



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

PETITION NO. 7 OF 2015

BETWEEN

TOBIAS O. SEE PETITIONER

AND

MASENO UNIVERSITY..... 1ST RESPONDENT

PROF. DOMINIC MAKAWITI 2ND RESPONDENT

DR. VITALIS OUKO 3RD RESPONDENT

BEDROCK HOLDINGS LIMITED ... 4TH RESPONDENT

RULING

1. The petitioner has brought the chamber summons dated 14th December 2016 in which he seeks, in the main, orders of stay of execution pending issuance of reasons for taxation decision by the Deputy Registrar and orders of stay pending the hearing and determination of the intended objection to taxation (the reference). The petitioner had invoked the provisions of **rule 11(4)** of the **Advocates Remuneration Order, section 3, 3A and 63(e)** of the **Civil Procedure Act, Order 22 rule 7(2), 9(b), 13(4)** and **22 and Order 49 rule 5** of the **Civil Procedure Rules**.

2. The grounds upon which the application is made are set out in the petitioner's affidavit sworn on 14th December 2016 and are as follows. Following a judgment and award of costs against him, the respondents filed their respective bills of costs which were taxed by a ruling dated 4th October 2016. The 1st, 2nd, 3rd and 4th respondents were awarded Kshs. 222,979.06, Kshs. 246,959.06, Kshs. 408,058.48 and Kshs. 282,592.26 respectively. The petitioner's counsel issued a notice of objection under **rule 11** of the **Advocates Remuneration Order** with a view to filing a reference to the High Court. The petitioner avers that he has not received the reasons for taxation from the Deputy Registrar to enable him lodge a reference to the High Court. In the meantime, the 2nd respondent proceeded with execution by proclaiming his motor vehicle and other property. He fears that if execution proceeds, he will suffer substantial loss and his intended objection to taxation will be rendered nugatory.

3. All the respondents have all opposed the application by filing replying affidavits. As I understand, the tenor of opposition is three-fold. First, the application is incompetent as the court does not jurisdiction to issue orders of stay of execution of costs under the **Civil Procedure Rules** as the matter of taxation of costs is brought under the **Advocates Remuneration Order**. Second, the petitioner has not made out a case for the grant of stay of execution. Third, a similar application for stay of execution pending appeal

was dismissed by the Court of Appeal.

4. As regards the issue of jurisdiction, I am not convinced that this court lacks jurisdiction. Although the **Advocates Remuneration Order** is a complete code for matter concerning remuneration of Advocates, matters of execution are governed by the general rules of procedure. This issue is clearly resolved by the application of **section 89** of the **Civil Procedure Act** provides that:

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.

5. In any case, the primary proceedings before the court are civil in nature and as such the **Civil Procedure Act** and **Rules** made thereunder are applicable in so far as their provisions do not conflict with the express provisions of the **Advocates Remuneration Order**. Furthermore, the execution proceedings are governed by the provisions of the **Civil Procedure Rules** hence it would be difficult to argue that the **Civil Procedure Act** does not apply (see **Labh Singh Harman Singh Ltd v Attorney General and Others MKS HC Misc. Civil Appl. No. 83 of 2015[2016]eKLR**). Moreover, the inherent jurisdiction of the court read together with the overriding objective founded on the express provisions of **Article 159(2)(d)** of the Constitution which provides that, “*justice shall be administered without undue regard to procedural technicalities*” leaves no doubt that the court grant orders of stay in an appropriate case to meet the ends of justice (see also **Dilbagh Singh Brothers (Investments) Limited v Alvi Auto Spares Limited NRB HCCC No. 31 of 2007[2012]eKLR**).

6. Since this court has jurisdiction to consider the application, the next question is whether the petitioner has made out grounds for grant of relief. The general rule founded on **Order 42 rule 6** of the **Civil Procedure Rules** is that an order of stay will not be granted pending appeal unless the applicant shows that he will suffer substantial loss and has provided security for the due performance of the terms of the decree or order that may be eventually binding upon him. The applicant bears the burden of demonstrating these conditions by evidence. It is not sufficient to state, as the petitioner has done, that, “*I am apprehensive that unless restrained they will execute and I will suffer substantial loss and my intended objection to taxation (reference) will be rendered nugatory.*” These words alone mean nothing unless they are supported by facts and evidence upon which the court can exercise its discretion.

7. The petitioner has not shown that if the costs are paid, the respondents are so poor that they cannot refund the same. He has also not been shown that he will suffer under hardship if he is called upon to pay the taxed costs. It is also worth noting that the petitioner has not even offered to provide any form of security to protect the respondents’ position. As the petitioner has not met the conditions for grant for stay, I need not comment on the application for stay pending appeal in the Court of Appeal.

8. It must be clear that the application must fail and is accordingly dismissed with costs.

9. I assess the costs due each respondent at Kshs. 10,000/-. The interim orders in force are discharged forthwith.

DATED and DELIVERED at KISUMU this 6th day of March 2017.

D.S. MAJANJA

JUDGE

Mr Gachuba instructed by Onyoni Opini and Gachuba Advocates for the petitioner/applicant.

Ms Olang’o instructed by Wasuna and Company Advocates for the 1st respondent.

Mr K’Ouko instructed by Odhiambo Owiti and Company Advocates for the 2nd respondent.

Mr Anyumba instructed by Neto and Company Advocates for the 3rd respondent.

Mr Mwamu instructed by Mwamu and Company Advocates for the 4th respondent.