taxation was objected to but she has so far failed to give reasons to enable the applicant file a reference in this court pursuant to the provisions of Paragraph 11 of the Advocates Remuneration Order. In the meantime it is shown that execution process has commenced to recover the sum taxed by the taxing officer. The applicant now wants a stay of execution pending the filing and determination of the intended reference which is said to be with great chances of success. It is proposed that amongst the grounds which will be relied are:

First, that there was no advocate/client relationship between the objector and the Respondent and that the taxing officer failed to appreciate or even inquire into the issue and that she wrongly assumed the existence of the relationship.

Secondly, the applicant averred that the taxing officer had failed to appreciate that the Respondents block fee note having settled in full, the Respondent was estopped from demanding any fees whatsoever

from the objector in the same suit.

Thirdly, that the taxing officer erred in law in refusing to allow the objector a stay of execution pending the filing and determination of the objection proceedings.

Fourthly, that the applicant is likely to suffer irreparable loss if the stay order is not granted.

Finally that the taxing officer has not furnished reasons for the taxation of 10th July 2003 yet on the same date she issued a decree when no terms of such a decree were ever sent to the objector's Advocates for approval, moreover, proclamation was made on the objector's motor vehicles on 16th July 2003.

On his part Mr. Nyamango who appeared for the respondent opposed the motion by stating that the same was incurably defective. He said that the applicant should have filed a chamber summons rather than come by way of a Notice of Motion. Under the provisions of order VI rule 12 of the Civil Procedure rules the law bars any technical objection to any pleading on the ground of any want of form. Of course the procedures were not made in vain. They have to be followed to the letter. In this case the applicant has relied on various rules in which on one hand should be in form of chamber summons and on the other hand the form prescribed is a motion. What I have is a sort of an omnibus application. However my decision is that the defect is excusable because it does not go to the jurisdiction of the matter. The applicant is in between and either way he is right or wrong. This is an occasion when this court can exercise its inherent power to excuse the mistake for the broad interest of justice.

The Respondent also raised another preliminary point in that this court has no jurisdiction this matter because the issues put forward had been heard and determined by the Deputy Registrar when doing the taxation. It is stated that this court can only have jurisdiction to deal with this application by way of a reference under the provisions of Paragraph 11 of the Advocates Remuneration Order. It is not denied that the dispute gravitates around the decision of the Deputy Registrar in her capacity as the taxing officer of this court. Paragraph 11 (2) of the Advocates Remuneration Order Provides:

*“The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”*

It is clear from the above provisions of the law that this court can only have jurisdiction to hear and determine disputes based on taxation pursuant to Paragraph 11 (2) of the Advocates Remuneration Order. I hold the view that there is no room for a party aggrieved to introduce the provisions of other statutes like in this case.

The applicant has averred that an application for stay of execution was made before the taxing officer and she refused. However, the proceedings in that case have not been annexed to enable me see whether to or not exercise my inherent power. I am of the view that this application should have been presented in the first instance to the Deputy Registrar of this court acting in her capacity as the taxing officer. This is a step which the applicant should have followed before coming to this court. The provisions of the civil procedure Act and rules therein which have been cited by the applicant are inapplicable in this instance.

I have intentionally avoided dealing with the merits of the motion before me so that the applicant's future rights if so advised are not prejudiced. I have come to the conclusion that I have no jurisdiction to hear this matter unless the same is presented to this court via paragraph 11 of the Advocates (Remuneration) Order. I have also concluded that the same is incompetent. Consequently the same is ordered struck out with costs to the Respondent.

**DATED AND DELIVERED THIS 14th DAY OF May 2004**

**J.K. SERGON**

## JUDGE