



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC. APPLICATION NO. 104 OF 2017**

**EMPERIUM REAL ESTATE LIMITED.....CLIENT/APPLICANT**

**VERSUS**

**GICHUKI KING'ARA & CO. ADVOCATES.....ADVOCATE/RESPONDENT**

**RULING**

1. By a notice of motion application dated 19<sup>th</sup> February 2019, the Applicant seeks for orders that;

- (a) The Honourable court be pleased to set aside the entire proceedings and the ruling of the taxing officer delivered on 15<sup>th</sup> November 2017, and the Advocate-Client bill of costs filed vide Miscellaneous Application No. 104 of 2017;*
- (b) The Certificate of costs issued in respect of the ruling delivered on the said 15<sup>th</sup> November 2017 be set aside;*
- (c) The Honourable court be pleased to order that the bill of costs dated 2<sup>nd</sup> March 2017 be taxed afresh;*
- (d) The Honourable court be pleased to enlarge time for the filing of this Reference and deem the Reference as properly filed;*
- (e) Pending the hearing of the Reference, the Honourable court be pleased to grant orders of stay of execution proceedings herein;*
- (f) Costs of the application be provided for.*

2. The application is premised on the ground on the face of it and an affidavit dated 19<sup>th</sup> February 2019, sworn by the Applicant's director; Yebeltal Getachew Senehiwot.

3. However, before the application was heard and determined, the Respondent filed a preliminary objection dated 28<sup>th</sup> February 2019 against it arguing that, on the 17<sup>th</sup> March 2017, the Honourable court issued orders to the Applicant, that it should deposit Kshs. 17, 746,916 as security in this suit. To date, no such security has been deposited, thus the Applicant is in contempt of the said order. That in view of the continuing contempt of court, Applicant has no right of audience and the application should be dismissed or stayed until the Applicant complies with the court order.

4. Further a certificate of cost can only be set aside through a Reference and the instant application is not a Reference, and the Reference is a time barred under the Advocate Remuneration order. The application also offends the provisions of the Advocate Remuneration Order and does not lie, as the reasons for the taxation have not been requested for nor obtained so the application is premature.

5. Be that as it were, on 5<sup>th</sup> February 2019, the respective parties addressed the court orally on the preliminary objection. The Respondent reiterated the content of the preliminary objection submitting in a nutshell that, the Applicant should not be heard due to its failure to comply with the court orders issued on 17<sup>th</sup> March 2017. As the order has not been challenged and remains valid, it should be obeyed. That the application is incompetent as there are no reasons for the taxation and further, there is no challenge on any of the items taxed. The notice of objection was not lodged within fourteen (14) days as required under Rule 11 of Advocates Remuneration Order.

6. However, the Applicant disputed the alleged contempt of the court order and argued it has not been cited for contempt. Further there are two (2) applications filed; one for stay of execution and the other for enlargement of time to file a Reference. Thus the preliminary objection

is misplaced and should be dismissed.

7. After considering the arguments advanced by the parties, I find that, the following issues have arisen for consideration;-

*(a) Whether, the Applicant is in contempt of the court orders issued on 17<sup>th</sup> March 2017;*

*(b) If so, whether they should be denied a right of audience;*

*(c) Whether there is a competent Reference before the court.*

8. I shall deal with the first two issues together. In that regard, I note that the Respondent herein and Applicant in the notice of motion application dated 8<sup>th</sup> March 2017; filed the Application seeking for orders that;-

*(a) The Honourable court do restrain the Respondent either by themselves or through their agents from disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise the parcel of land known as L.R.No. 3734/417, pending the taxation of the bill of costs dated 3<sup>rd</sup> March 2017;*

*(b) The court do restrain the firm of Mwaniki Gachoka & Company Advocates, from disbursing and/or using the monies from the sale of the apartments pending inter parties hearing and determination of the application;*

*(c) In the alternative, the Respondents do deposit the sum of Kshs. Twenty Six Million Nine Hundred and Twenty Three Thousand One Hundred and Eighty Three (Kshs. 26,923,183) into Court and/or in a joint interest earning account in the names of the Advocates for the Applicants and the Respondents as security for satisfaction of the sum as may be taxed in this cause;*

*(d) Costs of and occasioned by this application be provided for.*

9. The Application was heard ex parte as the Respondent therein was said to have been served but was not in court on the date of hearing of the Application. The court granted prayer (4) thereof, which was requiring the deposit of the subject sum. The record clearly indicates that, there has been no challenge to the orders granted. Therefore, the Respondent is in order to argue that, the orders have been disobeyed.

10. However for the Applicant to be denied audience, they need first of all, to have been served with an application of contempt of court and be called upon to show cause why they should not be held liable of contempt of court. Indeed denial of audience is one of the remedies available for contempt of the court order. However, it can only be ordered where due process of law is followed. In that case, the Respondent should move the court procedurally by filing a contempt Application and not through a preliminary objection.

11. As regards the 3<sup>rd</sup> issue, I find that indeed there is no Reference filed before the court. Prayers 1, 2, 3, require existence of a Reference. Therefore prayer (4), under which the Applicant seeks for enlargement of time for filing of the Reference should be dealt with first and if granted then, can then seek for the other orders.

12. As regards prayer (5) seeking for stay of execution proceedings, I note that the Applicant avers that all through it was never served with applications filed in court. However, the Respondent argues that, the Applicant has been served through out and an affidavit of service filed to that effect. That even then, the parties herein met in September 2018 to discuss the matter. Thereafter, the Applicant sought for time to settle the claim which the Respondent conceded to. However, the Applicant kept quiet. Further, the Applicants' lawyers have been to court on three occasions on 23<sup>rd</sup> August 2018, 10<sup>th</sup> September 2018 and 5<sup>th</sup> February 2019.

13. In my considered opinion, the stay of execution can only be granted on the three parameters in law, the main one being the provision of the security. In this case, the only security the Applicant can be granted pending the hearing of the Application and in particular stay of execution is to deposit the sum certified in the Certificate of taxation in a joint interest earning account in the names of both parties counsels within fourteen (14) days of this order. In default execution to proceed. Thereafter, the Applicant can move the court on other prayers herein, on the issue of enlargement of time and/or on the Reference.

14. Therefore the Preliminary objection is dismissed. The costs thereof shall abide the outcome of the application when and if filed, served, heard and determined.

15. Those then are the orders of the court.

**Dated, delivered and signed in an open court this 14<sup>th</sup> October 2019.**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Mirie for Mr. Kingara for the Advocate/Respondent

Mr. Ochuka for Mr. Thiong'o for the Applicant

Dennis -----Court Assistant