



Head Note

1. Stay of Taxation
2. Enlargement of time to Appeal
3. Order 42 – Ruling by Deputy Registrar on Preliminary Objection; Is leave to appeal required?

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION CASE NO. 177 OF 2001

E.N. NGANGA & CO. ADVOCATES APPLICANT

VERSUS

NATIONAL IRRIGATION BOARD RESPONDENT

R U L I N G

The 2nd Defendant has filed an application for stay of taxation of the auctioneers Bill of costs pending hearing of this application. It has also sought an extension of time for the filing of an appeal against the decision, dismissing the Preliminary Objection.

The 2nd Defendant had earlier filed the Preliminary Objection to the taxation of the auctioneers' bill, on the grounds that the said bill was a nullity, as it had arisen out of an execution that the two parties to the suit had, by consent, declared to be null and void.

By the same consent letter, the two parties had set out the terms upon which the Defendant would be required to pay the decretal amount. It was for that reason that the applicant had objected to the taxation of the auctioneers' bill. In his Ruling, the Senior Deputy Registrar, Mr. Muya held that the auctioneer could not be bound by the terms of the consent as the said consent was between the Plaintiff and Defendant only. He therefore dismissed the Preliminary Objection, with costs. The next step would therefore be the taxation of the auctioneers' bill. The application is thus intended to stay that process of taxation.

The applicant submits that if stay is not granted, their intended appeal would be rendered nugatory. I note that the application has been brought pursuant to this provisions of Order XLVIII 5 (2) and (5); Order XLIX V 5, and Order L rule 1 of the Civil Procedure Rules. Regrettably, I am unable to trace Order XLVIII 5 (2) and (5) in the Civil Procedure Rules, even if it is assumed that citation was intended to be in respect of Order XLVIII rules 5 (2) and (5). In any event, the whole of Order XLVIII deals with the "Special Powers of Registrars".

It is therefore not at all clear to me how the said rules can be the foundation for an application for stay of taxation and/or enlargement of time to file an Appeal. Also the citation of Order XLIX V 5 is equally baffling. Be that as it may, the applicant explained that it did send its advocate's court clerk to take the Ruling before the Deputy Registrar. I must say that I found the said disclosure somewhat disturbing, as court clerks do not have any right of audience before the courts in this country. But it is probable that the advocate had instructed his clerk to get an advocate to hold his brief.

If that was the case, I would say that the applicant's advocate consciously undertook the risk that his court clerk may be unable to find an advocate to hold his brief when the Ruling was being delivered. But as luck would have it, the court clerk did get an advocate to hold brief for the applicant's advocate. However, the said advocate who held his brief did not relay any information thereafter to the applicant's advocates. In view of the said lack of information, the applicant's advocates kept on requesting for the court file, for their perusal. It has been explained to the court that the time taken in trying to get the court file, resulted in the delay in lodging the appeal against the Ruling of the Senior Deputy Registrar.

I would say that the delay was the direct consequence of the manner in which the applicant's advocates handled the matter. Had the said advocates attended before the Senior Deputy Registrar, personally, or alternatively through a duly nominated advocate, it would not have become necessary to spend time thereafter, trying to ascertain the contents of the Ruling. Notwithstanding this criticism of the advocates, I find that the delay of 7 days is not in itself so inordinate as to deprive the applicant of the order sought, if it was otherwise merited.

But as I stated previously, the applicant has not illustrated to me the provisions upon which the application is founded, so that I can apply my mind judicially, in trying to assess whether or not the application is merited, when weighed in the light of the relevant provisions. I also note that the applicant is contending that if this court does not grant an order of stay of the taxation process, the applicant's intended appeal would be rendered nugatory.

Having made that submission, the applicant did not then illustrate to the court how the intended appeal would be rendered nugatory if the taxation were allowed to proceed. Meanwhile, when the Respondent rose to oppose the application, it first accused the applicant of being very economical with the truth. It was emphasized that when the Ruling was delivered by the Senior Deputy Registrar, the applicant was duly represented by an advocate. Thereafter, when I perused the court records, I did ascertain that the applicant was at the material time, represented by counsel, Miss Kalewa.

The record also shows that after the Ruling was delivered, Miss Kalewa applied for an adjournment. The Respondent's second line of attack, was that the intended appeal has absolutely no chances of success. The reasons for these, it was submitted, are that Order 42 stipulates that leave to appeal is required, yet the applicant had not sought leave. The respondent therefore contends that even if time to file an appeal is enlarged, it would be in vain, as the applicant has not sought leave to appeal, as is required by the rules. Mr. Ng'ang'a, advocate for the 2nd Respondent opposed the application on the grounds that pursuant to the provisions of Order 42 rule 1 (2), leave to appeal is required; yet no such leave has been sought by the applicant. The 2nd Respondent also submitted that the application was premature, as no execution can threaten the applicant at this stage of the proceedings. Any execution could only take place after taxation; and that therefore, the applicant could still file an application for stay at a later date, when the threat of execution was real.

Ultimately when the court asked the applicant's advocates for legal authorities on her assertion that an appeal lies as of right pursuant to the provisions of Order 42, she promised to make available several authorities. The application was then adjourned for 2 weeks to enable counsel make available the legal authorities. The court notes that no authorities were provided. Instead, the applicant's advocates filed a single page of written submissions. The filing of the written submissions was without the leave of the court, nor concurrence by the other parties. I ought therefore to disregard the same. However, upon further consideration, I decided to take them into account, as they are already before me.

The gist of the written submissions is to fault the Deputy Registrar for hearing the applicant's objection to the taxation. The submissions also state that Order 42 has no application to the matter before me. The provisions of Order 42 specify the particular parts of the Civil Procedure Rules, from which appeals will lie as of right. It is my understanding that if any Order and/or Rule is not cited in Order 42, any Ruling, or order made in that respect would not be eligible to appeal as of right. In so saying, I recognize the fact that Order 42 rule 3 categorically states that

“Nothing in this Order shall apply to any adjudication which, as regards the

court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit”.

As far as I can see, the Ruling by the Senior Deputy Registrar did not conclusively determine the rights of the parties on the issue of taxation. Also the applicant has failed to persuade me that the said decision, against which they intend to appeal, falls under the category of decisions in respect of which there is an automatic right of appeal.

That being the case, it would imply that even if this court were to grant an order enlarging time for the filing of the intended appeal, such an order might be in vain. I believe that by seeking an enlargement of time to file the appeal at a time when they have not obtained leave to appeal, is akin to putting the cart before the horse. I therefore hold that the application for enlargement of time has no merit, and the same is dismissed with costs. And as I had already alluded to hereabove, the applicant has also failed to persuade me that they are deserving of an order for stay of the taxation. Accordingly, the application dated 1st October 2003 is dismissed, in its entirety with costs.

Dated at Nairobi this 1st day of April 2004.

FRED A. OCHIENG

Ag. JUDGE