



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KERICHO**

**MISC CAUSE NO. 4 OF 2018**

**SOT TEA GROWERS RURAL CO-OPERATIVE SAVINGS**

**& CREDIT CO-OPERATIVE SOCIETY**

**LIMITED (STEGRO SACCO).....APPLICANT/CLIENT**

**VERSUS**

**ANDREW MENGICH T/A**

**MENGICH & CO ADVOCATES.....RESPONDENT/ADVOCATES**

**ARISING FROM**

**ERICK KIMUTAI SITONIK** (*suing as the legal representative of*

*the estate of the late ZACHAYO KIPLANGAT SITONIC*

**alias ZAKAYO KIPLANGAT SITONIC.....PLAINTIFF**

**VERSUS**

**SOT TEA GROWERS AND CREDIT CO-OPERATIVE**

**SOCIETY LIMITED (STEGRO SACCO).....1<sup>st</sup> DEFENDANT**

**STEGRO (EPZ) TEA FACTORY LIMITED.....2<sup>nd</sup> DEFENDANT**

**DANIEL KIPKIRUI LANGAT.....3<sup>rd</sup> DEFENDANT**

**PETER KIPKORIR LANGAT.....4<sup>th</sup> DEFENDANT**

**JOEL KIPKEMOI LANGAT.....5<sup>th</sup> DEFENDANT**

**STEGRO SACCO LIMITED.....6<sup>th</sup> DEFENDANT**

**AND**

**COUNTY GOVERNMENT OF BOMET.....1<sup>st</sup> INTERESTED PARTY**

**CO-OPERATIVE BANK OF KENYA.....2<sup>nd</sup> INTERESTED PARTY**

**RULING**

1. Before me for determination are two applications, the first one dated the **9<sup>th</sup> January 2020** brought by the Applicant (STEGRO SACCO) under the provisions of Section 51(2) of the Advocates s Act, Order 22 Rule 25, Order 12 Rule 7, Order 51 Rule 1 of the

Civil Procedure Rules, Rule 13(3) of the Advocates Remuneration Order, Sections 1A and 1B of the Civil procedure Act, Article 159 of the Constitution and all other enabling provisions of law wherein the Applicant seeks for stay of execution of the ruling on the Applicant's Bill of Costs and for the court to determine whether a retainer existed between the Respondent (M/S Mengich & Co Advocates) and the Applicant and thereafter make appropriate orders.

2. The Applicant further seek for orders to set aside the Ruling of the Respondent's bill of costs and to subsequently dismiss the application and consequential orders and Decree for taxation filed by M/S Mengich & Co Advocates.

3. The application was supported by the grounds on its face as well as the supporting affidavit of its chairman one Joseph Mabwai dated the 9<sup>th</sup> January 2020.

4. The said application was opposed by the Respondent's replying affidavit dated the 19<sup>th</sup> of February 2020 to the effect that it was unfounded in law, untenable and did not disclose any arguable point of law. There was also a replying affidavit by the chairman of STEGRO (EPZ) Tea Factory Limited, the 2<sup>nd</sup> Defendant herein, dated the 28<sup>th</sup> February 2020 to the effect that the bill of costs had already been taxed on the 26<sup>th</sup> June 2019 for a sum of Ksh. 1,012, 620.84/= Both the Respondent and the 2<sup>nd</sup> Defendant herein further deponed that whereas the Applicant's application sought to appeal against the decision of the Deputy Registrar in assessment of Bill of Costs, the Court lacked jurisdiction to determine the issue of retainer.

5. In Response, the Respondent filed an application dated 28<sup>th</sup> February 2020 under the provisions of Order 51 Rule 1 and 15, Order 45 Rule 1 of the Civil Procedure Rules, Section 51(2) of the Advocates Act, Sections 1, 1A, 3 and 3A of the Civil Procedure Act and all other enabling provisions of law seeking orders to set aside the ex-parte orders of stay of execution issued on the 15<sup>th</sup> January 2020 and judgment be entered against the Applicant STEGRO SACCO as per the certificate of costs dated the 9<sup>th</sup> July 2019 together with interest at the rate of 14% from 26 July 2019 as well as for costs of the application.

