



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NYAMU, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI 245 OF 2011 (UR 159/2011)**

**BETWEEN**

**CHARTER HOUSE INVESTMENT LIMITED ..... APPLICANT**

**AND**

**SIMON K. SANG ..... 1<sup>ST</sup> RESPONDENT**

**MARGARET MUNYAO ..... 2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR , UASIN GISHU ..... 3<sup>RD</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS thro'**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

***(Being an application for extension of time to lodge a reference from a ruling and orders of the High Court of Kenya at Eldoret, (Dulu, J.) dated 13<sup>th</sup> January 2004***

***in H.C.C.S.NO.2 OF 2004)***

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**RULING**

In this application, the applicant is represented by learned counsel Mr Kamau, and the 1<sup>st</sup> respondent is represented by learned counsel Mr P. Gicheru.

The application seeks the following principal order.

***“The time within which the applicant should apply to refer to a Judge of the Honourable Court, the decision ruling and order of the Deputy Registrar on taxation herein dated 29<sup>th</sup> September, 2011 as well as the bill of costs in accordance with rule 112 of the Court of Appeal Rules be extended by such period as this Honourable Court may deem just and expedient.”***

The application is supported by an affidavit sworn by Sophie Chemengon, a director of the applicant, on

18<sup>th</sup> October, 2011.

The main ground which has been raised in the supporting affidavit is that the reference could not be filed within 7 days as prescribed under **Rule 112(3)** of this Court's Rules for the reason that the Deputy Registrar ruling on taxation which was initially scheduled for 27<sup>th</sup> September, 2011 was read on 29<sup>th</sup> September, 2011 without any notice to the applicant or the applicant's advocates. It contended that at the ex-parte taxation, the bill of costs was taxed at Kshs.6,079,185 which the applicant claims to be a colossal amount. On behalf of the applicant it was also submitted that the applicant's advocates came to know about the taxation on 5<sup>th</sup> October, 2011 after the Deputy Registrar had issued warrants of attachment against the applicant's moveable and immovable properties and thereafter, on 7<sup>th</sup> October 2011, the Deputy Registrar issued a prohibitory order restraining the directors of the applicant from dealing with the properties, Eldoret Municipality Block 12/43 and Eldoret Municipality Block 3/45 and that warrants of sale were issued on the same day. It is Mr Kamau's contention that the property being sold in execution of the decree is valued at Kshs.100 million and the taxed costs are not more than 7 million and therefore the intended execution defies the principle of proportionality. Finally, it was contended that although the appeal which gave rise to the taxation of the bill involved an interlocutory application the bill was erroneously taxed as if the main suit has been concluded.

In reply, Mr Gicheru relied on two replying affidavits both sworn on 1<sup>st</sup> December 2011 by Margaret, the 2nd respondents, and Morgan J. Omusundi, an advocate in the firm representing the respondent respectively. The substance of the two affidavits is that the actual taxation was done inter-parties but the ruling was initially scheduled for 27<sup>th</sup> September, 2011 but the date of the ruling was subsequently postponed to 29<sup>th</sup> September, 2011 and all the parties were notified of the change vide a notice by the Deputy Registrar dated 26<sup>th</sup> September, 2011 and which was prominently affixed on the Court's notice board. The notice was to the effect that the Deputy Registrar would not be sitting on 27<sup>th</sup> September, 2011 and that the parties and advocates who had matters before the Deputy Registrar on that day should take fresh hearing dates in the registry but in the body of the same notice, the Deputy Registrar had informed those concerned that the ruling in **Court of Appeal CA 315 of 2004** would be delivered on Thursday 29<sup>th</sup> day of September, 2011 at 2.00 p.m. This notice was also affixed on the door to the Deputy Registrar's court on 26<sup>th</sup> September, 2011. Mr Gicheru added that contrary to the applicant's assertion the applicant and its advocates were duly notified. Mr Gicheru further contended that the applicant is guilty of concealment and non disclosure of material facts relating to this matter namely that even after this matter was certified as urgent and a hearing date allocated for 6<sup>th</sup> December 2011, the applicant while knowing that it had filed an application for extension of time to file a reference in this Court filed another application before the Deputy Registrar seeking an order for stay of execution well aware that it is only this Court which had jurisdiction to entertain such an application; although by a twist of fate the application was heard ex-parte and dismissed. The other concealment and non disclosure is that after the refusal of the application for stay by the Deputy Registrar, the applicant did file Constitutional Petition No. 2 of 2011, where the respondents included the Chief Justice as a respondent, which petition challenges the taxation and this Court's decision to fix the hearing of this application for 6<sup>th</sup> December, 2011 instead on an earlier date. The third concealment and non-disclosure is that an application for stay will come up for hearing on 13<sup>th</sup> December, 2011 before the High Court. Mr Gicheru further submitted that it is improper for the applicant to have instituted parallel proceedings, a fact it did not disclose to this Court.

