REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 87 OF 2007

MBEU KITHAKA...PLAINTIFF/APPLICANT

VERSUS

PHILIP MUCHIRI MUGO..DEFENDANT/RESPONDENT

RULING

On 30th March 2017 this Court made a Ruling on the effect of the Plaintiff's/Applicant's Advocate's lack of practicing certificate on the bill of costs. It was held that the Advocate was not entitled to interest during the period he had no practicing licence. Consequently the Deputy Registrar was directed to have the certificate of costs and warrant of arrest in execution be corrected to subtract any costs and interests that may have been incurred during the period counsel did not have a valid practicing certificate. The Deputy Registrar complied and issued directions dated 28th July 2017 calculating the interest to be deducted as Kshs. 37,000/-. The Deputy Registrar also considered that there was a further sum of Kshs. 18,920 due to the Defendant from a ruling by Hon. Justice Ngaah dated 30th April 2014.

The said ruling of 30th March 2017 and the directions of the Deputy Registrar provoked the instant application dated 2nd August 2018 by the Plaintiff/Applicant under Sections 1A, 3A, 99 and 100 of the Civil Procedure Act seeking orders *inter alia* that:

1. This honourable Court be pleased to order a stay of execution to stop the Defendant/Respondent from executing the decree dated 30th March 2017.

2. There be an order for taking accounts of any money earned by Counsel from 1st January to 12th August 2012.

3. The amount of Kshs. 18,000/- having been set off earlier by the previous order the same be excluded from the sum to be accounted for.

4. The Respondent to refund all monies irregularly paid to him.

5. Costs of the application be in the cause.

The application is supported by the affidavit of Mbeu Kithaka, the Plaintiff/Applicant stating as follows: -

1. The accounts for the period between January and August 2012 when the applicant's advocate had not taken out a practicing certificate had not been done.

2. No money was earned by the advocate during the period of January to August 2012 and the bill of cost does not include any monies during that period.

3. Therefore the amount charged to be returned to the Respondent is improper.

4. The amount deducted or paid to Respondent was improper.

5. By order of the Court the Respondent's Kshs. 18,000/- was offset against the decretal amount and the order that it was an amount to be refunded would give the Respondent a double payment.

6. There was no order setting aside the taxed costs in the application the Respondent made to the High Court.

7. The delay occasioned by the Applicant's Advocate in taking out the practicing certificate was not due to negligence on his part.

The application is opposed through a Replying Affidavit dated 3rd September 2018 by Philip Mugo Muchiri, the Defendant/Respondent, stating majorly that he does not owe the Applicant any money. He stated that the Applicant's Advocates had no practicing licence between January and August 2012 yet he illegally pursued the Respondent to be arrested through a warrant of arrest based on inflated amount of Kshs. 123,798/- with a further Kshs. 30,635/- being further costs.

The application was canvassed via oral submissions with each party reiterating the contents of their affidavits. The issues for determination are;-

1. Whether to issue stay of execution to stop the Defendant/Respondent from executing the decree dated 30th March 2017

2. Whether it is proper to issue an order for taking accounts of any money earned by Counsel from 1st January to 12th August 2012

3. Whether the amount of Kshs. 18,000/- had been set off earlier by a previous order and hence should excluded from the sum to be accounted for

4. Whether any monies were irregularly paid to the Respondent to warrant a refund?

Before determining the issues, it is necessary to look at the provisions of Sections 99 and 100 of the Civil Procedure Act provide on which the application is anchored. **Section 99** states as follows:

> ***"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."***

Section 100 provides: -

> ***"The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."***

These provisions stand for what is known as "the slip rule" which allows court to relook at its decisions for minor corrections. In the case of ***Valla Bhdas Karsandas Ranica vs Mansukhlal JivraJ and others [1965] EA 700,*** it was held that

> ***"A slip order will only be made where the Court is fully satisfied that it is giving effect to the intention of the Court at the time when Judgment was given or in the case of a matter which was overlooked where it is satisfied beyond doubt as to the order which it would have made had the matter been brought to its attention."***

Looking at the application before me, I find that there is no connection between the orders sought and principles for the application of the slip rule. This Court's ruling dated 30th March 2017 determined that if there was any interest charged during the time the Advocate had no valid practicing licence the same should be refunded to the Respondent. The Deputy Registrar indeed found that there was interest charged during that period of time and credited the same to the Respondent in line with the said Ruling. The application does not identify any error in either the ruling or the application, to warrant the invoking of the said provisions of law. Instead the Applicant raises a different issue that his advocate did not earn interest which issue ought to have been canvassed before the Deputy Registrar. The Deputy Registrar did find that interest was charged and determined the issue. Nothing has been placed before this court to warrant a re- opening of the issue. Hence the answers to issue no 2, 3 and 4 is in the negative.

The remaining issue is the prayer for stay of execution of the orders of this Court in its ruling of 30th March 2017. It is important to note that the first step of the said ruling has already taken place through the directions issued on the Deputy Registrar on 28th July 2017. In a plethora of authorities including the **cases of <u>Kiplagat Kotut vs. Rose Jebor Kipngok [2015] eKLR</u> and <u>Kenya Commercial Bank Limited vs. Sun City Properties Limited & 5 Others [2012] eKLR</u>** the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

> **1. Substantial loss may result to the applicant unless the order was made;**
>
> **2. The application was made without unreasonable delay; and**
>
> **3. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

The three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed as the word is **"and"** connotes that all three (3) conditions must be met simultaneously. The rationale for the above requirements was stated in **<u>Machira T/A Machira& Co. Advocates vs. East African Standard (No. 2) [2002] KLR 63</u>,** where it was held:

> **"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding**

objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

Nothing in the application and the submission by the Applicant indicates that the application meets the above threshold for stay. Having concluded that the prayer for accounts is not tenable, a stay will not be necessary as the same will serve no purpose. There is no pending appeal to the material decision of this Court dated 30th March 2017 and there cannot be an order of stay of execution in perpetuity. The upshot is that the application must fail in its entirety.

Dated, delivered and signed at Nyeri this 1st March 2019.

Mumbua T Matheka

Judge

In the presence of:-

Court Assistant:-Juliet

Ms. Mwai for HK Ndirangu for applicant

N/A for respondent

Mumbua T Matheka

Judge

1/3/19