



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 903 OF 2010

IN THE MATTER OF THE ESTATE OF GERALD KAMAU

RULING

1. By a Notice of Motion dated 16th May, 2013 and taken out under Order 22 Rule 22 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, the Applicants seek from Court orders that:-
 - a.(Spent)
 - b.(Spent)
 - c. That this Honourable Court be pleased to issue an order of stay of execution herein pending the hearing and determination of the appeal.
 - d. That costs of this application be provided for.
2. The application is predicated on the grounds that the Applicant has asked for reason of taxation to enable filing a reference in court which are yet to be provided by the Deputy Registrar, that the Applicant has appealed against the decision of this court, that proclamation of the Applicants goods has been made in execution herein, that the Applicant shall be prejudiced if execution is to continue causing her to suffer substantial loss and damage. The application is further supported by the annexed affidavit of **Lucy Wanjuhi Gatharia** one of the Appellants sworn on 16th May, 2013, where the Deponent has reiterated the grounds above.
3. In opposing the application, the Respondents filed in a Replying Affidavit sworn by the third Respondent **Elizabeth Kahaki**, on 3rd July, 2013. In her affidavit, she avers among others that the application is frivolous, vexatious and an abuse of court process, that the Respondents were rightfully entitled to costs, that the Applicants were duly informed of the taxation and that the Applicants were therefore at all times material aware of the outcome of the taxation but failed to comply with the court order and thus their application is merely intended to derail the cause of justice. She further contends that the applicants declined to comply with the court order and/or deliberately ignored the same, and she instructed her advocates on record to pursue execution and recover the costs as awarded, that the Applicants had sufficient time to make any inquiries as they received the letters on 5th December, 2012 but execution only began in May, 2013 which was more than five months later. Further, she contends that the applicants are being dishonest and their actions ought not be condoned by this Honourable Court. That, she believes that the ex parte order for stay issued by the court herein was obtained without full disclosure by the Applicants of the pertinent issues surrounding this matter, that in any event, this is an old matter that has dragged for long due to the actions in bad faith of the applicants in an attempt to frustrate the Respondents and deny them their share of the estate. It is their contention that the Applicants' assertion that they filed an appeal does not warrant and/or justify the orders issued herein. Finally, she prays that the said application be dismissed with costs and she be allowed to proceed with the execution as

commenced.

4. Having carefully considered the application, the Supporting affidavit and the Replying affidavit on record, I form the view that the main issue for consideration is whether the application for stay of execution pending the hearing and determination of appeal is merited.
5. The Applicants have invoked the discretionary power of this court, which discretion is based on the principle that an Applicant must show sufficient cause in an application of this nature. Order 22 Rule 22 of the Civil Procedure Rules under which the application has been taken out provides thus:

‘(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.’

6. Have the Applicants herein shown sufficient cause to warrant the grant of orders sought? The contention of the Applicants is that they have asked for reasons of taxation to enable them file a reference in court which reasons the Deputy Registrar is yet to provide. The Applicants have also appealed against the decision of this court, that proclamation of the Applicants goods has been made in execution herein, and the Applicant shall be prejudiced if execution is to continue causing her to suffer substantial loss and damage.
7. I have noted from the records that the Applicants had made an application for revocation of grant, which application was dismissed with costs. Indeed, the ruling was delivered on 8th March 2011. As a result of the said Ruling, the Respondents filed the Bill of Costs dated 25th May, 2011. The said Bill of costs was taxed at Kshs. 437, 567 for which a certificate of taxation was issued. The respondent has averred that the applicants were duly informed of the taxation. They further have contended that the Applicants’ advocates were duly served with the ruling notice.
8. The Applicants, in their Supporting Affidavit at paragraph 5, aver that the bill of costs was filed by the Respondent which the taxing master assessed at Kshs. 437,567.00. The Applicants have even annexed a copy of certificate of taxation.
9. However, this court is not of the view that the Applicants have shown sufficient cause to warrant them the orders sought. The fact that they have not obtained reasons from the taxing master in order for them to file a reference is not ground to grant stay the execution. In *Gathenji & Co. Advocates v Waihenya & 3 Others Nairobi Milimani HCCC No. 721 of 2000*, it was held that;

‘What is referred to as “reasons for the taxing officer’s decision” is no more than his ruling on the matter. Since such ruling has been made, signed and delivered by the taxing officer on 2nd October, 2001, there was obviously no need to request for such reasons.’

10. Besides this court holds the view that there cannot be a stay for taxed costs. This position was well espoused and restated in *S. Gichuki Waigwa vs. Nina Marie Ltd* where it was held that -

‘Indeed it is correct to state that a certificate of costs once issued is final and binding on the parties unless it is set aside or altered by the Court. What that means is that if the advocate was to start execution for those costs, the client would not have a defence.’

11. Furthermore, in *Nyamogo and Nyamogo Advocates vs. Mwangi (2008) 1 EA 283*, Kasango J. stated:

“The client did not prosecute that application but instead went further and filed an objection under Rule 11 of the Advocate’s Remuneration Order. The client yet again filed another application dated 23.10.2006. By that application the client sought a stay of execution of taxed costs and a declaration that the full amount of those costs had been paid. The application now for this ruling, made by the advocate, that is the chamber summons dated 18 December 2007 is brought under Order VI, rule 13 (1) (b), (c) and order XVI, rule 5 (d). It seeks to strike out the client’s application dated 23 October 2006. Having considered the application and the arguments placed before court I am of the firm view that the Civil Procedure Act does not apply to matters relating to the Advocates Act. I therefore make a finding that the prayers sought by the client for stay of execution cannot be granted. The Advocates Remuneration Order has elaborated procedures laid out for objecting to taxed costs. The application therefore dated 29 September 2006 and 23 October 2006 are therefore incompetent for seeking to rely on the Civil Procedure Act. In the application for consideration before court the advocate has also relied on the Civil Procedure Act. Although so relying on that Act I find that the prayers sought can be entertained under the inherent jurisdiction that the court always has. That inherent jurisdiction cannot be defeated by quoting the rules of the Civil Procedure Act. Having made a finding that there cannot be stay of taxed costs I find that the client’s both applications must fail. In making that finding I rely on the case of *Frances Kabaa vs. Nancy Wambui and Jane Wanjiru* civil application number Nairobi 298 of 1996 (113 of 1996 UR) where the Court of Appeal had the following to say:

‘In any case, even if that were so, the appellant, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs.’ ”

12. This court is not persuaded that the Applicants have demonstrated sufficient cause for the grant of the orders they are seeking. It must be re-emphasized here that the grant of stay Orders is discretionary, and the same will not be issued if the applicant has not shown sufficient cause. The upshot of the foregoing is that the application dated 16th May 2013 is hereby dismissed.

DATED, SIGNED and DELIVERED at NAIROBI this 9th DAY OF May 2014.

W. MUSYOKA

JUDGE

In the presence of Ms. Gikunju advocate for the applicant.

No appearance advocate for the respondents.