



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 631 OF 2012**

**PAUL GACHANGA NDARUA.....PLAINTIFF**

**- VERSUS -**

**KENYA POSTS & TELECOMMUNICATIONS CORPORATION.....DEFENDANT**

**RULING**

1. The application by the plaintiff is for stay of all proceedings pending the hearing and determination of an appeal from the judgement delivered on 20<sup>th</sup> June 2014.
2. The second limb of the application is for stay of execution pending the hearing and determination of the objection arising from the decision delivered by the Taxing Officer on 20<sup>th</sup> July 2016.
3. Following the pronouncement of the Judgement on 20<sup>th</sup> June 2014, the plaintiff filed a Notice of Appeal on 1<sup>st</sup> July 2014. Simultaneously with the said Notice of Appeal, the plaintiff wrote to the Deputy Registrar of the High Court, requesting the record of the proceedings, which he would thereafter be using when lodging the appeal.
4. As at the time when he was canvassing this application, the plaintiff had not yet received the record of the proceedings.
5. In those circumstances, the plaintiff fears that unless this court stays all proceedings and also stays the process of execution, the intended appeal and the intended reference proceedings would be rendered nugatory.
6. The plaintiff opined that if the proceedings were not stayed he would suffer substantial loss.
7. Therefore, it was his considered opinion that it was in the interest of justice to stay the proceedings.
8. When canvassing the application the plaintiff submitted that the court has jurisdiction to grant an order for stay of execution in cases where such execution arose from the taxation of costs.
9. In **LABH SINGH HARMAN SINGH LIMITED Vs ATTORNEY GENERAL & 2 OTHERS Misc. APPLICATION No. 83 of 2015, (at Machakos)**, Muriithi J. said;

**“I am unable to agree with the submission by counsel for the respondent that the court has no power to order stay in cases of taxation for costs as exists in the Civil Procedure Rules. It is**

**clear to me that taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. Indeed, section 94 of the Civil Procedure Act provides as a general rule that execution of orders of the court should await confirmation of the costs by taxation unless the court grants leave for execution before taxation of costs?.**

10. The applicant also cited the case of **EDWARD MWANGI MACHARIA Vs REGISTRAR GENERAL, Misc APPLICATION No. 426 of 2006**, in which Dulu J. said that;

**“...therefore, depending on the circumstances, and also coming to court through the correct procedure, stay of execution of a certificate of taxation can be granted?.**

11. In arriving at that decision, the learned Judge had quoted with approval, the following words which I had used in **KASSAM KHIMJI LTD Vs MERIDIAN PROPERTES LTD Hccc No. 757 of 1994**;

**“In my considered opinion, a decree cannot stricto sensu, arise out of the taxation. That which arises out of a process of taxation is a Certificate of Taxation. However, the court does recognize that execution can issue in respect of a Certification of Taxation. Therefore, if the applicant were to satisfy the requirements for the grant of an order for stay of execution, the court would grant it?.**

12. Another authority cited by the plaintiff was that of **KILONZO & Co. ADVOCATES Vs JOHN NJENGA MUTUTHO Hccc No. 49 of 2010**. In that case Odunga J. stated as follows;

**“The Court, when properly moved, may in the exercise of its inherent jurisdiction grant stay of execution notwithstanding the fact that the order sought to be stayed arises from taxation?.**

13. I believe that the plaintiff provided those many authorities because he anticipated that the defendant would challenge the court’s jurisdiction to grant stay of execution in a matter arising from a Certificate of Taxation.

14. My said belief is based upon the fact that Ogola J. had, on 2<sup>nd</sup> October 2015, dismissed the plaintiff’s first application for stay further proceedings, on the grounds that there was no proceedings which could be stayed after the court had granted its judgement. The learned Judge had observed that the court could only interfere with the process of the taxation of costs, when a reference was filed, arising from taxation.

15. For those reasons, the court declined to stay the process of taxation, noting as follows;

**“It is the events which may proceed after the Certificate of Taxation is issued that may create proceedings capable of being stayed?.**

16. Now that the costs had been taxed and a Certificate of Taxation issued, the plaintiff asked for stay of execution, as well as stay of proceedings.

17. In my considered opinion, after the court has granted judgement and after the Taxing of costs, the only process remaining is that of execution.

18. Therefore, I am unable to comprehend why the plaintiff has asked the court to order for both stay of execution and stay of proceedings.

19. I am aware that the plaintiff has filed a Notice of Appeal, in relation to the Judgement dated 20<sup>th</sup> June 2014.

