

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO.513 OF 2001

FISHERMANS LEISURE INN LTD 1ST PLAINTIFF

LEISURE TRADING 2ND PLAINTIFF

LEISURE CAR HIRE & TOURS SAFARIS LTD. 3RD PLAINTIFF

VERSUS

GIRO COMMERCIAL BANK LTD 1ST DEFENDANT

G.A. DATOO & CO. LTD. 2ND DEFENDANT

RULING

The Respondents were awarded costs amounting to KSh.576,920 by the learned Deputy Registrar after taxation of the same on 15th November 2002. They are now seeking to execute the same. The applicant has filed this application dated 28th February 2003 seeking mainly two orders as prayers 1 and 2 had been dealt with. The two orders it is seeking are first in prayer 3 a stay of execution order be issued to stay execution for the defendants costs at KSh.576,920/- made on 29th January 2003 pending the hearing and determination of the application and second is in prayer 4 and that is that the court be pleased to set aside the order made on 15th November 2002 allowing taxation exparte and that the court does order the same taxation to proceed and in the alternative and without prejudice to the foregoing, that the Plaintiffs be granted leave to pay the Defendants costs by installments of KSh.50,000/- per month till completion of the same.

The grounds upon which the same application is made are six and these are in a summary that the Applicants erstwhile Advocates on record did not attend taxation though they were notified of the date of taxation; that the proclamation has caught the Plaintiff off guard and embarrassed them financially considering other financial obligations in this suit; that the applicant will suffer prejudice if taxation proceeds; and that the rights of the Applicants to defendant and vary the bill has been wrested away. The application is supported by three Affidavits and several annextures. The Respondents opposed the application and filed Replying Affidavit together with two annextures.

I have considered the application, the grounds for the same application, the affidavits in support and the Replying Affidavits together with all the annextures to the same affidavits filed by both parties.

First, Affidavit of Sunny Nawab offends the provisions of section 5 of the Oaths and Statutory Declarations Act in that it does not state in the jurat the date when the oath was taken. That in my mind is a breach of an act of Parliament and I cannot therefore rely on the same Affidavit as it is not properly on record.

Secondly, as regards prayer 3 of the application, it is now spent as the application has been heard, and as regards the first part of prayer 4, i.e. a prayer seeking that the taxation order made by the Deputy Registrar on 15th November 2002 be set aside, my short answer to that is that that prayer is not properly before this court and it does not fall under any of the Rules cited in this application. There are clear provisions in the Advocates (Remunerations) Order Clause 11 which deals with objections to decisions

on taxation. This is found in the Advocates Act Chapter 16. Even if I were to accede to Mr. Hassan's pleas, I would still not set aside the taxation as the procedure spelt out there requires certain hurdles to be cleared before High Court can be possessed of the matter. That part of prayer 4 i.e. the first part or the main part of that prayer seeking the setting aside of the order made on 15th November 2002 by the learned Deputy Registrar cannot stand. It is dismissed.

The alternative prayer to that prayer of setting aside is the prayer that the amount of KSh.576,920/- awarded as costs be paid by installments of KSh.50,000/-. I had earlier on in this Ruling disregarded the affidavit sworn by Sunny Nawab. That leaves only two affidavits to support this application on points of facts. These are the affidavits in support of the application sworn by Sunny Nawab on 28th February 2003 and Affidavit of Amjad Parves Malik sworn on 5th March 2003. The Affidavit of Sunny Nawab sworn on 28th February stated mainly only that the Applicant is currently paying KSh.250,000/- per month in respect of installments to clear the decretal amount and if they are made to pay this amount of KSh.576,920 at once then their working operations would stall completely. He has not in that affidavit indicated their financial position and this makes it difficult to appreciate their problem. Unfortunately the Respondent's affidavit also does not help me as the Respondent is also not alleging that after the Applicant pays KSh.250,000/- per month, it is still financially able to meet this amount in lump sum i.e. that the applicant is in a position to pay KSh.826,920/- without its accounts being seriously affected.

In these circumstances and doing the best I can, I will allow the Applicant to pay KSh.576,920/- being respondents costs by four equal monthly installments with effect from 20th day of March 2003 and thereafter on 20th Day of each succeeding three months till payment in full. In default of any payment on its due date, execution to issue. Applicant will pay costs of this application in any event. Orders accordingly.

Dated and Delivered at Mombasa this 12th Day of March 2003.\

J.W. ONYANGO OTIENO

JUDGE