Tom Ojienda & Associates v National Land Commission (Commercial Case 513 of 2016) [2024] KEHC 11858 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11858 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE 513 OF 2016

A MABEYA, J

OCTOBER 4, 2024

BETWEEN

TOM OJIENDA & ASSOCIATES ..... APPLICANT

AND

NATIONAL LAND COMMISSION ..... RESPONDENT

RULING

1. This is a ruling on 2 applications. The application by the applicant dated 13/12/2023 and the respondent's application dated 14/12/2023. I propose to start with the applicant's application dated 13/12/2023. It seeks judgment against the respondent for the sum Kshs. 69,242.001.64 together with interest from 6/3/2017 until full payment.

2. The application is brought under section 51 (2) of the *Advocates Act*. It is supported by the affidavit of Tom Ojienda S.C sworn on even date. The grounds for the application are that the applicant obtained a Certificate of costs following taxation of its bill of costs against the respondent. The Certificate of costs has not been set aside or altered and there are no outstanding issues after the respondent's appeal was struck out by the Court of Appeal on 8/11/2023. That the applicant has not been paid its fees for over 6 years. The applicant further prays for interest on the amount from 6/3/2017 until full payment.

3. The application is contested through the grounds of opposition filed by the respondent. Parties also filed submissions on the application.

4. The applicant's submissions were that the court should enter judgment as the Certificate of costs has not been altered. That the respondent has not made any attempts to settle the amount and has no intention to remunerate the applicant. The provisions of rule 7 of the Advocates Remuneration order were relied on for the proposition that interest should be granted at the rate of 14% per annum.

5. The respondent filed rival submissions to those of the applicant. That its appeal, CA No. E264 of 2020: Prof. Tom Ojienda & Associates- Vs- National Land Commission had been instituted in exercise of its right to appeal and not to deny the applicant its judgement. That the appeal was struck out on a technicality and the respondent has since preferred an appeal before the Supreme court vide a Notice of Appeal dated 15/12/2023. It urged the Court to stay these proceedings pending that appeal. The further argues that it is a tax funded public body which stands to suffer irreparable loss if the execution proceeds.

6. Further, that this Court does not have jurisdiction to determine the matter and that the application offends the provisions of section 21 of the *Government Proceedings Act*. That the applicant ought to have applied for a Certificate of costs and enforce it through an order of mandamus. That the applicant must also show proof that he demanded payment from the respondent after issuance of a Certificate of costs and Certificate of order against the respondent.

7. The respondent relies on the case of Permanent Secretary Office of the President, Ministry of Internal Security & Another ex parte Nassir Mwandihi (2014) eKLR wherein Odunga J stated that: -

> "It therefore follows from the foregoing discourse that the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the *Government Proceedings Act* have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order."

8. That the respondent is a government entity and the applicant cannot execute a judgment against a state organ or a government entity. Reliance is placed on the case of Nairobi Milimani ELC Suit No.445 of 2014: Five Star Agencies Limited –Vs- National Land Commission where the court made a finding that no party can execute a judgment against the respondent on account of section 21(4) of the *Government Proceedings Act* and Order 29 Rule 2 (2),(b)& (c) of the Civil Procedure Rules.

9. The second application is by the respondent and is dated 14/12/2023. It seeks a stay of execution of the judgment dated 20/12/2023 pending its appeal before the Supreme Court. It is brought on the grounds that; the respondent had filed its replying affidavit and submissions in opposition to the applicant's application. That the appeal before the Supreme Court would be rendered nugatory if the stay sought is not granted.

10. On its part, the applicant reiterated that respondent's application is fatally defective and is incompetent. That the Court lacks jurisdiction to determine an application for stay pending appeal to the Supreme Court. That the respondent ought to have filed the application under section 23A of the *Supreme Court Act*. That the Court had granted a stay pending appeal which lapsed with dismissal of the appeal. Further, that the cardinal principle is that issues pending before a higher court cannot be brought to a lower court.