6. The said application was opposed by the Applicant's affidavit dated the 3<sup>rd</sup> March 2020 to the effect that it was a fishing expedition, was not plausible and ought to be dismissed since the Applicant had never appointed the Respondent's firm to represent them. That the certificate of costs was fatally defective, was obtained by false means and should be struck out.

7. By consent, both parties were directed by the court to file their respective written submissions to the applications but by the time I write this ruling, only the Respondent/Advocate has complied.

8. For ease of reference in this ruling, the parties shall be referred to as '**Applicant and Respondent**' respectively in both Applications.

#### **Respondent's written submissions.**

9. The Respondent's submission in reference to the application dated the 9<sup>th</sup> January 2020 was that that taxation was undertaken on the 26<sup>th</sup> June 2019 and a certificate of costs issued by the taxing officer on 9<sup>th</sup> July 2019 for the sum of Ksh. 1,012, 620.84/=. **The Applicant did not file any reference to the High Court to challenge the same. That the orders sought by the Applicant for the court to set aside the ruling on the Bill of Costs and to dismiss the application and consequential orders and Decree for taxation filed by M/S Mengich & Co Advocates had therefore been overtaken by events.**

10. **That the objection by the Applicant to the ruling, based on lack of retainer, was an afterthought and had never been raised before the taxing master and therefore the same was a belated attempt to defeat the execution of costs duly taxed and awarded by the court for services rendered. Reference was made to the instructions given to the Respondent/Advocate in the parent file ELC No. 65 of 2015, and the numerous matters prosecuted by the Respondent/Advocate thereafter on behalf of the Applicant.**

11. That the Applicant's application was therefore aimed at defeating the right of an Advocate to earn fees for professional services rendered and therefore the ex-parte orders of stay of execution obtained on the 15<sup>th</sup> January 2020 ought to be vacated in the interest of justice. That further the Applicant had not adduced sufficient reason for grant of the said order and neither had he followed the right channel of challenging the decision of the taxing officer.

12. The Respondent submitted that the deponent, Joseph Mabwai lacked authority to swear the affidavit on behalf of the Applicant since he and his team had only been allowed to hold office pursuant to a joint resolution in a meeting held on 13<sup>th</sup> August 2017 and therefore they could not have instructed the Respondent's firm to act on behalf of the Applicant. The Respondent sought for the application dated 9<sup>th</sup> January 2020 to be dismissed with costs.

13. In regard to their own application dated the 20<sup>th</sup> February 2020, which was in response to the Applicant's application dated 9<sup>th</sup> January 2020, the Respondent herein submitted that the Applicant, **Sot Tea Growers Rural Co-operative Savings & Credit Co-operative Society Limited (STEGRO SACCO)**, was its client during the 2015/2016 financial year wherein they had declined to pay costs and the Respondent filed their Bill of Costs dated 6<sup>th</sup> March 2018. The same was assessed and taxed by the court on 26<sup>th</sup> June 2019 and a certificate of costs issued on 9<sup>th</sup> July 2019 for a sum of Ksh. 1,012, 620.84/=. That the Respondent therein served the Applicant with the mandatory notice to execute and thereafter sought orders of execution from the court before instructing the 'Double O' Auctioneers to proclaim the Applicant's goods in execution of the orders of the court.

14. The Respondent further submitted that pursuant to the Applicant's plea and their acceptance to settle the detretal amount by way of installments and while parties were still working out the modalities of settlement, the Applicant moved the court and obtained ex-parte interim orders of stay wherein it abandoned the settlement proposal initially advanced. The Respondent therefore sought for the said interim ex-parte orders of stay to be set aside.

