

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 527 OF 2015

S. MUSALIA MWENESI ADVOCATES.....APPLICANT

VERSUS

JACK & JILL SUPERMARKET LIMITED.....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 3rd June, 2016 seeking a stay of execution of the decision of the taxing master made on 5th May, 2016. There is also a prayer that the decision and the entire proceedings thereof be set aside. There is another prayer that the court determines the justification of the filing of the bill of costs by the advocate yet the suit was dismissed for want of prosecution. Alternatively the bill of costs dated 27th November, 2015 be remitted for taxation.

The application is supported by an affidavit sworn by a director of the respondent/ applicant. Other grounds are set out on the face of the application. An order was made for filing submissions but only the respondent /applicant complied.

I have gone through the application and the submissions by the respondent applicant. It is clear to the court that there was a glaring mistake in the respondent/ applicant's postal address used by his then advocate to send notices. That alone is enough to set aside the proceedings and determination of the bill of costs because the bottom line is that the hearing proceeded ex-parte.

The respondent/ applicant was condemned unheard and the cardinal rule of natural justice is that no party should be condemned without a hearing. Without going to the merits of the bill of costs, I am persuaded that the application should succeed. Accordingly the decision and proceedings of the taxing master are set aside in their entirety. Having said so, the prayer for stay of execution is a moot point because one cannot execute an order that does not exist.

The bill of costs shall be remitted for taxation before a different taxing master after due notice to both parties. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 6th Day of April, 2017.

A. MBOGHOLI MSAGHA

JUDGE