I have placed the rival submissions on the scales and firstly, I am of the view that sufficient notice was given by the Deputy Registrar as per the exhibited notice and therefore had a representative of the applicant attended court on the scheduled day, namely 27<sup>th</sup> September, 2011, the ruling would not have been read ex-parte since the notice was permanently affixed. It is also clear to me that the applicant has not come to Court with clean hands in that it has instituted parallel proceedings which include a Constitutional petition and has failed to disclose this to the Court. For this reason, the Court cannot help thinking that the concealment or nondisclosure was aimed at deceiving this Court. This is an affront to this Court because the constitutional petition is grounded on almost the same grounds as this application, a fact which could result in conflicting decisions been handed down by the two courts handling parallel

matters. In an application of this nature where an applicant is seeking an extension, I believe that a single judge has an unfettered discretion but subject to the overriding objective. In exercise of that discretion my inclination is to disallow the application for the reasons indicated above. Indeed the position I have taken is fortified by this Court's decision in the case of ***Tiwi Beach Hotel Ltd vs Stamp [1991] KLR 658*** where the Court had this to say about the effect of non disclosure:-

***“It matters not upon a point of this nature being taken whether the applicant was entitled to or that the Court would have granted relief sought in any event, that is to say, leaving aside the non-disclosure for it is the affront to the dignity and credulity of the Court that is in point.”***

In the circumstances before me I find the concealment was deliberate and in my view both the concealment or non-disclosure and the filing of parallel proceedings seeking similar reliefs constitute an abuse of the court process. Applying the overriding objective as set out in **sections 3A** and **3B** of the Appellate Jurisdiction Act, I would be failing in my duty not to further the objective and to facilitate the attainment of its aims if I were to grant the extension.

I think that any conduct capable of constituting abuse of Court process or concealment/nondisclosure of material facts contravenes both the letter and the spirit of the overriding objective (O<sub>2</sub>). Thus, it directly breaches the parties/advocates duty to cooperate and assist the Court. Above all, such conduct also obstructs the proceedings thereby preventing the just determination of the proceedings including hampering and delaying speedy disposal of the matter at hand. In addition, the same conduct has in my view the effect of unreasonably increasing costs of litigation. In the matter before me, this is the outcome of the applicant's acts and omissions. In a nutshell, such conduct obstructs the pathways of justice and therefore flies in the face of the overriding objective (O<sub>2</sub>) and for this reason I am of the view that the court would be entitled to act firmly including denying the guilty party the relief sought. In the circumstances, I believe it is incumbent on the court to develop and nurture a jurisprudence that liberates the court from shackles of technicalities, but which also facilitates and encourages a disciplined court process aimed at resulting in inspiring respect of the court process without which the rule of law would be greatly hampered. To my mind, any act or omissions which substantially distracts, inhibits or compromises the overriding objective or is likely to prevent the court from doing its core business - *doing justice* must be rejected. Thus, the great break with the past is for the court to address the requirement that the exercise of any power under any provision in the Appellate Jurisdiction Act or rule is to facilitate, further and attain the overriding objective including the enunciated aims as set out in **section 3B** of the Act. In the ever expanding jurisprudence on the topic it has been clearly established that in the context of the Kenya situation the overriding objective (O<sub>2</sub>) is both procedural and substantive because it is set out in Act and not in the Civil Procedure Rules. In the matter before me, I have given it both meanings by considering the global effect of the applicants conduct.

In the result, this application is dismissed with costs to the Respondent.

***Dated and Delivered at Nairobi this 27<sup>th</sup> day of January, 2012.***

**J.G. NYAMU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**