**Determination.**

15. I have considered the Applicant's Application seeking for stay of execution and the setting aside of the **the ruling on the Bill of Costs taxed on the 26<sup>th</sup> June 2019 for a sum of Ksh. 1,012, 620.84/=**. I have also considered their further prayers seeking that the court determines whether a retainer existed between them and the Respondent (M/S Mengich & Co Advocates).

16. I have also considered the argument raised by the Respondent against granting the orders so sought as well as their application to set aside the ex-parte orders of stay of execution issued on the 15<sup>th</sup> January 2020 and thereafter to enter judgment against **the Applicant STEGRO SACCO as per the certificate of costs dated the 9<sup>th</sup> July 2019 together with interest at the rate of 14% from 26 July 2019 and for costs of the application.**

17. **The issues that arise for determination are:**

i. **Whether there existed a retainer between the Applicants herein and the Respondent (M/S Mengich & Co Advocates).**

ii. **Whether the ruling on the Respondent's Bill of Costs should be set aside.**

iii. **Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of the Ruling dated 26<sup>th</sup> June 2019.**

18. I have perused the court record and find that indeed this matter emanated from the parent matter in ELC No 65 of 2015. That vide letter dated the 28<sup>th</sup> April 2016 (herein marked as 'AM1') the Applicant who was a shareholder of the 2<sup>nd</sup> Defendant herein before the two entities were split vide a court order of 10<sup>th</sup> October 2017 in JR 463/17, and through a special Board resolution dated 30<sup>th</sup> April 2016, resolved to appoint the Respondent to represent them in the suit to safeguard the interests of the society and its members thereby creating a client-Advocate relationship. The Respondent thus became entitled to instruction fee the moment he was seized with the matter. See *Mayers & Another vs Hamilton & Others* [1975] EA 13 wherein it had been held that;

*"I accept that the moment an Advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee but it is only necessary to look at the concluding words of the particulars of the instruction fee in the bill of costs now in issue - "considering most difficult and conflicting case-law on the matter" - to realise that an Advocate will not ordinarily become entitled at the moment of instruction to the whole fee which he may ultimately claim. Suppose, for example, that within a few minutes of receiving instructions to defend a suit, an Advocate were informed that the Plaintiff had decided to withdraw. The Advocate, as I see it, would be entitled to claim the minimum instruction fee but he could not properly claim in respect of work he had not done. The entitlement under the instruction fee grows as the matter proceeds."*

19. In *Tononoka Steels Limited vs The Eastern & Southern African Trade & Development Bank (P.T.A BANK) HCCC NO 267/98*, it was held that even when a suit was determined summarily, an Advocate would still be entitled to his instruction fees. In that case, the Defendant did not file a defence to the suit. Instead, his Advocates raised a Preliminary Objection to both the application for injunction as well as the suit. The court upheld the preliminary objection, on the grounds that it lacked jurisdiction to entertain and determine the suit.

20. The single most important issue is the nature of the instructions given by a client to his counsel. In the present case the Respondent was asked;

*'To represent the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the case and safeguard the interests of the society and its members.'*

21. Once the extent of the Advocates' instruction was clear and he undertook steps in furtherance of those instructions, he would have earned some instruction fee. On the first issue for determination, the **Court is satisfied therefore that there existed a retainer between the Applicants herein and the Respondent (M/S Mengich & Co Advocates).**

22. **It is not in dispute after the Respondent had represented the Applicant for some time, there had been a Notice of Change filed wherein the court directed the Respondent to tax their Bill of Costs. The same was filed on the 6<sup>th</sup> March 2018 and taxed on the 26<sup>th</sup> June 2019 at a sum of Ksh 1,012,620.84/=**. The Applicant now seeks to set aside the Ruling on the said taxation.

