



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 216 OF 2012**

**BETWEEN**

**ANDREW O. NYANGWESO.....APPELLANT**

**AND**

**ALLOYS BARASA.....1<sup>ST</sup> RESPONDENT**

**OYE ASHIOYA T/A**

**ASHIOYA & CO. ADVOCATES.....2<sup>ND</sup> RESPONDENT**

**EMMANUEL OTIANGALA T/A**

**KURONYA AUCTIONEERS.....3<sup>RD</sup> RESPONDENT**

*(Appeal arising from the Ruling or Order of the High Court of Kenya*

*at Busia (Kimaru, J.) dated 31<sup>st</sup> July 2012*

**in**

**HCCC NO. 39 OF 2010)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**INTRODUCTION**

1. This is an appeal from the Ruling of Kimaru, J. dated 31<sup>st</sup> July, 2012 in which the court invoked its inherent jurisdiction and set aside the exparte assessment of the respondent's bill of costs so that the appellant could have an opportunity to participate in the taxation of the same. That notwithstanding, the appellant was not satisfied with the decision and preferred an appeal to this Court.

**BACKGROUND**

2. On 15<sup>th</sup> March, 2012 the appellant filed an appeal in the Court of Appeal at Kisumu to challenge the

decision of the High Court of Kenya at Busia in **Civil Appeal No. 39 of 2010** regarding refusal by the Resident Magistrate's Court, Busia, to adopt an order by the Rent Restriction Tribunal (RRT) against the respondents.

3. The appellant also filed an application for stay of execution of the High Court's order pending hearing and determination of the appeal.

4. On 3<sup>rd</sup> April, 2012 the appellant filed an application seeking to have the notice of taxation dated 26<sup>th</sup> March, 2012 and execution of the same stayed pending hearing and determination of the appeal that he had filed before this Court at Kisumu. The application was made on the grounds that, the notice of taxation was improperly filed; that the appeal had high chances of success and would be rendered nugatory unless the orders sought were granted.

5. The aforesaid application was heard before Kimaru, J. on 26<sup>th</sup> July, 2012. However, on 19<sup>th</sup> June, 2012 the respondent's bill of costs had been assessed at Kshs 51,100/=. That was done in the appellant's absence, the respondents had served the appellant with a notice of taxation on 11<sup>th</sup> June, 2012 but the appellant did not attend Court.

6. In his ruling, Kimaru, J. rightly pointed out that to succeed in his application, the appellant was required to establish that he would suffer substantial loss if the bill of costs was taxed; and further that he was required to provide security for costs, but had failed to satisfy the two requirements. He therefore dismissed the application for stay of taxation.

7. Notwithstanding that finding, the court set aside the ex-parte assessment of the respondents' bill of costs in order to afford the appellant an opportunity to participate in its taxation.

### **APPEAL TO THIS COURT**

8. In his amended memorandum of appeal, the appellant, who appeared in person, argued, *inter alia*, that the learned judge erred by regarding his application for stay as an application seeking "to submit himself for taxation"; by not recording his submissions in their entirety; by failing to evaluate his evidence; and for failing to exercise his discretion to allow the application as presented.

9. When the appeal came up for hearing, the appellant sought to rely on his self-drawn submissions that are on record. In his brief highlight of the same, the appellant stated that the learned judge misapprehended the application that was before the court in that, while the application sought to stay the notice of taxation and the subsequent execution pending hearing and determination of the appeal that he had filed before this Court, the learned judge ordered that the taxation be done afresh. In his view, the ruling did not at all serve the purpose of the application.

10. **Miss Wanjala**, learned counsel for the respondents, opposed the appeal. She submitted that the appellant's application was rightly dismissed because the appellant did not demonstrate to the Court that the orders sought were merited.

### **DETERMINATION**

11. We have considered the record of appeal and all the submissions on record. It is not in dispute that the application that gave rise to this appeal sought discretionary orders of stay of execution pending hearing and determination of an appeal.

12. In **EDWARD SARGENT V CHHOTABHAI JHAVERBHAT PATEL [1949] 16 EACA 63**, it was held that an appeal does not lie to an appellate court against an order made in the exercise of judicial discretion by a lower court, but an appellate court will interfere only if it is shown that the discretion was not exercised judicially.

13. That same principle was reiterated in **MBOGO & ANOTHER V SHAH [1968] E. A. 93**, where it

was held that:

***“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion ...”***

14. Did the appellant’s appeal satisfy the above requirement? We think not. The learned judge appreciated the nature of the application before him, and having carefully considered all the relevant factors came to the conclusion, and in our view rightly so, that the appellant had not demonstrated that he would suffer substantial loss if the respondents’ costs were assessed. He further held that if the appellant succeeded in his appeal the respondents would be compelled to refund any sum paid to them as costs.

15. In spite of that finding, the learned judge, set aside the ex-parte assessment of the respondents’ bill of costs so that the appellant could participate in the taxation! We cannot therefore, appreciate the legal basis of the appellant’s disgruntlement with the learned judge’s decision.

16. We find this appeal lacking in merit and dismiss it with costs to the respondents.

***Dated and Delivered at Kisumu this 20<sup>th</sup> day of July, 2017.***

**D.K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU,FCI Arb**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**