



REPUBLIC OF KENYA



KENYA LAW
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**Sidolana General Services v Kilifi County & another (Civil Case
170 of 2012) [2021] KEHC 9815 (KLR) (1 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 9815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 170 OF 2012
JN ONYIEGO, J
SEPTEMBER 1, 2021**

BETWEEN

SIDOLANA GENERAL SERVICES PLAINTIFF

AND

KILIFI COUNTY 1ST DEFENDANT

GOVERNOR OF KILIFI COUNTY 2ND DEFENDANT

RULING

1. Judgment in favour of the plaintiff in this suit was on February 23, 2016 entered against the defendants then the municipal council of Malindi (1st defendant) and the municipal council of Malindi(2nd respondent). Aggrieved by the said judgment on grounds that they never participated in the proceedings due to lack of proper service, the defendants filed an application dated April 13, 2016 seeking *inter alia*; stay of execution of the decree and the said judgment and its consequential orders; orders revoking or setting aside the execution proceedings; that the defendants be allowed to file defence and participate in the proceedings.
2. Upon considering the application *ex parte*, the court issued interim stay of execution orders on April 14, 2016 pending *inter partes* hearing. From the record, it is not clear whether the interim orders were ever confirmed although there is a copy of a consent agreement signed by both parties on December 20, 2016 purporting to extend the interim orders of stay of execution.
3. Nevertheless, parties attempted severally to engage in settlement negotiations with the new defendants being Kilifi County and the governor of Kilifi County the successors of the former defendants.
4. Unfortunately, the said negotiations did not bear any fruit. On July 24, 2017, the matter was mentioned before Justice Korir who had now taken over from Judge Chitembwe. Judge Korir directed parties to file submissions for highlighting on September 25, 2017. Parties proceeded to file submissions as directed in disposing the application. On September 25, 2017, the presiding judge was engaged in



- election petitions hence the matter could not proceed. Since then, the application dated April 13, 2016 has been pending hearing and determination despite the filing of submissions.
5. However, the matter took a different trajectory with the plaintiff taking a different approach thereby filing a bill of costs for taxation of party and party costs. The same was then scheduled for taxation on August 3, 2021. When parties appeared before the deputy registrar, the defendants sought for return of the file to the presiding Judge for hearing of the pending application and suspension of the taxation process until the matter is finalized. The deputy registrar rejected the request on grounds that there was nothing pending determination as the suit had been determined and concluded. The deputy registrar however scheduled the file for mention on September 14, 2021 for further directions.
 6. Aggrieved by the deputy registrar's directions, the defendants filed a Notice of Motion dated August 18, 2021 the subject of this ruling seeking orders as follows.
 - (1) That application be certified as urgent and be heard *ex-parte* in the first instance
 - (2) That this honourable court be pleased to issue a stay of taxation proceedings of the bill of costs dated March 23, 2021 before the Deputy Registrar pending hearing and determination this application *interpartes*.
 - (3) That this honourable court be pleased to issue a stay of taxation of the bill of costs dated March 23, 2021 before deputy registrar pending the hearing and determination of the 1st and 2nd defendants' Chamber Summons application dated April 13, 2016.
 - (4) That this honorable court be pleased to set aside the taxation proceedings and order issued on August 3, 2021 by the deputy registrar.
 - (5) That this honourable court be pleased to declare that the bill of costs dated March 23, 2021 as presented is incompetent, bad in law, incurably defective, vexatious and abuse of the court process and ought to be stuck out.
 - (6) That the costs of this application be provided for.
 7. The application is anchored on the grounds set out on the face of it and further amplified by the averments contained in the affidavit in support sworn by K N Kibara counsel for the defendants on August 18, 2012. It is the applicants' case that the interim orders of stay of execution issued on April 13, 2016 were entered by consent on December 20, 2016 and that they are in force to date hence the filing of the bill of costs for purposes of taxation and the intended subsequent execution of the decree was irregular and premature. When the matter came up before the duty judge, the applicant was ordered to serve and parties to file skeleton submission.
 8. In response, Manase Ananda Caleb counsel for the applicant filed grounds of opposition dated August 26, 2021 and swore an affidavit on August 27, 2021 disputing that the interim orders of April 14, 2016 were extended. He however admitted that there was a judgment in place and a decree extracted thereof. He further acknowledged that there is a pending application for stay of execution dated April 14, 2016.
 9. As to the existence of the interim orders and their extension by the court, Mr Ananda averred that they signed a draft consent but the same was never adopted as an order of the court. That the interim orders of April 13, 2016 were extended on May 10, 2017 before Judge Olola and later on May 29, 2017 before judge Korir. That since then, they have never been extended hence the same lapsed culminating to the filing of the bill of costs. Mr Ananda stated that the deputy registrar is properly seized of the matter as there is nothing pending.