23. Section 11 of the Advocates Remuneration Order provides that a party aggrieved by the decision of the Taxing Officer in respect to a Bill of costs under the Advocates Remuneration Order has a right to challenge the decision by way of an objection to the High Court within 14 days. The said provision states as follows;

*"(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.*

*(2) 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.*

*(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.*

*(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired".*

24. The Rule sets a time limit of 14 days from receipt of reasons from the Taxing Officer for the filing of an objection normally referred to as a "Reference" by way of a Chamber summons to a Judge

25. In the case of **Machira & Co. Advocates vs. Magugu [2002] 2 EA 428** Ringera J (as he then was) held that:-

*"As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a Reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order."*

26. I need not belabor on the Application and on the point that Article 159 of the Constitution should not be used as a panacea for all ills and omissions in approaching the court. In the absence of appropriate Reference to challenge the decision of the Taxing Officer made on the 26<sup>th</sup> June 2019 in compliance with the mandatory provisions of Paragraph 11 of the Advocates Remuneration Order, I find that the Applicant failed to comply with the said provision of the law and their prayer seeking to set aside the Ruling of 26<sup>th</sup> June 2016 herein must fail.

27. The Applicant also sought for stay of execution of the Ruling dated the 26<sup>th</sup> June 2019. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

*No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.*

*(2) No order for stay of execution shall be made under sub rule (1) unless—*

*(a) the Court is satisfied that substantial loss may result to the 1st Applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the 1st Applicant.*

28. There are three conditions for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

i. The Court is satisfied that substantial loss may result to the 1<sup>st</sup> Applicant unless stay of execution is ordered;

ii. The application is brought without undue delay and

iii. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicants.

29. On the first condition of proving that substantial loss may result unless stay order is made, it was incumbent upon the Applicant to demonstrate the kind of substantial loss he would suffer if the stay order was not made in his favour and not merely stating that he would suffer loss if the order of stay of execution was not issued.

30. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma v Abuoga (1988) KLR 645** where their Lordships stated that;

*"Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory."*

31. In an application of this nature, the Applicant ought to have shown the damages he would suffer if the order for stay is not granted since by granting stay it would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment. The Applicant herein has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay and therefore the Application on this ground must fail.

32. On the second condition, I find that the impugned ruling was delivered on the 26<sup>th</sup> June 2019 wherein the present application was filed on the 9<sup>th</sup> January 2020 a period of about 6 months. No explanation has been given for the delay and the Court therefore finds that there has been inordinate delay in filing the application for stay.

33. On the last condition as to provision of security, I find that the Respondent has not provided or intimated its willingness to avail security for due performance of the decree. In the case of **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 Others [2014] eKLR** the Court held that:

*“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules Acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”*

34. I find that the Applicant having not established any of the conditions required for stay as provided for under Order 42 Rule 6 the Civil Procedure Rules, the application for stay of execution must fail.

35. The Respondent in their Application dated the 20<sup>th</sup> February 2020 has sought to set aside the ex-parte orders of stay **of execution issued on the 15<sup>th</sup> January 2020** and thereafter enter judgment against **the Applicant STEGRO SACCO as per the certificate of costs dated the 9<sup>th</sup> July 2019 together with interest at the rate of 14% from 26 July 2019 and for costs of the application.**

36. **Section 51** of the Advocates Act provides that:-

*“The certificate of the taxing officer by whom a bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”*

37. Rule 7 of the Advocates Remuneration Order states that;

*“An Advocate may charge interest at 14% per annum on his disbursements and cost, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full*

38. I find that since the certificate of costs of the taxing officer by whom the bill had been taxed has not been set aside, altered or stayed by the court, the judgment that was entered against the Applicant, **Sot Tea Growers Rural Co-operative Savings & Credit Co-operative Society Limited (STEGRO SACCO) still stands.**

39. The summation of the ruling herein is as follows:

- i. The Applicant’s Application dated the 9<sup>th</sup> January 2020 is herein dismissed with cost
- ii. Interim orders issued on the 15<sup>th</sup> January 2020 are herein set aside.
- iii. The Respondent’s application dated the 20<sup>th</sup> February 2020 has merit and is allowed as prayed with **costs.**

**Dated and delivered via Microsoft Teams this 25<sup>th</sup> day of May 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**