



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 399 OF 2005

**THE DEPOSIT PROTECTION FUND BOARD The Liquidator of
EURO BANK LIMITED(In Liquidation)PLAINTIFF**

-Versus-

ROSALINE NJERI MACHARIA.....1ST DEFENDANT

GUARDIAN BANK LIMITED2ND DEFENDANT

R U L I N G

1. The Chamber Summons application dated 10th December 2018 is filed by **The Deposit Protection Fund Board** the Liquidator of **Euro Bank Limited (in Liquidation)** (herein after the Plaintiff). The application is pitted against the 1st Defendant **Rosaline Njeri Macharia**. The application is for the following orders:

- a. That there be a stay of execution of the Certificate of Taxation pending hearing and determination of this Application.
- b. That there be a stay of execution of the Certification of Taxation Pending hearing and determination of the Reference.
- c. That this honourable Court enlarge the time within which to file a reference against the decision of the taxing officer delivered on 20th September, 2018.
- d. That this Honourable Court do make any additional orders as the demands of justice dictate.

BACKGROUND

2. The Plaintiff's suit against both Defendants was struck out on 16th January 2006. The Plaintiff filed an appeal against that striking out. According to the 1st Defendant that appeal was dismissed. The 1st Defendant filed a party/party Bill of Costs. It was taxed on 20th September 2018 at Kshs. 12,128,418. It is that taxation that the Plaintiff's application is directed at.

PLAINTIFF'S ARGUMENTS

3. The Plaintiff relies on the affidavit of its Learned Advocate Kemigisha Margret in support of the application. The said Advocate deponed that during the pendency of the Plaintiff's appeal the 1st Defendant made proposal to settle her indebtedness with the Plaintiff by paying the Plaintiff Kshs. 28 million. The proposal for that payment and for each party to pay their own costs was accepted by the Plaintiff. Further to that proposal for settlement the 1st Defendant gave the Plaintiff postdated cheques but only Kshs. 3.75 was paid. It is deponed that in view of that proposal to settle and the part payment that was made by the 1st Defendant the Plaintiff was surprised by the 1st Defendant's filing of Bill of Costs for taxation. Parties appeared before the Taxing Master on 13th August 2018 when the Plaintiff referred to its affidavit which set out the above stated settlement. The deponent stated that the 1st Defendant's Advocate asked for time to consult his client in order to respond to the issues on proposed settlement. The Plaintiff Advocate stated that she was the view that the Taxing Master would rule on whether there was a valid proposal to settle the matter or not. She sated she later was surprised to be served with a Certificate of Taxation. It is for the above reason the Plaintiff seeks to file a reference to the taxation.

4. The Plaintiff Advocate stated that she mis-diarized the date of ruling by the Taxing Master and hence why the reference was not filed in time.

1ST DEFENDANT’S ARGUMENTS

5. The application is opposed by the 1ST Defendant. The Learned Advocate for the 1ST Defendant filed her affidavit in opposition to the application. In her view the alleged proposal by the 1ST Defendant was made on without prejudice basis. Further that no consent, in those terms has been filed in this matter. The Learned Advocate also doubted that he Plaintiff’s Advocate failed to understand that the Taxing Master was to rule on the Bill of Costs. In the 1ST Defendant’s view the present application has been brought with the aim of delaying execution of the taxed amount.

ANALYSIS

6. I have considered the parties’ affidavit and submissions. As correctly state, by the Plaintiff, paragraph 11 of the Advocates(Remuneration) Order affords a Court discretion to enlarge time for filing a reference. But like any discretion, I dare say, it ought to be exercised judiciously. Further the party seeking the Court to exercise discretion in his/her favour has to present material for such exercise.

7. The Plaintiff before me has alluded to a proposal by the 1ST Defendant to settle her debt with the Plaintiff by paying Kshs. 28 million. The 1ST Defendant also proposed that each party bear their own costs in this case. That settlement was never made part of the proceedings in this matter and the proposal to pay the debt was only partially met.

8. The Plaintiff’s Learned Advocate stated that she was under mistaken view that the Taxing Master adjourned the matter with a view to Rule whether or not the issue of costs had been agreed between the parties.

9. I find it difficult to accept what Learned Counsel for the Plaintiff said as a reason for failing to attend the Taxing Master’s ruling and for failing to file a reference in time. I have that doubt because the Taxing Master’s proceedings of 13th August 2018 are very clear. They were made in the presence of the very Advocate for the Plaintiff who now says she misunderstood what the Taxing Master alluded to. The Taxing Master listened to the Plaintiff’s and 1ST Defendant’s Advocate make submission in response to the 1ST Defendant’s Bill of Cost. After hearing them the Taxing Master made an order that the 1st Defendant could file her affidavit, then Ruled:

“I shall go ahead and make a Ruling on the submissions... response notwithstanding.”

10. It was clear in the proceeding that parties were addressing the Taxing Master on whether 1ST Defendant should be afforded opportunity to respond to Plaintiff’s affidavit in response to Plaintiff’s affidavit in respect to the Bill of Costs.

11. In my humble view there is no basis upon which I can exercise the discretion to extend the period for the Plaintiff to file a reference. The Plaintiff has failed to sufficiently explain why it failed to file a reference in time.

CONCLUSION

12. The application, by Chamber Summons, dated 10th December 2018 is without merit and is dismissed with costs to the 1ST Defendant.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 4TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE 1ST DEFENDANT

..... FOR THE 2ND DEFENDANT