



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC NO 210 OF 2008**

**DAVID ANUNDA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN KARU (SUED IN HIS OWN CAPACITY**

**AND AS THE CHAIRMAN OF KILELESHA**

**GITHUNGURI ROAD RESIDENTS ASSOCIATION).....1<sup>ST</sup> RESPONDENT**

**MARGARET OWINO (SUED AS THE SECRETARY KILELESHA**

**GITHUNGURI ROAD RESIDENTS ASSOCIATION).....2<sup>ND</sup> RESPONDENT**

**EUNICE MIMA (SUED AS THE SECRETARY KILELESHA**

**GITHUNGURI ROAD RESIDENTS ASSOCIATION).....3<sup>RD</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Plaintiff/Applicant has filed a Chamber Summons dated 18<sup>th</sup> March 2021, seeking the following prayers;

*I. ....Spent.*

*II. This Honourable Court be pleased to enlarge the time provided for under rule 11(2) for the Plaintiff/Applicant to file against the Ruling on the Bill of Costs dated and delivered on the 21<sup>st</sup> January 2021.*

*III. The Honourable Court be pleased to order stay of execution of the ruling 21<sup>st</sup> January 2021 and the Certificate of Costs therefrom pending the hearing and determination of this Application.*

*IV. This Honourable Court be pleased to find that the cost of Kenya Shillings 1, 114, 693.30/= assessed and awarded to the Defendants by the Taxing Officer through the ruling dated 21<sup>st</sup> January 2021 and the certificate of costs therefrom are manifestly excessive and unreasonable and should be set aside.*

*V. The Honourable Court be pleased to re-assess the Defendants costs.*

2. The Chamber Summons Applications under reference is supported by an Affidavit of the Plaintiff/Applicant sworn on the 18<sup>th</sup> March 2021, whereby the Plaintiff/Applicant endeavors to explain the reasons of delay, failure and/or non-filing of the reference within the stipulated timelines.

3. Upon being served with the Chamber Summons Application, the Defendant/Respondent herein responded to same by filing a Replying Affidavit sworn by one Grace Wangui on the 14<sup>th</sup> June 2021, as well as a Preliminary Objection dated the 27<sup>th</sup> April 2021.

### **Depositions by the parties the applicant's case**

4. Vide the Supporting Affidavit sworn on the 18<sup>th</sup> March 2021, the Plaintiff/Applicant avers that the Bill of Costs which was assessed in the sum of Kes.1, 114, 693.30/= only, by the Taxing Master, was manifestly excessively. Secondly, the Plaintiff/Applicant further avers that the assessment of the Bill, same requested for a copy thereof through his Advocates letter dated 29<sup>th</sup> January 2021, but the said ruling was never availed up to the 18<sup>th</sup> March 2021, when the Chamber Summons was filed.

5. Nevertheless, the Plaintiff/Applicant further avers that on the basis of the unavailability or non-provision of the ruling, same was unable to file the reference.

6. Owing to the foregoing, the Plaintiff/Applicant now seeks enlargement of time within which to file a reference to this Honourable Court.

### **DEFENDANT'S/RESPONDENT'S CASE**

7. According to the Respondent's case, the Bill of Costs was taxed and the ruling thereof was delivered in the presence of both Counsels. In any event, the Defendant/Respondent further avers that upon the delivery of the Ruling, the Taxing Master informed both Counsels that the ruling was available and thus could be collected from the Registry of the Honourable Court on the 22<sup>nd</sup> January 2021, same being a day after the delivery.

8. On the other hand, the Respondent further avers, that upon the delivery of the taxation, it was incumbent upon the Plaintiff/Applicant to file and lodge a Notice of Objection to the taxation, within 14 days, however no such notice of objection was ever filed.

9. Besides, the Respondent further avers that having not filed a Notice of Objection to taxation, the Application for extension of time to file a reference is therefore premature, misconceived and hence legally untenable.

10. In short, the Respondent has sought that the subject Application constitutes and/or amounts to the abuse of court process and that same should be dismissed.

