



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURT**  
**Civil Suit 1123 of 2001**

**PREMIER BAG AND CORDAGE LTD.....**  
**.....PLAINTIFF**

**VERSUS**

**NATIONAL IRRIGATION**  
**BOARD .....DEFENDANT**

**BETWEEN**

**NATIONAL IRRIGATION BOARD**  
**.....DEFENDANT/APPLICANT**  
**AND**

**Benjamin K. Sila T/A Legacy Auctioneering Services.....auctioneer/respondent**

**RULING**

1. By a Notice of Motion dated 23<sup>rd</sup> March 2012 and filed on the same day, the Defendant sought orders of stay of proceedings in Miscellaneous Civil Application No. 922 of 2011 **Benjamin K. Sila T/A Legacy Auctioneering Services –vs- National Irrigation Board**, in the matter of the assessment of costs/fees payable to an Auctioneer Benjamin K. Sila T/A Legacy Auctioneering Services by the Defendant pending the hearing and determination of an appeal to the Court of Appeal of the decision by the Hon. Justice Muga Apondi delivered on 9<sup>th</sup> August 2011. The applicant also prayed for the costs of the Application to be provided for.

2. The Application was supported by the Affidavit of Engineer Daniel Barasa, the Defendant’s General Manager. The Defendant contended that being dissatisfied with the ruling made on 9<sup>th</sup> August 2011 the Defendant had instructed its advocates on record to lodge an Appeal against the said orders. A Notice of Appeal had been filed and certified copies of proceedings and ruling therein applied for, that when the application for stay of execution pending appeal came up for mention on 11<sup>th</sup> November 2011 the advocates on record with agreement of the court sought to review and vary the orders issued on 9<sup>th</sup> August 2011 whereby the dispute over calculations of the outstanding interest was referred to the parties’ respective auditors and the reports therein filed in court, that the issue of the auctioneer’s costs was not addressed by either the court or the parties, and in that respect, the said order as to auctioneers costs remained intact. That the auctioneers did file their bill of costs which was scheduled for hearing on the

25<sup>th</sup> of January 2012, that should there be taxation of the said bill and execution thereof, the Defendant's appeal will be rendered nugatory and the Defendant stands to suffer irreparable loss as the execution will negatively affect the defendant's core business. The Defendant further contended that it has an arguable appeal and it was willing to give security for the performance of its obligations under the orders of the court in the event that it is unsuccessful in its appeal.

3. In opposition to the application, the Respondent filed a Replying Affidavit sworn on the 16<sup>th</sup> May, 2012. The Respondent contended that the bill of costs arose from warrants of attachment and sale of movable property dated 27<sup>th</sup> July 2010 and issued by the Court in this case and assigned to him for execution, that the sum due and payable in respect to the decree and warrants of attachment and sale was Kshs. 26, 814, 542/-, that when the bill of costs came up for hearing before the taxing officer on 23<sup>rd</sup> February 2012, the parties agreed and informed the court that they had agreed to mediate and negotiate the same, that since there was no settlement forthcoming, the Respondent had filed written submissions to the taxing officer in terms of the consent order of 23<sup>rd</sup> February 2012, that the order giving rise to the defendant's liability to pay the Respondent's costs for the auctioneers was made way back on 9<sup>th</sup> August 2011 and that the Defendant did not apply for stay of execution then, that in the premises the application was an abuse of the court process brought belatedly and is in bad faith as it offends the orders by consent made by the court on 23<sup>rd</sup> February 2011. It was further contended that the taxing of the bill of costs shall not prejudice the defendant.

4. I have considered the rival submissions and the materials placed before me. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules. The conditions for granting a stay of execution pending appeal are set out in Order 42, Rule 6(1) and (2) of the Civil Procedure Rules and are well settled. These are that there must be sufficient cause, that the application must be made timeously, that the Applicant will suffer substantial loss if the stay is not granted and that security must be offered. In view thereof, has the applicant established sufficient grounds to warrant the court exercise its discretion in its favour?

5. The application seeks to stay the proceedings that are before the Deputy Registrar for the taxation of the Respondent's bill of cost and to stay any orders that would emanate from the said proceedings. The question that then follows is whether this court has the jurisdiction to stay such proceedings. The case of **Lubullellah & Associates Advocates –vs- Nasser Ahmed t/a Airtime Business Solutions High Court at Nairobi (Milimani Commercial Courts) Miscellaneous Case 719 of 2009** proves instructive as Koome J. held that:

***“.....Courts in Kenya are hierarchical, the jurisdiction of taxation of costs is vested upon the taxing master who should evaluate the matters placed before him/her and should do so independently. The jurisdiction that is vested in the High Court on the other hand is to deal with a reference emanating from the decisions of the taxing master.”***

Further in the case of **John Njogu & Anor –vs- James K. Gitau(t/a Gitau Kariuki & Co. Advocates) HCCC No.159 of 2009**, the court held that;

***“Taxation of costs is a special jurisdiction reposed only in taxing officers of the court. It is not reposed in judges. This court has no jurisdiction to interfere, by way of stay or injunction, that process of taxation. The court can only stay execution of a decree for costs. It cannot make an order to prevent the determination of such costs by taxation.” (Emphasis mine)***

I am alive to the fact that in the two cases, the courts were dealing with taxation of costs under the Advocates Remuneration Order whilst we are dealing with the auctioneers costs in this matter. However, the issue is the same taxation of costs by the Deputy Registrar.