20. As the court had already given its judgement, there were no other proceedings which can take place before the High Court, save for execution. Therefore, if the court were to grant an order for stay of execution, it would be superfluous to also issue an order for stay of proceedings. Indeed, it would not just

be superfluous, it would be wrong to order that proceedings be stayed in such circumstances, when there were no other proceedings capable of being undertaken if the court had already stayed execution.

21. Ordinarily, when a party was appealing against a judgement, he would only seek, (*if he chooses to do so*), an order for stay of execution.

22. In relation to a Certificate of Taxation, it is final unless it is set aside, reviewed or varied by a Judge, arising from a reference.

23. If a party wishes to challenge the decision of a Taxing Officer, he would file a reference. He does not lodge an appeal.

24. Pursuant to Rule 11 (1), (2) and (4) of the Advocates Remuneration Order, the party who has an objection to the decision of the Taxing Officer, has 14 days to give a written notice to the Taxing Officer, indicating the items of taxation which he is objecting to.

25. Upon receipt of the notice, the Taxing Officer is supposed to immediately thereafter provide the party with reasons for his decision on the items in respect to which an objection had been raised.

26. From the moment the Taxing Officer provides his reasons, the party is required to file a reference before a Judge.

27. It is now well settled that when the Taxing Officer has given reasons for his decision, within the body of the Ruling on Taxation, there is no need for the Taxing Officer to give any other reasons.

28. In this case, the Taxing Officer had already given the reasons for her decision, within the body of the Ruling. Therefore, the Taxing Officer responded to the request for reasons, by stating in her letter dated 4<sup>th</sup> August 2016, that the reasons for the taxation were contained in the Ruling delivered on 21<sup>st</sup> July 2016.

29. As the plaintiff has the reasons for the decision, he was supposed to have lodged the reference within 14 days.

30. However, the plaintiff is yet to file any reference.

31. In the absence of a reference, there is no known challenge to the Taxing Officer's decision.

32. The question that then arises is what purpose would be served with an order stopping the execution of a Certificate of Taxation which is not being challenged. The answer is that no lawful purpose would be served by stopping the defendant from taking steps to recover the taxed costs.

33. Whereas a Notice of Appeal from the decision of the court is deemed to constitute the commencement of the process of appeal, the notice by a party who wishes to file a reference does not constitute the commencement of the reference from the decision of the Taxing Officer.

34. An appellant may obtain a Certificate of Delay, provided that he had made a written request for the typed record of the proceedings he intends to appeal against, and if the said request was copied to the other party.

35. With regard to decisions from the Taxing Officer, no such elaborate procedures exist.

36. Therefore, the party wishing to challenge the decision of the Taxing Officer has to lodge a reference within the stipulated period of time. When no reference has been lodged in accordance with the rules, the finality of the Certificate of Taxation is confirmed.

37. If the court were to grant a stay of execution when there was no pending reference from the decision

of the Taxing Officer, it would be equivalent to granting a stay of execution pending an appeal, when no appeal had been lodged. That cannot be right, as it would constitute an order in perpetuity, barring a judgement or order which remained valid.

38. As there is no reference which has been lodged to challenge the decision of the Taxing Officer in this case, I decline to grant an order for stay of execution.

39. If the plaintiff had lodged a reference within the stipulated time-span, I could have delved into the consideration of the *merits (or otherwise)* of staying execution.

40. The plaintiff asserted that if execution went ahead, he stood to suffer substantial loss.

41. In **GOVERNORS BALLON SAFARIS LTD Vs SKYSHIP COMPANY LTD & ANOTHER, CIVIL APPLICATION No. NAI. 132 of 2015**, the Court of Appeal reiterated the following words, which it had first used in **Patel Vs Transworld Safaris Limited, Civil Application No. NAI. 197 of 2003**;

**“In deciding the matter before it the Court exercises discretionary jurisdiction, which discretion has to be based on evidence and sound legal principles. The duty, obviously, squarely falls on the applicant to place such evidence before the court hearing the application?.**

42. In the event, it was incumbent upon the plaintiff to provide this court with evidence to demonstrate that if stay of execution was not granted, he would suffer substantial loss.

43. Although the plaintiff swore an affidavit to support his application, he did not provide any evidence in it, to show that he would suffer substantial loss. The bare statement that he would suffer substantial loss did not constitute evidence.