10. As directed, parties filed their respective submissions together with authorities. During the hearing, Mr Kibara counsel for the applicant reiterated the averments contained in his affidavit in support of the application insisting that the interim orders were entered by virtue of the signed consent agreement notwithstanding that it was not formally adopted or endorsed by the court. Counsel urged the court to uphold the spirit and intention of the consent agreement and presume the same as an extension of the interim orders.
11. Learned counsel further relied on his submissions filed on September 1, 2021 contending that the consent order extending the interim orders of stay has never been appealed against nor reviewed and that the proceedings before the deputy registrar are incompetent and therefore should be struck out with costs as no taxation can be conducted before the matter is fully determined. In support of this proposition counsel relied on the holding in the case of *Commercial Bank of Africa Vs Haji Karsan Rabadia and 2 Others* (2012) eKLR and *Moses Wachira Vs Niels Bruels and 2 Others* (2016) eKLR.
12. On his part, Mr Ananda also adopted averments contained in his affidavit in reply in which he insisted that interim orders of April 13, 2016 lapsed as the consent agreement to extend them further was never endorsed nor adopted by the court. He contended that the proceedings before the deputy registrar are procedurally regular and properly filed.
13. In his submissions dated August 26, 2021 which is a replica of the content contained in the replying affidavit, Mr Ananda maintained that there was never an extension of the interim orders.
14. Mr Ananda contended that the application herein is brought in bad faith and under wrong provisions of the law. That the application has been brought after a long period of time hence intended to delay the execution process. Mr Ananda opined that this court has no jurisdiction to stay proceedings before the deputy registrar as the matter is fully determined and that there is no basis laid to warrant intervention of the court.
15. I have considered the application herein and the response thereof. Issues that emerge for determination are;
 - (1) Whether the interim orders of stay of execution issued on April 14, 2016 were ever extended and therefore in force to date.
 - (2) Whether the proceedings for taxation of bill of costs before the deputy registrar are properly instituted.
16. There is no dispute that there is an ex parte judgment entered against the defendants on February 23, 2016. It is also not in dispute that an interim stay of execution order was made on April 14, 2016. What is in contention is whether the stay of execution order was ever extended and whether it is still in force.
17. From the court record, the interim orders were issued on April 14, 2016, extended on April 10, 2017, and then May 10, 2017 when the court directed for mention on May 29, 2017 for parties to record a settlement. On that day, no settlement was arrived at hence a further mention for July 24, 2017 was fixed. The order for extension of interim orders was made. On July 24, 2017 again no settlement was recorded. The court once again fixed the matter for mention on February 25, 2017. No order for extension of the interim orders was made.
18. The allegation by Mr Kibara that the interim order was extended by the court on December 20, 2016 is not reflected in the court proceedings. There was no court session held on that day. Parties however urged that they drew a consent agreement dated December 20, 2016 in which they agreed for the interim orders obtained on April 13, 2016 be extended pending determination of the chamber summons.



19. From the record, the said consent was filed on December 20, 2016 but the same was never endorsed nor adopted by the court. I believe that is why the court kept extending the interim orders subsequently on April 10, 2017 and May 10, 2017. Mr Kibara admitted that the consent agreement was not endorsed by the court nor adopted as an order of the court. It is trite that mere filing of a consent agreement does not amount to an order of the court. For a signed consent agreement to acquire the force of law or authority, it must be adopted by the court. As it stands, the consent agreement is not capable of extraction as an order for execution or implementation anywhere.
20. The failure to move the court to adopt the consent squarely lies on both parties and more particularly the applicant who was to benefit from the same. It is my finding that the consent agreement signed on June 20, 2016 without adoption by the court is not an order by itself. Since the interim stay order was never extended, the same is deemed to have lapsed thus opening the door for other procedural processes to follow among them taxation of a bill of costs.
21. In view of the above holding, I do find that taxation proceedings before the deputy registrar are competent, lawful and procedural. The only remedy available is to fast track the hearing of the application for stay of execution and persuade the court to consider maintaining the status quo pending delivery of its ruling.
22. For the above reasons stated, it is my finding that the application is not merited and the same is dismissed with costs to the respondent /plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 1ST DAY OF SEPTEMBER, 2021

J N ONYIEGO

JUDGE