11. That the issue is res-judicata since the court had already determined stay pending of the decision in the ruling dated 20/11/2019. That the application involves the same parties and the issue of stay had already been determined with finality in the ruling of 2019.

12. Lastly, that the provisions of Order 42 Rule 6 had not been satisfied. That irreparable loss and/or prejudice had not been demonstrated and particularly how the public body would be affected by settling the applicants' costs in the event the appeal succeeds.

13. That the magnitude of the amount and the respondent's delay in settling the costs necessitates the Court to set the security amount at Kshs 69,242,001.64 sought in the application.

14. I have considered the averments on record and the submissions of Learned Counsel. The issues for determination are; whether stay should be granted, whether this court has jurisdiction to determine the applicant's application for judgment and whether judgment may be entered.

15. I propose to start with the application for stay. It should be noted that what the respondent wants this Court to do is to stay execution or further proceedings pending its appeal to the Supreme Court. A similar situation arose in Misc Appln. No. E298 of 2024 Macharia Mwangi & Njeru vs. Eco Bank (K) Ltd [2024] eKlr. The court held that: -

> " Determining jurisdiction before addressing the merits of an application is crucial because it defines the court's authority and scope. In this case, Order 42 Rule 6 of the Civil Procedure Rules specifies that a stay of proceedings can only be granted by either the court from which the appeal originates or the court to which the appeal is directed. Given that the appeal is intended to be from the Court of Appeal, the Court's view is that, it is either the Supreme Court or the Court of Appeal that should entertain the stay application.
>
> More-so, it became crystal clear at the hearing of the application, that when the parties were arguing certification application, the client sought the stay from the Court of Appeal, but that Court declined.
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> In light of the forgoing, this Court finds that it would not be proper to exercise a jurisdiction that does not exist. This determination is based on the fundamental principle that jurisdiction establishes the limits within which a court is empowered to act. As set out above, Order 42 is clear as to when an order of stay is to be made, it is either by the court from where an appeal arises or to the court to which an appeal is made. In the present case, neither of the circumstances exist.
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> Given the above findings, it is unnecessary to address the merits of the application or evaluate the grounds for granting a stay of proceedings. I find no merit in the application and the same is hereby struck out with costs."

16. I reiterate the foregoing here and hold that the respondent's application is without merit and I strike out the same with costs.

17. I now move to consider the 2nd application by the applicant dated 13/12/2023. Section 51(2) of the *Advocates Act* provides that: -

> " The certificate of the taxing officer by whom any 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."

18. The application before Court seeks judgment against the respondent on a Certificate of costs. The same has not been altered or set aside. The objection is on the basis that the applicant has not complied with the provisions of the *Government Proceedings Act*. That the said Act requires notice against the Government to be served.

19. In my view, that is not an argument to be raised at this juncture. That has to await the application to be determined and the applicant commences execution. That argument does not hold and is premature.

20. In Lubulellah & Associates Advocates versus N K Brothers Limited [2014] eKLR, the court observed that: -

> " The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent absence of any order staying or setting aside this court's ruling and certificate of taxation, the applicant's application for judgement on costs should succeed."

21. Where a bill of costs has been taxed and a Certificate of costs issued, the only bar to adoption and execution of the same is where the same has been set aside or stayed. (See Mwangi and Co Advocates vs. Machakos County 2020 Eklr). In the present case, the Certificate of costs has not been altered or set aside. The Court has no otherwise but to enter judgment accordingly.

22. On the issue of costs, section 27 of the *Civil Procedure Act* provides for the Courts discretion to award interest where a judgment is for a liquidated sum. Rule 7 of the Advocates Renumeration Order provides that interest may be awarded at 14% per annum charged by an advocate on a bill of costs. It provides that: -

> " An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiry to one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount has been paid or tendered in full."

23. Accordingly, I find that the applicant's application is merited and I allow the same as prayed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI ARB

JUDGE