44. Thereafter, when canvassing the application, the plaintiff’s advocate submitted thus;

**“16. The Applicant will suffer substantial losses if his property is attached for the satisfaction of the taxed costs. He is in business and such payment will drive him out of business?.**

45. For the first time, the court was being given a hint about the kind of losses which the plaintiff stood to suffer, if his property was attached for the satisfaction of the taxed costs.

46. The person tendering that information is the advocate for the plaintiff. He does not indicate how or wherefrom he got he said information.

47. And, in any event, the information is provided as a part of submissions. In effect, the information is not in the nature of evidence.

48. Evidence is tendered by a party or his witness. Evidence is not tendered by the advocate representing a party. Advocates make submissions; and submissions do not constitute evidence.

49. In the result, I find that the plaintiff failed to produce evidence to show that he would suffer substantial loss if stay of execution was not granted.

50. A distinction needs to be made between evidence and submissions. I emphasize that point because in the plaintiff’s affidavit, he did not depone to any reasons to explain why there was some delay between the time when the Taxing Officer gave her Ruling on 21<sup>st</sup> July 2016, and 16<sup>th</sup> September 2016 when the present application was filed.

51. Of course, if such an explanation was in relation to what transpired between the plaintiff’s advocate

and a clerk at the High Court Registry, the appropriate person, to have sworn an affidavit containing those facts, would have been the advocate.

52. The plaintiff's advocate has not sworn an affidavit in this application.

53. Nonetheless, the submissions dated 28<sup>th</sup> October 2016 contain the following statements;

**“21. The Applicant's advocate attended Court on 21<sup>st</sup> July, 2016 but was misadvised by a clerk at the registry that the ruling was not to be delivered on that day but on the following day. This misinformation left the Applicant's advocates in the dark as we were not aware of the contents of the ruling or even that the same was delivered?.**

54. That is a statement of fact. It should not have been incorporated into the submissions, as submissions do not constitute evidence.

55. Finally, the plaintiff acknowledges that the defendant has the ability to repay the costs if ultimately the court determined the case in his favour.

56. If the respondent was able to restore the applicant to his position, the loss which the applicant may have suffered would be compensated. But I do appreciate that the ability of the respondent to compensate the plaintiff should not be considered in isolation.

57. In the exercise of its discretion the court must strive to balance the competing rights and interests of the parties. It is only when the court strikes an appropriate balance that justice and fairness would be a reality.

58. For instance, if the sums of money involved are large, the party who is compelled to pay it out at once may be unable to survive thereafter. Therefore, even if he were to be compensated later, his life or business would already have been destroyed.

59. In this case, the plaintiff said that he is ready and willing to comply with such terms as the court may impose, as a pre-condition for the grant of a stay of execution.

60. Pursuant to Order 42 Rule 6 (2) of the Civil Procedure Rules, the party seeking stay of execution, must provide;

**“b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him....?”**

61. In this case, the plaintiff may ultimately have to settle the taxed costs. Therefore, in compliance with Order 42 Rule 6 (2) (a) of the Civil Procedure Rules, he has to provide such security as would satisfy the Certificate of Taxation.

62. In the circumstances, if the plaintiff was ready to provide the said security, as a condition for the grant of stay of execution, it implies that the plaintiff has the requisite ability to pay the taxed costs.

63. If he were to make payment, his property will not need to be attached.

64. It is also possible that the court could order the plaintiff to provide security, by way of depositing the taxed costs in court or in an interest-earning account. If such be the order on the provision of security, the money so deposited would not be available to the applicant.

65. Considering that the plaintiff said that he is willing to comply with such order as the court may make with regard to security, that implies that the plaintiff would be willing to deposit the taxed costs in court.

66. To my mind, the willing deposit of the money, in the nature of security, or the provision of funds to

settle the taxed costs, both have the impact of taking away from the applicant, the sum of money which is sufficient to pay-off the taxed costs.

67. Therefore, I cannot fathom why the outright payment of the taxed costs would be more detrimental to the plaintiff, than when the same amount of money was deposited as security. Of course, I am making that observation within the context of this case, in which the plaintiff acknowledges that the defendant has the ability to repay the money, if it was later required to do so.

68. It is my finding that the plaintiff has failed to prove that he would suffer substantial loss if stay of execution was not granted.

69. In the final analysis, I find no merit in the application dated 16<sup>th</sup> September 2016. It is therefore dismissed, with costs to the defendant.

**DATED, SIGNED and DELIVERED at NAIROBI this 6<sup>th</sup> day of February 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

*Miss Onsongo for the Plaintiff*

*Miss Kariuki for the Defendant*

*Collins Odhiambo – Court clerk.*