



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 27 OF 2006**

**JOHN MBURU.....PLAINTIFF**

**- VERSUS -**

**CONSOLIDATED BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

1. The application before me is for stay of the taxation proceedings until the plaintiff's appeal was heard and determined.
2. On 19<sup>th</sup> February 2015 the court delivered its judgement, in which it dismissed the plaintiff's suit, with costs.
3. On 25<sup>th</sup> February 2015 the plaintiff filed a Notice of Appeal. Thereafter, on 6<sup>th</sup> July 2015 the plaintiff filed his appeal.
4. Having filed the appeal, the plaintiff felt that unless this court stayed the process of the taxation of the costs awarded by the trial court, the appeal would be rendered nugatory.
5. The plaintiff expressed the view that his appeal was meritorious and, therefore, it had a reasonable probability of success.
6. He pointed out that one of the issues being challenged by the appeal was the order awarding costs to the defendant. Therefore, the plaintiff's view was that the interests of justice and equity require that the taxation ought to be put on hold until the appellate court had determined the party who should pay the costs of the suit.
7. For those reasons, the plaintiff said that the taxation of the Bill of Costs was premature.
8. If taxation proceeded, the plaintiff believed that he was likely to suffer extreme prejudice and financial loss. In contrast, the stay of the taxation process was said to be unlikely to cause any undue prejudice to the defendant.
9. The plaintiff drew the court's attention to the case of **SYNER-MED PHARMACEUTICALS LTD Vs GLAXO GROUP LTD, CIVIL APPLICATION No. 77 of 2010**, in which the Court of Appeal granted a stay of the judgement delivered by the trial court. The order of stay was granted, so that the applicant could continue marketing its product in the market until the appeal was heard and determined.

10. In arriving at its decision, the court noted that the application before it was brought pursuant to Rule 5 (2) (b) of the Court of Appeal Rules. In the circumstances, the court said that the applicant;

***“was obliged to satisfy the Court on two well known points, namely, that its intended appeal is an arguable one and secondly that unless we grant to it the order of stay it seeks, its proposed appeal, were it to succeed upon its being heard, the success would have been rendered nugatory by the refusal to grant the order of stay?.***

11. It is within the context of an application before an appellate court that the said court would also be able to make a *prima facie* assessment of the question as to whether or not the appeal was arguable.

12. In my considered opinion, if the court which had delivered a Ruling or a Judgement came to the conclusion that an appeal arising out of that decision was arguable, it would be akin to saying that the court had reason to believe that its decision could be upset on appeal. If that be the position, I venture to suggest that the court should then not have delivered a decision, if the said court did not have good reason for believing that it was sound.

13. In **KENYA COMMERCIAL BANK LTD Vs MUTURI GAKUO & COMPANY ADVOCATES Hccc No. 591 of 2003**, Kasango J. expressed herself thus;

***“In my view, not only would it be a waste of judicial time to allow taxation to proceed, which if the appeal is successful, may be set aside, but I also consider that; and here I am taking judicial notice that the plaintiff being one of the major banks in Kenya, would be able to pay the defendant the amount that will eventually be taxed, if taxation does in future proceed?.***

14. The learned Judge made it crystal clear that she arrived at that decision through the exercise of judicial discretion, which was exercised rationally and on the basis of evidence.

15. In effect, each case must be determined on the basis of its own circumstances.

16. In the case of **KENYA COMMERCIAL BANK LTD Vs MUTURI, GAKUO & COMPANY ADVOCATES**, one of the factors which influenced the court was the consideration that;

***“...if the amount of the bill, that is Kshs.26 Million is paid to the defendant, there is no evidence that the defendant, if the appeal is successful, will be in a position to repay the same to the plaintiff. Balancing the two, I am of the view that the court’s discretion should be exercised in favour of the plaintiff?.***

17. It is to be noted that that case involved an Advocate/Client Bill of Costs. Therefore, upon the taxation of that Bill of Costs, judgement would issue for the amount of costs awarded.

18. The appeal arising from the striking out of the plaint was on nothing other than the question whether or not the Law Firm was entitled to any further fees, considering that the client had earlier paid legal fees which the client believed to constitute the total fees payable.

19. In contrast, the case before me involves land, as the subject matter. Therefore, the appeal would, primarily, be concerned with the efficacy of the decision to dismiss the plaintiff’s claims for compensation.

20. In my considered opinion, the process of taxation, in this case, cannot be prejudicial to the plaintiff. Taxation is the process through which the Taxing Officer determines the quantum of the costs payable. Such a determination cannot occasion any loss to the party against whom the order for costs was made.

21. Secondly, the taxation cannot render the appeal nugatory.

22. I so hold because I hold the view that there is a distinction between the process of taxation of a bill of

costs, and the process of execution of a Decree.

23. When execution of a Decree is undertaken, the judgement-debtor would, (*if required to make payment*), have something taken away from him.

24. But the process of taxation does not take away anything from any party. It is a process which only determines the quantum of the costs payable. In effect, taxation of a bill of costs is one step before execution.

25. I find no reason in law or in fact to warrant the stay of the process of taxation. Accordingly, the application dated 1<sup>st</sup> February 2016 is dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 8<sup>th</sup> day of September 2016.**

**FRED A. OCHIENG**

**JUDGE**

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

*No appearance for the Plaintiff*

*Miss Aluvale for Murugara for the Defendant*

*Collins Odhiambo – Court clerk.*