



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 692 OF 2004

BETWEEN

STANDARD CHARTERED BANK LIMITED..... PLAINTIFF

AND

ALI NOOR ABDI.....1ST DEFENDANT

WETANGULA AND COMPANY ADVOCATES.....2ND DEFENDANT

KARIANGO INVESTMENTS LIMITED.....3RD DEFENDANT

RULING

1. The Plaintiff has filed a Chamber Summons dated 25th February 2021 under **Rule 11** of the *Advocates Remuneration Order* seeking, inter alia, to set aside the decision of the Deputy Registrar dated 10th September 2020 stemming from its Bill of costs dated 18th February 2020. The application is supported by the grounds set out in the face of the application together with the affidavit of Aamir Sheikh, counsel of the Applicant, sworn on 26th February 2021. The Applicant has also filed written submissions. The 1st Respondent opposes the application through its written submissions.

2. A brief background giving rise to the instant application is as follows. In 2004, the Plaintiff offered the 1st Respondent a term loan of KES. 20,000,000.00 as part finance of the purchase price of a property he intended to purchase from the 3rd Defendant. The Plaintiff paid out the KES. 20,000,000.00 to the 2nd Defendant who was acting for the 1st Defendant in the transaction. However, after the sale, perfection and registration of the securities, it turned out that the sale was fraudulent as the 3rd Defendant stated that it did not enter into the purported agreement for sale with the 1st Defendant nor transfer to it the suit property. In order to protect its interests, the Plaintiff, filed this suit together with an application where it sought and obtained an order freezing the KES. 20,000,000.00 in the 2nd Defendants account.

3. The matter was resolved by a judgment dated 24th September 2019. The court concluded that the 1st Defendant had admitted the Plaintiff's case to the extent of the invalidity of the security and therefore entered judgment for KES. 20,000,000.00 in favour of the Plaintiff. It also entered judgment against the 2nd Defendant for the KES. 20,000,000.00 and directed that it be remitted to the Plaintiff. The court struck out the case against the 3rd Defendant with costs. In ordering that KES. 20,000,000.00 be paid to the Plaintiff by the 1st and 2nd Defendants, jointly and severally, the court also awarded it costs of the suit.

4. The 2nd Defendant filed an application dated 6th November 2019 seeking to stay execution of the said judgment which was allowed by the court on 2nd June 2020. In the meantime, the Plaintiff had already presented its party and party Bill of Costs dated 18th February 2020 for taxation.

5. During the taxation proceedings, the 1st Defendant challenged the propriety of the proceedings in light of the order of stay. The Deputy Registrar, in his ruling dated 10th September 2020 stated that he had perused a number of authorities on the subject of propriety of taxation when there is an order of stay of execution and held that in all of them, it is clear that taxation of costs has no impact on the process of appeal only that at the point of execution, it has to await the outcome of the appeal and that where an appeal has been lodged, it remains a mere assessment of quantum which may favour any party depending on the outcome of the appeal. The Deputy Registrar held in conclusion as

follows: “It is purely out of logic that I will stay this taxation until such a time the successful party in the pending appeal will have the legal capacity to execute then he or she will give out notice of taxation or file their own bill depending on the outcome of the appeal”.

6. It is this decision by the Deputy Registrar that the Plaintiff is aggrieved with and now seeks to set it aside and that its bill proceeds for taxation.

7. The Plaintiff assails the decision of the Deputy Registrar as being contrary to the decisions of this court’s holding that an order of stay of execution pending appeal is not a bar to taxation of a bill of costs and that in exercising his discretion, the Deputy Registrar failed to take into account the court’s decisions which are binding on him. Further, that failure by the Deputy Registrar to consider and apply the decisions stating that an order of stay of execution pending appeal is not a bar to taxation of a bill of costs constitutes an error of principle. The Plaintiff cited several decisions among them; **Kenya Electricity Generating Company Limited (Kengen) v OJSC Power Machines Limited & others ML HC Misc. Cause 376 of 2015 [2017] eKLR**, **Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd ML HCCC No. 465 of 2009 [2014] eKLR** and **Kevin Aggrey & Another V Housing Finance Company Ltd & 2 Others NRB ELC Case No. 585 of 2009 [2013] eKLR** which it states are binding on the Deputy Registrar and he ought not to have arrived at a different finding on the basis of convenience.

8. The Plaintiff submits that taxation of the bill will only finalise the process of assessment of costs and if the pending appeal is successful and the Plaintiff is denied costs, the parties will then proceed accordingly.

9. The 1st Defendant supports the decision of the Deputy Registrar and takes the position that Plaintiff’s bill of costs is wrongly filed, premature and misconceived and the same should be struck out and/or stayed pending the outcome of the appeal in view of the ruling of the court staying execution of the judgment pending appeal. It submits that the outcome of the appeal will determine the rightful party entitled to costs and execution thereof hence it is unnecessary to proceed with a process that would possibly be reversed.

10. The 1st Defendant submits that the issue of taxation and costs is so intricately connected with execution of the decree which has since been stayed and that no prejudice will be suffered by the Plaintiff if the stay of taxation pending appeal is granted. In any event, if the Appeal eventually fails, the Plaintiff would then proceed to duly tax and execute its costs.

11. The main issue for determination is whether the Deputy Registrar should tax the Plaintiff’s Bill of Costs in light of the order of stay of execution. It is common ground that the court stayed the execution of the entire judgment dated 24th September 2019 including the decision on costs. However, there was no order of stay of the taxation proceedings which were ongoing at the time and in any case, no party sought for the same. There is a difference between stay of execution and stay of proceedings and what the court ordered was stay of execution and not stay of proceedings. I find this distinction to be relevant since the effect of the court’s order was that the Plaintiff could not execute the judgment in respect of costs against the 1st and 2nd Defendants. However, this did not mean that the quantum of costs could not be ascertained by the Deputy Registrar through taxation proceedings. I am in agreement with this court’s holding in **Kenya Electricity Generating Company Limited (Kengen) v OJSC Power Machines Limited & Others (Supra)** that the process of taxation only enables the parties to become aware of the quantum of costs payable and that this is the only function available to a taxing officer in taxation. Once the quantum of costs is determined, then the execution will depend on whether or not the stay orders of the court have been discharged. If the said orders are still in force, then the Plaintiff cannot execute. Should the appeal be successful, the determination of costs falls by the wayside and the successful party’s inconvenience of the taxation proceedings is mitigated by an award of costs.

12. In short, the Deputy Registrar ought to have determined the Plaintiff’s Bill of Costs dated 18th February 2020. There was no reason to stay the taxation proceedings because the order of stay of execution did not include staying of proceedings.

13. The Chamber Summons dated 25th February 2021 is allowed. The Deputy Registrar is directed to proceed with the taxation of the Plaintiff’s Bill of Costs dated 18th February 2020. The 1st Defendant shall bear the costs of this reference.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY 2021.

D. S. MAJANJA

JUDGE

Ms Kirimi instructed by Hamilton, Harrison and Mathews Advocates for the Plaintiff.

Mr Olaha instructed by Garane and Somane Advocates for the 1st Defendant.