



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.495 OF 2012

NEPHAT HINGA MWANGI.....PLAINTIFF

VERSUS

CHINESE HUANGPAI GRAIN PROCESSING

EQUIPMENT ASSEMBLERS LIMITED.....DEFENDANT

RULING

(1) Before Court is the Notice of Motion dated **29th May 2019** by which **NEPHAT HINGA MWANGI** the Plaintiff/Applicant seeks the following Orders:-

“1. SPENT

2. THAT this Honourable Court be pleased to stay execution of the costs awarded in the matter pending hearing and determination of the Appeal filed by the Plaintiff/Applicant at the Court of Appeal.

3. THAT costs of this Application do abide the outcome of the Appeal.

(2) The application which was premised upon **Order 42 Rule 6(2)** of the **Civil Procedure Rules 2010, Sections 3A and 63(c) Civil Procedure Act (Cap 21), Laws of Kenya** and all other enabling provisions of the law, was supported by the Affidavit of even date sworn by the Plaintiff/Applicant.

(3) The Defendant/Respondent **CHINESE HUANGPAI GRAIN PROCESSING EQUIPMENT ASSEMBLIES LTD**, opposed the application through the Grounds of Opposition dated **3rd July 2019**. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed his written submissions on **8th October 2019**, whilst the Defendant/Respondent filed its submissions on **28th October 2019**.

BACKGROUND

(4) The Plaintiff/Applicant filed this suit on **2nd August 2012**, seeking damages against the Defendant/ Respondent in the sum of **Kshs.53,405,000**. Vide a judgment dated **30th November 2018** **Hon Lady Justice Olga Sewe** dismissed the Plaintiff's suit. The Plaintiff being aggrieved by the decision of the High court lodged in court a Notice of Appeal dated **31st January 2019**. In the meantime the Defendant/Respondent proceeded to file a Party and Party Bill of costs dated **3rd May 2019**. Hence, the present application to stay execution of the costs awarded by the trial judge.

ANALYSIS AND DETERMINATION

(5) I have carefully considered the written submissions filed by both parties. The Applicant submits that the costs awarded by the High Court are a matter which will be directly in issue in his intended appeal. That the intent of this application is to preserve the subject matter so that the appeal may be argued without any prejudice to the Applicant. That the intended appeal may well be rendered nugatory if no stay is granted.

(6) On their part the Respondent submits that the High Court does not have jurisdiction over a taxation matter. They cite Paragraph 10 of the **Advocates (Remuneration) Order 2009** which provides:-

“The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or Deputy Registrar of the High Court or, in the absence of a Registrar, such other qualified officer as the chief Justice may in writing appoint; except that in respect of bills under Schedule 4 of the order the Taxing Officer shall be the Registrar of trademarks or any Deputy or Assistant Registrar of trademarks.”

(7) I do agree with the Defendant/Respondent that this application for stay of Taxation is an application that properly lies within the jurisdiction of the Taxing Master. In **DONHOLM RAHISI STORES –VS- EAST AFRICAN PORTLAND LIMITED [2005] eKLR**, it was held: -

“Taxation of costs, whether those costs be between party and party or between Advocate and Client is a special jurisdiction reserved to the taxing officer by the Advocate (Remuneration) Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates (remuneration) Order. The present application is not such reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself. The taxing officer does nothing beyond taxation of the bill of costs. The consequences of such taxation, for instance recovery of the taxed costs, will be a matter for the court, and the court can at that stage be asked to stay recovery of those costs pending whatever event, say, an appeal against the order granting the costs, or a reference under Rule II of the Advocates (Remuneration) Order.” [own emphasis]

(8) I note that this is a matter in which taxation is yet to take place. In the circumstances, I find that the present application is premature. The Applicant should have filed this application before the Taxing Master and only moved to the High Court if dissatisfied by the decision of the Taxing Master. I am fortified in this finding by the decision of my learned brother **Hon Justice Makau** in the case of **TOM OJIENDA & ASSOCIATES –VS- MUMIAS SUGAR CO. LIMITED & ANOTHER [2015] eKLR**, where he held:-

“I am not satisfied that the Applicant has proved the substantial loss that it stands to suffer if the application for stay is denied. The Applicant has recourse to file a reference to the High Court once all matters in issue are ventilated and Deputy Registrar makes her determination. The failure to prove the substantial loss that the Applicant stands to suffer, if stay of the Bill of Costs is not granted, in my view renders this application untenable. I do not see any justifiable cause for granting stay of the Bill of Costs as this is a duty of the Taxing master to evaluate all the issues before her after considering all the evidence and submissions before her and ensure that she decides the matter in accordance with the provisions of the law.”

(9) Accordingly, I find no merit in the present application. The Notice of Motion dated **29th May 2019** is hereby dismissed in its entirety. Costs are awarded to the Defendant/Respondent.

Dated at Nairobi this 7th day of July 2020.

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Justice Maureen A. Odera