



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC CIVIL APPLICATION NO 492 OF 2018**

**SHAH AND PAREKH.....APPLICANT**

**VERSUS**

**KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT**

**RULING**

1. The Respondent's Notice of Motion application dated and filed on 16<sup>th</sup> July 2019 had sought nine (9) prayers. Amongst them were temporary orders that had been sought pending the hearing and determination of the said application, a stay of execution of the Certificate of Taxation dated 18<sup>th</sup> June 2019 pending the hearing and determination of the intended reference, enlargement of time to file a Notice of Objection against the decision of the Taxing Master, enlargement of time to file the intended reference within fourteen (14) days or such other time that the court would deem fit to grant and costs of the application. The said application was supported by the Affidavit of its Head of Legal Department, Winnie Awour. The same was sworn on 16<sup>th</sup> July 2019.
2. It contended that after filing Written Submissions in respect of the Applicant's Advocates- Bill of Costs dated 27<sup>th</sup> September 2018, on 15<sup>th</sup> May 2019, the Taxing Master directed that the matter be mentioned on 9<sup>th</sup> August 2019 with a view to taking a Ruling date. However, the Taxing Master proceeded to deliver her Ruling on 31<sup>st</sup> May 2019 which its advocates came to learn had been delivered vide the Applicant's letter dated 27<sup>th</sup> June 2019 in which the Certificate of Taxation had been enclosed.
3. It pointed out that it was aggrieved by the taxed sum of Kshs 2,254,819/= which was manifestly unjust, unfair and punitive to it but that it was unable to file an objection because the said Ruling was delivered without notice to its advocates.
4. It urged this court to allow it to file a Notice of Objection out of time as it had made its application without unreasonable delay and was willing to abide by any conditions by the court.
5. In opposition to the said application, on 29<sup>th</sup> July 2019, the Applicant filed Grounds of Opposition and a Replying Affidavit that was sworn by Hasmukhrai Manilal Parekh. They were of even date.
6. It averred that the Notice of delivery of the Ruling was posted on the daily cause list of 31<sup>st</sup> May 2019 and that just because the Taxing Master awarded the Respondent the aforesaid sum of Kshs 2,254,819/= was not a ground for objection or a reason to file a reference. It added that an order for stay or leave to file the reference out of time could not be granted as the Respondent had admitted part of the amount due to it and that in any event, the Certificate of Taxation was not a decree to be executed.
7. The Respondent submitted that this court had power to enlarge time and in this regard, it referred to Paragraph 11 (4) and (5) of the Advocates Remuneration Order. It also placed reliance on the case of **John Kiplangat Barbaret & 8Others vs Isaiah Kiplangat Arap Chelugot [2011] eKLR** in which it was held that in exercising its discretion to enlarge time, the court therein should consider the principles of enlarging time being the length of delay, reason for the delay, chances of the appeal succeeding if the application was allowed and the degree or prejudice to be suffered if the application was granted.
8. It added that taxation of costs is part of the execution process and consequently, a stay of execution could be granted. In this regard, it placed reliance on the case of **Labh Singh Harnam Singh Limited vs Attorney General & 2 Others[2016] eKLR** where the court therein held that **"taxation of costs is part of the execution process, complete with its provisions for stay of execution, under Civil Procedure Rules..."**
9. It argued that if the stay of execution was not granted, the Applicant would proceed to file a suit for recovery of the costs that would render its application purely an academic exercise and the court rubberstamp a miscarriage of justice. It was its further submission that Paragraph 11(4) of the Advocates Remuneration Order only provided for enlargement of time and not a stay as envisaged in Order 42 Rule 6 of the

Civil Procedure Rules, 2010 which applies when an aggrieved party was appealing.

10. It further pointed out that it had satisfied the grounds for being granted an order for stay of execution pending the hearing and determination of its intended reference for the reason that it had a right to seek justice in line with Articles 50 and 159 of the Constitution of Kenya, 2010.

11. On the other hand, the Applicant relied on the case of **Kenya Shell Limited vs Benjamin Karuga Kibiru & Another (1982-88) 1 KLR** where it was held that it was not normal in money decrees for appeals to be rendered nugatory if payment was made and that granting a stay would be denying a successful litigant the fruits of its judgment.

12. It was emphatic that since the Respondent had admitted owing it money, it was difficult to see why it should be kept out of its monies as was held by Platt JA (as he then was) in the case of **Kenya Shell Limited vs Benjamin Karuga Kibiru & Another** (Supra). It was its further submission that the Respondent had failed to demonstrate that it would not be able to refund it the taxed costs in the event its intended reference was successful.

13. Right at the outset, this court deemed it necessary to interrogate whether or not it could extend time to enable for an aggrieved party file a notice of objection and/or file a reference before it could delve into the issue of whether or not the Respondent herein could be granted an order for stay of execution pending the hearing and determination of the intended reference.

14. Paragraph 11 of the Advocates Remuneration Order provides as follows:-

**1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.**

**2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.**

**3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**

**4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.**

15. It was clear from the aforesaid provision that the court could extend time for an aggrieved party to file a notice of objection and/or to file a reference outside the stipulated periods in Paragraph 11 (1) and (2) of the Advocates Remuneration Order. That settled, when and how this extension could be granted was a matter for each individual case. Indeed, each case must be considered on its own merits.