6. The Defendant/ Applicant contends that the Auctioneer shall base his costs on the decree which amounts to **Kshs. 26, 814,542.00/=** of which in its view, was arrived at in an erroneous fashion. On this submission however, I do agree with the sentiments of the Respondent's counsel that it is within the preserve of the Deputy Registrar to determine what the costs of the auctioneers should be based on and

not this court. This court can only deal with taxation issues at the reference stage. In the case of **Lubullellah & Associates Advocates –vs- Nasser Ahmed t/a Airtime Business Solutions** (supra) the court held:-

***“.....The issues of the amount of work done or not done by the advocate.....should be presented to the taxing master. In other words, when defending his client, (one) should be able to argue the proportionate costs that should be paid ..... for the work which was done and which was not done. The high court should not micro manage the taxing master”***

In view of the foregoing, I do hold that it will be inappropriate for this court to entertain the issue of what amount the bill of costs will be based on at this stage given that the said proceedings of taxation are yet to be concluded before the taxing master. Should the Applicant's be aggrieved by the outcome of the taxation, then it will have recourse to this court by lodging a reference against the said decision.

7. The Respondent submitted that the application has been brought after undue delay, that it is an abuse of the court process as there have been consents recorded.

8. Back to the principles of granting a stay. As regards delay, there was a delay of 8 months in bringing the application. My view is that that is unreasonable delay that would disentitle an applicant from the exercise of the court's discretion.

9. It has been contended by the Respondent there is nothing to occasion substantial loss to the Applicant and that the duty of the taxing officer shall only be confined to the assessment of costs and in so doing, the same shall not render the appeal nugatory. It is further submitted that in essence the proceedings to be held before the Deputy Registrar shall not be prejudicial to the applicant. The Applicant however insists the issue of auctioneers cost are a subject of the pending appeal. The Respondent counters this argument by stating that there was no stay issued on the orders granted on the 9<sup>th</sup> August 2011, although the same were varied by consent of the parties. From the record, I note that there was no stay of execution granted by this court when the application dated 2<sup>nd</sup> August, 2011 came up for hearing on 1<sup>st</sup> November, 2011. What seems to have happened was that the orders of 9<sup>th</sup> August, 2011 were varied, without touching on the auctioneers costs. The Respondent was right therefore to have moved to tax his bill of costs. However, one issue that disturbs the court is whilst the warrants were in excess of Kshs.26million, the Applicant has contested that amount. It is also clear from the variation of the order off 11<sup>th</sup> November, 2011 that the amount that may ultimately be due may be far from that sum. What happens then if the Respondent would have already taxed his bill and paid on a higher sum?

10. The question therefore that needs to be resolved is whether the taxing of the said costs shall lead the Applicant to suffer substantial loss if the orders sought are not granted. In the case of **Adah Nyabok – vs- Uganda Holding Properties Limited (2102)eklr**, it was held that;

***“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”***

Has the Applicant demonstrated that it is likely to suffer substantial loss if the stay sought is denied? In the case of **Daniel Chebutul Rotich & 2 Others vs. Emirates Airlines Civil Case 368 of 2001** proves instructive as it was held that;

***“ .....“Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum. “***

11. I have looked at the Supporting Affidavit. What the Applicant has worn to is that it will stand to suffer substantial loss should the appeal succeed in that it would be rendered nugatory, that the Respondent is a person whose financial means is unknown and recovery of the monies paid to him may prove impossible. The Respondent has contended that the Applicant will not suffer any prejudice and had

not demonstrated how it will suffer substantial damage. I have noted that the applicant has indicated that if it pays whatever monies that are assessed, it might lead to disruption of its operations, that it might not recover the same if the appeal succeeds in for the reason that the Respondents' financial standing is unknown. The Respondent did not contradict this fact. For the reason that I have indicated the likelihood of the amount of the warrants being found to have been excessive, that the Respondent has failed to indicate his ability to repay the amount claimed, I believe that the Applicant may suffer substantial loss. The applicant is also a public body using public funds. Although the application was not brought timeously, I exercise my discretion and overlook that fact. Due to the substantial loss that the Applicant has demonstrated is likely to suffer. I will allow the application. I will make no orders as to costs. In the case of **Lalji Bhimji Sanghani Builders & Contractors –vs- Nairobi Golf Hotels Kenya Limited Civil Suit No. 1900 of 1995** Ringera , J stated that;

***“I am of the opinion that for an applicant to satisfy this condition, he must persuade the court .....such persuasion must spring from affidavit or other evidence on record. A bold statement from the bar or indeed in an affidavit by the judgment debtor that he will suffer substantial loss unless stay of execution is ordered unbacked by evidence of the matters alluded to carries no weight of persuasion in the mind of a Judge”***

12. The powers accorded to this court under order 42 rule 6 are discretionary in nature and should be exercised on the basis of evidence and sound legal principles. The Respondent's proceedings herein are valid in law, and in the foregoing I do dismiss the application dated 23<sup>rd</sup> March 2012 for stay of proceedings and execution pending appeal as prayed for in prayer 2 and 3, with costs to the respondent.

**Orders accordingly.**

**DATED and DELIVERED** at NAIROBI this 5<sup>th</sup> day of October, 2012

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**A. MABEYA**  
**JUDGE**