



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISCELLENOUS CAUSE NO. 112 OF 2017

I.N. NYARIBO & CO. ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

AFYARE ENTERPRISES LIMITED.....RESPONDENT/CLIENT

RULING

1. The applicant represented the respondent in **Nairobi HCCC No.9 of 2005** in which suit the respondent had an intention to purchase one of the properties known as Nairobi L.R. Number 36/VII/403 (Original number 36/8) otherwise known as Baraka Shopping Complex within 1st Avenue, Eastleigh, Nairobi. The matter was concluded through a consent order dated 9th March 2017. The applicant filed an Advocate/Client bill of costs dated 23rd August 2017 against the respondent for the services offered to him in **Nairobi HCCC No.9 of 2005**. The bill was taxed on 11th April 2018 and allowed in favour of the respondent against the applicant/Advocate in the sum of Kshs.1,538,787/=. On 24th April 2018, the applicant filed a notice of objection on the taxation to the bill of costs.

2. The application before me for determination is a notice of motion application filed on 24th April 2018 seeking stay of execution of the ruling dated 11th April 2018 pending the hearing and determination of the applicant's reference. The application is based on the grounds that:

- i. The applicant has filed a notice of reference to the Deputy Registrar notifying him of his intention to challenge the ruling dated 11th April 2018.**
- ii. The applicant has a *prima facie* case with high chances of success and in particular, he is challenging the instruction fees being item 1 which he feels is inordinate and premised on the wrong law and facts.**
- iii. The applicant is afraid that the respondents may proceed to execute the ruling in which case he stand to suffer immensely.**
- iv. The applicant has filed this case timeously and the application is not an afterthought meant to waste precious judicial time.**
- v. This court has the power to order for a stay of execution pending the hearing and determination of the reference.**

3. The application is supported by a supporting affidavit of Ishmael Nyaribo sworn on 24th April 2018 and a further affidavit sworn 3rd July 2018. It is the applicant's case that the Deputy Registrar of this court delivered a ruling on 11th April 2018 capping his Advocate client costs at Kshs.861,213/=; that he was dissatisfied with the said ruling and would be seeking reasons for the taxing out of certain items and the basis for computing instruction fees by lamping both conveyance and litigation instructions in the same bundle which adversely affected other items on the advocate client bill of costs; that he has issued a notice for his intention to have the matter placed before the judge for reference of the ruling dated 11th April 2018; that he is challenging particularly item 1 of the bill of costs which he believes the Deputy Registrar erred by failing to take into account the complexity of the case, the value of the estate and the amount of time and resources expended; that he has issued a notice to the taxing master requesting reasons for items specified in accordance with the Advocate Remuneration Order 2009 which reasons he is yet to receive; that if the order for stay is not granted, the applicant stands to suffer irreparable harm and; that in the event the order for stay is not granted the intended application for reference will be rendered nugatory.

4. The application is opposed by the respondent through the replying affidavit of Hassan Abdi Warsame dated 10th May 2018. The summary of his case was that the application together with the supporting affidavit do not conform and/or meet the mandatory requirements of the provisions of **order 42 rule 6(2) (b)** of the **Civil Procedure Rules**; that a stay of execution cannot be granted on issues to do with costs; that no substantial loss will be suffered by the applicant if stay is not granted; and that the intended reference lacks in merit, is

frivolous and an abuse of the court process more specifically the items objected to were very reasonably taxed by the Deputy Registrar. To buttress this case, Mr. Sumba relied on the authority in the case of **Francis Kabaa Vs Nancy Wambui & Another (1996) eKLR** where the Court of Appeal held that “ We do not think that stay can be granted in respect of costs”

5. I have perused the application, supporting and replying affidavits together with authorities submitted thereof. The issue for determination is whether the applicant has satisfied the conditions required for the court to order stay of execution of the ruling of 11th April 2018 pursuant to order 42 rule 6 of the Civil Procedure rules.

6. **Section 89** of the **Civil Procedure Act** provides for the application of the Civil Procedure Rules in all cases of a civil nature such as the present application arising from taxation of costs. **Section 89** of the **Act** provides as follows:

“89. Miscellaneous proceedings

The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.”

7. It follows, in my view, that the provisions of the **Civil Procedure Act** with regard to stay of execution pending the determination of the reference applies.

8. By analogy of the stay of execution pending appeal **under Order 42 Rule 6 of the Civil Procedure Rules**, a court will in granting stay of execution pending hearing and determination of a reference to a judge from taxation of costs be guided by presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the applicant. **(See Labh Singh Harman Singh Ltd v Attorney General & 2 others [2016] eKLR).**

9. The first condition is whether the applicant has demonstrated substantial loss. I note that no attempt has been made to show the nature of loss the applicant stands to suffer if the application is not granted. It has not for example been alleged that the amount involved is such that if the applicant is made to pay it up it will bring the applicant’s operation to a standstill **(See Reliance Bank Ltd v Norlake Investments Ltd EALR [2002] 1 EA 227 (CAK))**. It has also not been contended that the respondent is unlikely to refund the said amount if the same is paid over to the respondent. Accordingly, I am not satisfied that the applicant stands to suffer substantial loss unless the stay sought is granted.

10. However, considering the unique circumstances surrounding this case, in that the respondent had already paid legal fees in excess of what was taxed in favour of the applicant culminating to the order for release of the balance, the applicant’s intended reference would most likely be rendered nugatory if the refund is executed before the reference is heard and determined. On account of that ground, the court can grant stay orders.

11. On whether the applicant’s counsel has offered some form of security in the submissions, no such security has been offered in the supporting affidavit. However, the form of security is in the discretion of the Court and the mere fact that there is no offer of security may not necessarily lead to the dismissal of the application although the Court is perfectly entitled to take it into account.

12. Accordingly, I am persuaded that it is in the interest of justice that the application for stay be granted pending the filing and hearing of the intended reference. The applicant is further directed to file his intended reference within thirty days from the date of delivery of this ruling in default, the stay orders shall lapse.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF DECEMBER 2018

J.N. ONYIEGO

JUDGE