### **SUBMISSIONS BY THE PARTIES**

11. When the Application herein came up for Hearing on the 11<sup>th</sup> May 2021, the Honourable Court directed that the Application be canvassed by way of Written Submissions.

12. Pursuant to the order of the Honourable Court, the parties herein proceeded to and filed their respective Submissions, which are on record.

13. Having examined both the depositions contained in the Supporting Affidavit and the Supplementary Affidavit, as well as the Submissions by the parties and upon considering the provisions of Rule 11 of the Advocates Remuneration Order (2009), the following issues are Germaine;

*a. Whether this Honourable Court has jurisdiction to re-assess the Defendant's costs*

*b. Whether the Application of the extension of time is legally tenable*

*c. Whether the Order of stay of execution of the Certificate of Taxation and essentially the costs is legally tenable*

### **ANALYSIS AND DETERMINATION**

#### **ISSUE NUMBER 1**

#### **Whether this Honourable Court has jurisdiction to re-assess the Defendant's costs**

14. One of the prayers sought for by the Plaintiff/Applicant is that the court be pleased to re-assess the Defendant's costs or alternatively direct that the costs be re-assessed by a different Taxing Master.

15. Suffices to say, that when confronted with a proper and lawful reference, this Honourable Court would have the jurisdiction to re-assess the costs, awarded on the basis of party and party as well as advocates clients costs. In this regard, it is sufficient to refer to the case of **JORETH LIMITED V MUTURI KIGANO & ASSOCIATES ADVOCATES (2002) eKLR**, where the Honourable Court adopted the principle stated in the case of **STEEL CONSTRUCTION & PETROLEUM ENGINEERING E A LIMITED V UGANDA SUGAR FACTORY LIMITED** as hereunder;

*“counsel for the appellant submitted, relying on **D'SOUZA V FERAO (1960) E A 602 & ARTHUR V NYERI ELECTRICITY UNDERTAKING (1961) E A 492** that although a Judge undoubtedly has a jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follows from the said decision and that the general rule is that where fee is to be re-assessed on different principals, the proper cause is to remit same to another taxing officer. I would agree that, as a general statement, that is correct, adding only that is a matter of judicial discretion”.*

16. From the foregoing decision, it suffices that this Court has the twin responsibilities to either re-assess caused upon a reference, or alternatively send same to another Taxing Master, to carry out the re-assessment, though on the basis of the directions given.

17. Nevertheless, I must point out, that there is no reference before me, upon which I can venture to address and/or attend to the reliefs alluded to hereinabove.

18. It is my further finding, that in the absence of a duly filed reference, the prayers made by the Plaintiff/Applicant herein have been mounted in vacuum.

19. In the premises, I find and hold that this Honourable Court is not seized with the requisite jurisdiction to re-tax or otherwise refer the Bill of Cost for re-assessment, in the absence of a reference.

## **ISSUE NUMBER 2**

### **Whether the Application of the extension of time is legally tenable**

20. It is common ground that the Ruling in respect of the taxation, was rendered and/or delivered in the presence of Counsel of the respective parties. In this regard, the presupposition is that both Advocates, were alive to the finding of the Honourable Court.

21. Nevertheless, it is also not disputed that upon the delivery of the Ruling of the taxation, the Plaintiff/Applicant herein did not file and/or lodge a Notice of Objection to taxation itemizing the item of taxation to which he objects.

22. For the avoidance of doubt, Rule 11(1) of the Advocates Remuneration Order 9 (2009) makes it mandatory that should any party object to the decision of the Taxing Master, such a party is obligated within 14 days after the decision to give notice in writing to the Taxing Officer pointing out the disputed items of the taxation to which he objects.

23. It is important to note, that it is only upon the lodgment of the Notice of Objection to taxation that the Taxing Master is obligated to record and forward to the objector, (read in this case) the Applicant, the reason for the decision on the designated items.

24. In any event, it is only upon the receipt of the recorded and forwarded reasons on the disputed/designated items, that the Objector/Applicant can then file and/or commence a reference within 14 days thereof.

25. From the foregoing, it is obvious that before a person aggrieved by the taxation files a reference, such reference must be preceded by a Notice of Objection to taxation.

