



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**ELC CIVIL APPEAL NO. 1 OF 2011 AND CIVIL APPEAL NO. 81 OF 2013**

**ADDAX KENYA LIMITED.....APPELLANT**

**VERSUS**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....1<sup>ST</sup>RESPONDENT**

**MASTERMIND TOBACCO (K) LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

The appeals herein were determined in favour of the Appellant on 6<sup>th</sup> August, 2014 and the 2<sup>nd</sup> Respondent was condemned to pay the costs thereof. Following the determination of the appeals as aforesaid, the Appellant filed its bill of costs for taxation. The Appellant's bill of costs which had 214 items was drawn at a sum of Kshs.26,727,611.21.

When the said bill of costs (hereinafter referred to as "the bill") came up for taxation before the taxing officer, Hon. S. Mwayuli, only two items were contested namely, items 1 and 17 which concerned instruction and getting up fees. The instruction fee was charged at Kshs. 17,604,630.11, while getting up fees was charged at Kshs. 8,802,315.10. The taxing officer taxed the bill at Kshs. 9,653,999.33 on 30<sup>th</sup> March, 2016. A sum of Kshs. 17,073,611.88 was taxed off. The taxing officer's ruling on the taxation was made in the presence of the advocate for the Appellant only. There was no appearance for the 2<sup>nd</sup> Respondent. There is evidence on record however that a notice of the ruling was served upon the 2<sup>nd</sup> respondent's advocates.

What is now before me is the 2<sup>nd</sup> Respondent's application dated 4<sup>th</sup> July, 2016 which was filed on 6<sup>th</sup> July, 2016 seeking a stay of execution of the said decision of the taxing officer which was made on 30<sup>th</sup> March, 2016 and leave to file a reference against the same out of time. The application was brought on the grounds that the 2<sup>nd</sup> Respondent was dissatisfied with the decision of the taxing officer and was desirous of filing a reference against the same to this court. The 2<sup>nd</sup> Respondent stated that it failed to file reference on time because the court file went missing soon after the ruling was delivered and as such they could not access a copy of the ruling of the court to enable them prepare the reference. The 2<sup>nd</sup> Respondent stated that the court file was not traced until 30<sup>th</sup> June, 2016 which is the same date when it was issued with a copy of the ruling of the taxing officer. This was after the time for filing a reference had lapsed.

In its affidavit in support of the application, the 2<sup>nd</sup> Respondent annexed copies of letters dated 2<sup>nd</sup> April, 2016 and 12<sup>th</sup> April 2016 which were addressed to the Deputy Registrar by its advocates on record asking for a copy of the ruling of the taxing officer. The 2<sup>nd</sup> Respondent stated that the delay in the filing of a

reference was as a result of factors beyond its control. The 2<sup>nd</sup> Respondent stated that the intended reference is arguable and that the stay order sought is intended to safeguard its interest by preventing the execution of the decision of the taxing officer against which reference is to be preferred.

The application was opposed by the Appellant through a replying affidavit sworn by Edward Rutto, the Appellant's Project Manager on 18<sup>th</sup> July, 2016. In its response to the application, the Appellant stated that the ruling of the taxing officer was delivered in the presence of both parties and that the 2<sup>nd</sup> Respondent was required to file a notice of objection within 14 days of delivery of the said ruling setting out the items in the bill whose taxation it was not satisfied with. The Appellant stated that the 2<sup>nd</sup> Respondent failed to file the said notice of objection within the prescribed time. The 2<sup>nd</sup> Respondent stated that the explanation given by the Appellant for its failure to file reference within time is not reasonable. The Appellant denied that the court file was missing at the material time and contended that having failed to act expeditiously even after obtaining a copy of the ruling; the 2<sup>nd</sup> Respondent had approached the court with unclean hands. The Appellant stated that the 2<sup>nd</sup> Respondent having failed to file a notice of objection within the prescribed time, the application before the court was incompetent, misconceived and an abuse of the court process.

The Application was argued by way of written submissions. The 2<sup>nd</sup> Respondent filed its submissions on 8<sup>th</sup> August 2016 while the Appellant filed its submissions in reply on 14<sup>th</sup> November, 2016. I have considered the application and the affidavit filed in opposition thereto by the Appellant. I have also considered the affidavit filed in opposition to the application, the submissions by the parties' respective advocates and the authorities cited in support thereof. The following is my view on the matter. I am in agreement with the submission by the Appellant that the 2<sup>nd</sup> Respondent's application was brought under the wrong provisions of law. The application was principally for the extension of time to file a reference. The prayer for stay of execution was secondary. Paragraph 11 (1), (2) and (4) of the Advocates Remuneration Order provides as follows:-

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 his decision on those items and the objector may within fourteen days from the receipt of the reasons, apply to a judge by chamber summons, which shall be served on all the parties concerned setting out the grounds of his objection.
3. ....
4. The high court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any steps, 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.

It is clear from the foregoing that the 2<sup>nd</sup> Respondent's application should have been made under paragraph 11 (4) of the Remuneration Order by way of Chamber Summons. In its replying affidavit and written submissions, the 2<sup>nd</sup> Respondent urged the court to strike out the Appellant's application for being misconceived and incompetent. I am of the view that failure to cite the provisions of the law under which an application has been brought, citing wrong provisions or bringing the application in the wrong form is no longer fatal to an application. This court is enjoined under Article 159 (2) (d) of the Constitution to dispense justice without undue regard to procedural technicalities. For that reason, I will disregard the Appellant's objection to the application on account of the wrong provisions of the law under which the application was brought and the form thereof.

