



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

MISCELLANEOUS APPLICATION NO. 28 OF 2017

MUNGAI KIVUTI & CO. ADVOCATES.....PLAINTIFF/RESPONDENT

VERSUS

KENYA AFRICAN NATIONAL UNION.....DEFENDANT/APPLICANT

RULING

1. The Kenya African National Union (hereafter *the applicant* or *KANU*) craves three main reliefs. Firstly, for an order to restrain *Chaka & Company Auctioneers* from attaching or selling its properties. Secondly, for an order to set aside the ruling and consequential orders made on 28th January 2020; and, lastly, for leave to file a response to the earlier Notice of Motion dated 12th June 2019 pending filing of a reference against the decision of the taxing master dated 17th January 2018.

2. The application is dated 10th August 2020 and supported by an affidavit of Murang'a branch chairman, *Kenneth Marubu*. There is also an affidavit of even date sworn by *Joseph Toweet*, the executive director of KANU. The application is contested by the plaintiff.

3. The genesis of the dispute is a certificate of taxation issued by the taxing master on 21st September 2018 for Kshs 564,867 in favour of the plaintiff firm of advocates against the applicant. The plaintiff then obtained judgment and instructed *Chaka & Company Auctioneers* to execute the decree.

4. The applicant claims it was unaware of the taxation proceedings. It contends that service was defective as it was effected upon Kanu's Headquarters in Nairobi instead of its local Murang'a branch where the cause of action arose. The applicant's case is that the local branch is autonomous.

5. The respondent's *Grounds of Opposition* are two-pronged. Firstly, that there is no legal distinction between Kanu National office and its branch office in Murang'a; secondly, that the plaintiff employed the right procedure in obtaining the Certificate of Costs and subsequent execution orders. In a word, the plaintiff's case is that the application is unmerited and should be dismissed.

6. I am disinclined to grant the prayers for six main reasons. Firstly, the prayer for stay or to restrain the sale is premised on both Order 22 Rule 22 and Order 42 Rule 6 of the **Civil Procedure Rules**. The cornerstone of both jurisdictions is the element of substantial loss. I should add that the court *may* grant a stay if *substantial loss* may occur; that the application has been made *without delay*; and, that the applicant furnishes *security* for the due performance of the decree that may ultimately be binding on it.

7. This is a money decree. The applicant contends that it stands to suffer irredeemable loss if the intended auction is not stayed since the properties to be attached are *undervalued*. I am in doubt whether that is sufficient evidence of *substantial loss*. See **James Wangalwa & Another v Agnes Naliaka Cheseto**, High Court, Bungoma, Misc. Appl. 42 of 2011 [2012] eKLR. I am also alive to the general proposition that the mere execution of a *money decree* does *not* constitute substantial loss. **Kenya Shell v Benjamin Karuga** [1982-88] 1 KLR 1018.

8. Secondly, the applicant's main grievance is that it was not served with the application for taxation before the taxing master. In that respect it challenges the mode of service with those proceedings. If that be the case, the applicant should have filed a suitable application before the taxing master to set aside her *ex-parte* proceedings or order.

9. Thirdly, it is important to keep in mind that under section 51(2) of the **Advocates Act**, a certificate of costs by the taxing master becomes final unless it is set aside or altered by the Court.

10. Fourthly, the applicant readily concedes that there is as yet no reference before the Judge of the High Court challenging the decision of the taxing master dated 17th January 2018 and the ensuing certificate of taxation issued on 21st September 2018 for Kshs 564,867. To that extent, the present motion is on a legal quicksand.

11. Fifthly, the applicant now seeks leave for extension of time to file such a reference. The legal parameters are well settled: This court has wide and unfettered *discretion* to extend time. The discretion must however be exercised *judiciously*. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See ***Leo Sila Mutiso v Rose Mwangi***, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), ***Nicholas Salat v IEBC & 7 others***, Supreme Court, Application 16 of 2014 [2014] eKLR.

12. In the instant case, the impugned order of the taxing master was made way back on 17th January 2018. The subsequent order to enforce the certificate of taxation were made way back on 28th January 2020. The instant motion was only presented eight months later on 10th August 2020. Assuming that the applicant was completely in the dark about those proceedings, I note that the auctioneers made the proclamation on 24th July 2020. There was a further delay of two weeks. A clear pattern of lethargy emerges. I am thus not satisfied that the present motion was made timeously. I am accordingly disinclined to exercise my discretion to extend time.

13. Lastly, Order 10 Rule 11 of the ***Civil Procedure Rules*** empowers the court to set aside an *ex parte* judgment. On 28th January 2020, the High Court allowed the plaintiff's Notice of Motion dated 12th June 2019 which was unopposed. The applicant maintains that it was never served. The affidavit of service sworn by *Willis Agayi* deposes that service was made to the KANU Nairobi office at Chaka Road. Although the applicant insists that service should have been done to the KANU Murang'a Branch, I note that the Bill of Costs as well as the Notice of Motion are against the *Kenya African National Union* save that it was proposed to be served at a postal address in Murang'a.

14. In short, it is a strained construction to say the action was against the local branch. It is also conceded in the affidavit of *Joseph Toweet*, the executive director of KANU dated 10th August 2020 that the *ELC Case No. 616 of 2013* that was the subject of the advocate/client bill of costs was between *Evans Wekesa and the Kenya African National Union*. To be fair to the applicant it would seem that KANU had an arrangement, as deposed in paragraph 5 of the affidavit that "*it is the branch office that instructs an advocate to defend or prosecute a matter*". But as matters stand, I have no evidence that the *branch* was a *separate legal entity*.

15. The upshot is that the applicant's notice of motion dated 10th August 2020 lacks merit and is hereby dismissed but with no order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 21st day of September 2021.

KANYI KIMONDO

JUDGE

Ruling read in open Court in the presence of-

No appearance by counsel for the applicant.

Mr. Kariuki holding brief for Mr. Muchoki for the respondent instructed by Muchoki Kanga'ata Njenga & Company Advocates.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.