16. The court perused the court proceedings and noted that on 25<sup>th</sup> February 2020, the Taxing Master gave directions on the filing of Written Submissions. The matter was listed for further directions on 24<sup>th</sup> April 2019 but for reasons not indicated in the court record, the same was not listed. The Applicant fixed an *ex parte* hearing date for 15<sup>th</sup> May 2019 on which date the Taxing Master directed that the Ruling in respect of the Bill of Costs would be delivered on 9<sup>th</sup> August 2019 at 10.30am. However, the said Ruling was delivered on 31<sup>st</sup> May 2019 in the presence of the Applicant herein but in the absence of the Respondent herein.

17. In view of the fact that there was an Affidavit of Service that was sworn by Alexander Nelson Mwaura, the Process Server, on 9<sup>th</sup> May 2019 and filed on 10<sup>th</sup> May 2019 evidencing service of the Hearing Notice of 15<sup>th</sup> May 2019 upon the Respondent's advocates, the Taxing Master proceeded correctly when she directed that the Ruling would be delivered on 9<sup>th</sup> August 2019. However, bearing in mind that there was no personal service of a notice upon the Respondent's advocates notifying them of the change of the date of delivery of the said Ruling, the Taxing Master erred in delivering the said Ruling in their absence earlier than on the date it was scheduled to be delivered.

18. Indeed, it was necessary that the Respondent's advocates be aware of the date of the delivery of the said Ruling for the reason that subsequent action was time bound. The fact that the Taxing Master may very well have completed writing the Ruling before the date the said Ruling was scheduled was not sufficient and/or good reason for her to have notified the parties of its delivery through the cause list. Indeed, there is no legal obligation on a litigant and/or its advocate to peruse the daily cause lists to check whether their matters are listed on the cause list if they had no matters coming up on those days.

19. The objective of giving dates and notifying litigants and/or their advocates of dates of judicial proceedings is to give the court process a measure of certainty. It would be chaos for litigants and/or their advocates if they were to hazard a guess as to when their matters were scheduled to come up in court. The fact that the Applicant was more diligent in perusing the daily cause list on 31<sup>st</sup> May 2019 did not negate the importance of the notice being served upon the Respondent herein notifying its advocates of the change of date. Judicial practise is a matter of fairness and not ambush.

20. In this regard, this court came to the conclusion that the Respondent's right to fair trial under Article 50(1) of the Constitution of Kenya, 2010 had been violated and on that ground alone, it was entitled to an enlargement of time under Paragraph 11 (3) and (4) of the Advocates Remuneration Order.

21. Turning to the issue of stay of execution pending the hearing and determination of the intended reference, this court noted that both the Applicant and Respondent were in agreement regarding the circumstances under which it could be granted. The Respondent conceded that after the issuance of the Certificate of Costs, the next step the Applicant was to take was to file a suit for recovery of its costs.

22. Notably, a suit must be determined before judgment can be entered. In other words, a stay of execution can only be granted where the decree or order can be enforced. The certificate of costs is merely a certification of what costs an applicant would be entitled to. It is not a judgment that can be enforced as contemplated in Section 25 of the Civil Procedure Act which provides as follows:-

**1. The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow:**

**Provided that it shall not be necessary for the court to hear the case before pronouncing judgment—**

**i. where the plaintiff is drawn claiming a liquidated demand, and either—**

**a. the defendant has not entered such appearance as may be prescribed; or**

**b. the defendant, having entered such appearance, has failed to file a defence within the time prescribed; or**

**ii. in such cases as may be prescribed under section 81(2)(f).**

23. Further, Section 81(2)(f) of the Civil Procedure Act stipulates that:-

**In particular, and without prejudice to the generality of the powers conferred by subsection (1), such rules may provide for all or any of the following matters namely—**

**a. In suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a contract express or implied; or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only or on a trust; or**

**b. in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined for non-payment of rent, or against persons claiming under such tenant;**

24. Having said so, this court had due regard to Section 48 of the Advocates Act Cap 16 (Laws of Kenya) provides as follows:-

**1. Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaintiff, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month.**

**2. Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.**

**3. Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed.**

25. The Applicant herein taxed the Bill of Costs. Whether it should have proceeded under the provisions of Section 48 of the Advocates Act or Paragraph 68A of the Advocates Remuneration Order was not an issue for the court to consider. Suffice it to state that whichever way one looks at the issue, judgment must have been entered as aforesaid before execution proceedings could be commenced. For those reasons, this court found and held that granting an order for stay of execution would be premature. In this regard, this court respectively took a different view from that of the learned judge in Labh Singh Harnam Singh Limited vs Attorney General & 2 Others (Supra) in this respect.

26. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that each party relied upon, this court found that it was more persuaded that the Respondent should be allowed to exercise its constitutional right. Indeed, the Applicant would suffer no prejudice if the application was allowed as there was currently no money decree that could be enforced and thus deny it its fruits of judgment.

27. This court restrained itself from considering the merits or otherwise of the taxation that had been pointed out by the Applicant as that was the purview of the court hearing and determining the intended reference.

## **DISPOSITION**

28. For the foregoing reasons, the upshot of this decision was that the Respondent's Notice of Motion application dated and filed on 16<sup>th</sup> July 2019 was merited and the same is hereby allowed as follows:-

a. THAT leave be and is hereby granted to the Respondent to file a Notice of Objection against the decision of the Taxing Master that was delivered on 18<sup>th</sup> June 2019 within fourteen (14) days from the date of this Ruling.

b. THAT leave be and is hereby granted to the Respondent to file a Reference against the decision of the Taxing Master delivered on 18<sup>th</sup> June 2019 within fourteen (14) days from the date of receipt of the reasons of the Taxing Master.

c. Costs of the application will be in the cause.

29. It is so ordered.

**DATED and DELIVERED at NAIROBI this 11<sup>th</sup> day of May 2020**

**J. KAMAU**

**JUDGE**