The other objection which was raised by the Appellant which is related to the one I have disposed of is

the fact that the 2<sup>nd</sup> Respondent did not file objection to taxation under paragraph 11 (1) of the Advocates Remuneration Order and as such cannot maintain a competent reference even if the leave sought herein is granted. I am in agreement with the submissions by the Appellant once again that the 2<sup>nd</sup> Respondent should have sought in its application not only leave to file reference out of time but also to give notice of objection under paragraph 11(1) of the Advocates Remuneration order. I am of the view however that this is also an irregularity in procedure which is not fatal to the application. This is because, if the court finds that the 2<sup>nd</sup> Respondent has valid grounds for seeking extension of time to file a reference under paragraph 11(2) of the Advocates Remuneration order, I see no reason why the court cannot on its own motion extend time for the 2<sup>nd</sup> Respondent to file a notice of objection to taxation under paragraph 11 (1) of the Remuneration Order. This point in my view is also a procedural technicality which the court should ignore for the sake of substantive justice.

Having disposed of the technical objections which were raised against the application, I will now consider the same on merit. I am satisfied that the 2<sup>nd</sup> Respondent has put forward valid grounds that warrant the granting of the orders sought. It is clear from the court record that the ruling by the taxing officer was made in the absence of the 2<sup>nd</sup> Respondent. The ruling which was delivered by the taxing officer was handwritten. It appears from the record that it took sometime before the ruling was typed and signed by the taxing officer. After the ruling was typed and signed, the file seems to have been taken back to the taxing officer for the signing of the certificate of taxation which was not signed until 9<sup>th</sup> June, 2016. It appears that the court file was not available at the court registry for along time after the ruling by the taxing officer. The Appellant has admitted in its replying affidavit that the court file was in the typing pool for some time. The 2<sup>nd</sup> Respondent has contended that it did not receive a copy of the court ruling until 10<sup>th</sup> June, 2016. I am persuaded from the material before me that this is likely to have been the case. It appears as if the court file left the taxing officer's chambers after the signing of the certificate of taxation on 9<sup>th</sup> June, 2016. I have noted that the 2<sup>nd</sup> Respondent wrote to the taxing officer on 2<sup>nd</sup> April, 2016 soon after the ruling seeking a copy thereof. The 2<sup>nd</sup> Respondent could not have filed a reference within the prescribed time before receipt of a copy of the ruling by the taxing officer which ruling was not made available until 10<sup>th</sup> June, 2016. I am in agreement with the Appellant that there was unexplained delay of about 20 days after receipt of the ruling before the present application was brought. The delay although unexplained was in my view not inordinate in the circumstances. Due to the foregoing, I am in agreement with the submission by the 2<sup>nd</sup> Respondent that its failure to file a reference within the prescribed time was occasioned by the failure of the taxing officer to make a copy of the ruling available to it timeously. I am satisfied that the 2<sup>nd</sup> Respondent has made out a case for extension of time to file a reference against the decision of the taxing officer made on 30<sup>th</sup> March, 2016.

Apart from the extension of time, the 2<sup>nd</sup> Respondent had also sought a stay of execution for the recovery of the taxed costs. I have noted from the record that the Appellant has already filed in court an application for execution for recovery of a sum of Kshs. 9,653,999.33 being its taxed costs. It follows therefore that the Appellant would proceed with execution against the 2<sup>nd</sup> Respondent if the stay sought is not granted. The Appellant had contended that the 2<sup>nd</sup> Respondent had not met the conditions for granting a stay of execution set out in Order 42 Rule 6 of the Civil Procedure Rules. I am not in agreement with this submission. As I have stated above, the application herein was brought twenty (20) days after the 2<sup>nd</sup> Respondent obtained a copy of the taxing officer's ruling. The application in my view was not filed after unreasonable delay. On the issue of substantial loss, I have noted that the amount sought to be recovered by the Appellant through execution is substantial. It is not clear whether the 2<sup>nd</sup> Respondent would be able to recover the same from the Appellant in the event that it is successful in the intended reference. There is therefore a likelihood of the 2<sup>nd</sup> Respondent suffering substantial loss if the stay sought is not granted. In its submission, the 2<sup>nd</sup> Respondent stated at page 7 that the Appellant's bill should have been taxed at Kshs. 2,000,000/=. In light of this submission, I am of the view that there would be no justification for granting a stay of execution for the entire sum of Kshs.9,653,999.33.

On security, the 2<sup>nd</sup> Respondent did not indicate in its application or the affidavit in support thereof

whether it was prepared to furnish any security. The court is however enjoined to order security as a condition for granting a stay of execution.

In the final analysis and for the foregoing reasons, I am satisfied that the 2<sup>nd</sup> Respondent's application dated 4<sup>th</sup> July 2016 has merit. The application is allowed on the following terms:-

1. The 2<sup>nd</sup> Respondent is granted leave to file a notice of objection to taxation and a reference within 21 days from the date hereof.
2. There shall be a stay of execution for part of the taxed costs in the sum of Kshs. 7,653,999.33 pending the filing and determination of the intended reference or further orders of the court subject to the orders granted in paragraph (3) below.
3. The 2<sup>nd</sup> Respondent shall deposit the said sum of Kshs. 7,653,999.33 in an interest earning bank account in the joint names of the advocates for the Appellant and the Advocates for the 2<sup>nd</sup> Respondent within 21 days from the date hereof as security pending the hearing of the intended reference.
4. The costs of the application shall be in the intended reference.

**Delivered and Signed at Nairobi this 27<sup>th</sup> day of June, 2017**

**S. OKONG'O**

**JUDGE**

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

Mrs. Woodward h/b for Mrs. Opiyo	for Appellant
N/A	for 1 <sup>st</sup> Respondent
N/A	for 2 <sup>nd</sup> Respondent
Kajuju	Court Assistant