



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 172 OF 2015

1. PEARL BEACH HOTEL LIMITED

2. AL NOOR KANJI.....PETITIONERS

VERSUS

1. KENNETH STANLEY HAJI

2. THE COUNTY GOVERNMENT OF MOMBASA

3. NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....RESPONDENTS

RULING

1. By a chamber summons dated 2nd January 2018 the applicants who are challenging the taxation by the Taxing Officer of the court of the 1st respondent's party and Party costs made on 16th November 2017 sought the following orders:

1. Spent

2. That pending the hearing and determination of this application this Honourable court be pleased to stay the execution of the ruling and the certificate of costs issued herein on 16th November 2017 and all consequential orders.

3. That this Honourable Court be pleased to enlarge time for the applicants to file an objection against the decision of the Hon. D Wasike Deputy Registrar on 16th November 2016.

4. That pending the hearing and determination of the intended objection this Honourable Court be pleased to stay the execution of the ruling and certificate of costs issued herein on the 6th November 2017 and all the consequential orders.

5. That the costs of this application be in the cause.

2. The chamber summons is based on the grounds set out in the application as follows:

a) By a ruling dated 16th November 2017, the Hon. D. Wasike D.R. directed the applicant to pay the 1st Respondent's costs and certified the same on that instant date in the amount of Kshs.8,524,090.00.

b) The applicants advocate was not aware of the delivery of the ruling on the said date. The ruling was stated for delivery on 11th day of October 2017. Upon attendance of the same date, the learned Deputy Registrar deferred the delivery of the Ruling for reasons that the ruling was not ready and the Honourable Court reserved the delivery on Notice.

c) The Applicants advocate was not served with notice for the delivery of the ruling and as such there was no attendance on their behalf on 16th November 2017 when the same was delivered with a certificate of costs issued on the same date

d) The applicants and their advocate came to know of the delivery of the ruling upon being served with warrant of Attachment

dated 20th December 2017 accompanied with a proclamation of Attachment by the respondent's firm of Auctioneers on 21st December 2017.

e) The applicant is aggrieved by the said ruling and is desirous to challenge the same.

f) This court has discretion to enlarge the time for filing an objection to challenge the said ruling pursuant to Rule 11 (4) of the Advocates Remuneration Order.

g) The 1st respondent has instructed a firm of Auctioneers to proclaim and attach the Applicants commercial tools or the Trade property in execution of the certificate of costs issued pursuant to the impugned ruling of 16th November 2017 and as a consequence the Applicant stands to suffer irreparable damages and loss to the public unless this Honourable Court intervenes.

h) No prejudice will be served (sic) by the 1st Respondent should the orders sought herein be granted.

3. The application is supported by the affidavit of Daniel Amalemba the advocate for the applicants sworn on 2nd January 2018 and a further affidavit sworn on 28th February 2018 in which he reiterates the grounds in support of the application, adding that he did not instruct one Brenda Mayabi Advocate to hold his brief in the matter.

4. The 1st respondent who is the respondent to the application dated 2nd January 2018 opposed the said application and filed a replying affidavit sworn by Mr. Nyongesa Wafula Advocate on 12th January 2018. It is the respondent's contention that the applicants have not demonstrated good faith and have not been candid in demonstrating the circumstances surrounding the taxation process and the circumstances the order was made. That from the proceedings Mr. Amalemba advocate did not participate in the taxation proceedings but had all the time an advocate holding his brief.

5. I have considered the application and the submissions, by the counsel for the parties, Mr. Maloba for the applicants and Mr. Nyongesa for the 1st Respondent. The issues that arise for determination are:

i. Whether the court may extend the time for filing of a reference under the Advocates Remuneration Order in the circumstances of this case.

ii. Whether the court may stay execution of certificate of taxation of costs pending the hearing of the reference.

6. Clause II of the Advocates Remuneration Order is clear that the court has discretion to extend time for lodging a reference notwithstanding the expiry of the 14 days period prescribed for the reference from the taxing master's decision on costs. Paragraph II of the Advocates Remuneration Order provides as follows:

"II. Objection to decision on taxation and appeal to court of appeal.

1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

2) The taxing officer shall forthwith record and forward to the objector the reasons for the decision on those items and the objector may within fourteen days apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), for taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

7. In exercising its discretion in this regard, the court notes that there was no inexcusable delay in presenting this application. Indeed the 1st Respondent and the applicant had agreed by consent to enlarge the time. However, because of the issue of representation and the orders of the court which is the subject of a different ruling, the reference was not filed. The applicant has been diligent in seeking to have the dispute on the taxation of costs herein determined expeditiously.

8. The applicants have also sought for orders of stay of the certificate of costs. Taxation of costs is part of the execution process, complete with its provisions for stay of execution under the Civil Procedure Rules. The interests of justice requires that a party against whom substantial sums of money have been adjudged in the nature of taxed costs should not be required to pay such money before his challenge on the liability an quantum of the taxed costs is determined through a reference under the Advocates Remuneration Order. Otherwise such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time.

9. By analogy of the stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules, a court will in granting stay of execution pending hearing and determination of a reference to a judge from taxation of costs be guided by presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the applicant.

10. The court, while asserting jurisdiction to order stay of execution of the costs pending the hearing and determination of the reference to a judge, will determine whether the applicants stand to suffer substantial loss if stay is not granted and whether the applicants have provided security.

11. Counsel for the respondent has urged that the applicants be granted stay on condition that the Auctioneers should be paid his costs and secondly that the entire amount as taxed or reasonable amount be deposited in a joint account of counsel for both parties.

12. On the interests of justice, to enable the filing of an appropriate application for consideration by the court, the court will grant the applicants a limited period of time to comply with the provisions of paragraph II of the Advocates Remuneration Order, and in the meantime order a stay of execution of the certificate of costs dated 16th November 2017, upon terms.

13. Accordingly for reasons set out above, the court makes the following orders:

a. The applicant has leave of court to file out of time a reference from the certificate of costs dated 16th November, 2017 within fourteen (14) days from the date hereof.

b. There shall be a stay of execution of the certificate of costs dated 16th November 2017 pending the hearing and determination of the reference to be filed subject to the deposit by the applicant of Kshs.3,000,000.00 in an interest earning account with reputable bank in the joint names of the respective advocates within thirty (30) days from the date of this ruling. For avoidance of doubt, the sum of Kshs.3,000,000.00 excludes the sum of Kshs.1,500,000.00 which was not the subject of this ruling as the parties had agreed on its payment on 20th march 2018.

c. For their Counsel's failure to scrupulously comply with provisions for reference of an objection on taxation under paragraph 11 of the Advocates Remuneration Order, the applicants will pay the costs of this application to the 1st Respondent.

DATED, SIGNED and DELIVERED at MOMBASA this 31st day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Nzamsa for 1st respondent

Omuya holding brief for Maloba for petitioners.

Yumna Court Assistant

C.K. YANO

JUDGE

31/1/19