26. However, in respect of the instant matter, the Plaintiff/Applicant has not filed a Notice of Objection to taxation. In any event, the Plaintiff/Applicant has also not sought for extension of time within which to lodge and/or file the Notice of Objection to taxation.

27. I must say, that the Notice of Objection to taxation is envisaged under Rule 11 (1) and (2) of the Advocates remuneration Order, which is the fulcrum upon which an intended reference is premised and/or predicated. Simply put, the Notice of Objection to taxation, is the foundation upon which the skyscraper, known as the reference stands.

28. Having not filed any Notice of Objection to taxation and there being no application for extension of time within which to file any, the Application for extension of time herein, is premature, stillborn and nullity ab initio.

29. It is my further finding, that like in the Court of Appeal where an aggrieved Appellant who is keen to file an Appeal in the Court of Appeal, must first file a Notice of Appeal in line with Rule 75 of the Court of Appeal Rules, before filing a Record of Appeal, the situation beforehand bears resemblance.

30. In the premises, where no Notice of Objection to taxation has been filed and/or lodged the intended reference, for which enlargement of time has been sought, it would be an act in futility. One cannot put something on nothing and expect the something to hold sway. Certainly, the something will collapse.

31. To fortify the foregoing position, I must invoke and rely on the decision in the case of **MACFOY V UNITED AFRICA LIMITED (1961) 3 All F.R., at page 1172** where the Honourable Court – Lord Denning observed as hereunder;

*“If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it up aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”*

## **ISSUE NUMBER 3**

### **Whether the order of stay of execution of the certificate of taxation and essentially the costs is legally tenable**

32. The Applicant herein has also sought an Order of Stay on the Certificate of Costs and by extension the taxation, it must be noted that are consequential orders and same are governed by Section 27 of the Civil Procedure Act.

33. On the other hand, it is common ground that every litigant who chooses to approach the Honourable Court is alive to or whereof the incident of costs, which ordinarily will hang against the litigant, like the procambial sword of Damocles.

34. In respect of this matter, having filed the suit, no doubt he was alive to the fact that at some point, subject to the decision of the Court, costs must become due and payable. For clarity, such a time has now arisen and in my humble view, the Applicant can't now hide.

35. Be that as it may, what transpired to the Applicant's suit is that the suit was dismissed with costs. In this regard, what ensued from the dismissal was a negative order and in my humble view such a negative order, lesser with costs, which have now been taxed, does not lent itself to an Order of stay of execution.

36. To vindicate the foregoing position, I take refuge in the decision in the case of **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] e KLR** the Court of Appeal (Kantai J.A ) held as follows:

***'An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a "positive order" – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:***

***'..... an order for stay of execution must be intended to serve a purpose .....'*** (emphasis supplied).

37. The foregoing position has also been fortified in the case of **In Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR**, the Court of Appeal for East Africa stated in respect of stay of execution, stated as follows:

***"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered"***

38. Based on the foregoing decisions, it is my finding that the costs, which arose from the decision of the dismissal of a suit cannot be the subject of an Order of stay in the execution in the manner sought.

39. In any event, before a litigant can benefit from an Order of stay of execution, the litigant must certify certain minimized condition, which the Applicant herein has not established nor met.

40. Suffices to refer to the decision in the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR** where the Court observed as hereunder;

***"It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money"***.

41. From the totality of the deposition contained in the Applicant's Affidavit, nowhere has the Applicant alluded to any loss let alone substantial loss which may arise and/or accrue if the Order of stay is not granted, the obvious is that no such loss would arise and in the absence of proof of loss, which no doubt constitutes substantial loss, the order of stay sought cannot be issued.

#### **FINAL DISPOSITION**

42. Having reviewed the provisions of rule 11 (1) & (2) and taking into account the established principle of the law predicated on a number of precedents, I reach the inescapable conclusion that the Chamber Summons Application is a candidate for dismissal.

43. Consequently, same is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2021.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE,**

**ENVIROMENT AND LAND COURT,**

**MILIMANI.**

*In the presence of;*