



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appli 111 of 2004 (UR 60/04)

KENYA BUS SERVICES LIMITED APPLICANT

AND

NYAMOGO & NYAMOGO ADVOCATESRESPONDENT

(An application for stay of execution pending the filing, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya

Bungoma (Sergon, J.) dated 14th May, 2004

in

H.C.MISC. APPL. NO. 147 OF 2003)

RULING OF THE COURT

The matter placed before us for determination is a notice of motion dated 27th May, 2004 in which the applicants, M/S. Kenya Bus Services Ltd (KBS) seek the following orders: -

1. *THAT there be stay of execution in Busia High Court Misc. Application No. 45 of 2003, Nyamogo & Nyamogo Advocates – versus- Kenya Bus Services Limited until the further order of this Honourable Court and pending the filing and determination of the applicant’s appeal against the whole of the decision of Honourable Mr. Justice Sergon dated 14th May, 2004 in Bungoma H.C.Misc. Application No. 147 of 2003.*
2. *THAT there be such further order as may meet the ends of justice.*
3. *THAT the costs of this application be provided for.”*

The provisions of the law relied on are **rules 5 (2) (b)** and **74** of the Court of Appeal Rules (“*the rules*”), **Section 3A** of the Civil Procedure Act and **Order XLI rule 4** of the Civil Procedure Rules. We are told by Mr. Bw’Omote, learned counsel for KBS, and he was passionate about it, that we were perfectly at liberty to invoke the inherent jurisdiction of the High Court reserved under **Section 3A** of the Civil Procedure Act and that **Order XLI rule 4** of the Civil Procedure Rules was as much useful in this Court as it is in the High Court. Those were part of the provisions relied on before the superior court,

Sergon J, who on 14th May, 2004 struck out an application by KBS for stay of execution pending the hearing and determination of objection proceedings. In making those submissions, Mr. Bw'Omote referred us to **Section 3(2) and (3)** of the Appellate Jurisdiction Act, **Cap 9**, which provide:

“3(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

(3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court.”

In effect, as we understand Mr. Bw'Omote, he seeks of us that we grant the same orders which Sergon J. could have granted in that application but refused to. At the end of his arguments, however, he abandoned prayer (1) of the application leaving prayer (2) for substantive consideration. We shall return to the procedural provisions invoked in the matter shortly after examining what excited Mr. Bw'Omote's emotions as he earnestly called for justice and fairness to his client.

KBS was sued in **Busia SRMCC No. 211 of 2001** on account of a road traffic accident caused by one of its buses. It would appear that the insurers of that bus were **M/S. American Life Insurance Co. (Kenya) Ltd (ALICO)** and that upon being served with summons to enter appearance, KBS passed it on to ALICO to deal with the case. ALICO in turn instructed **M/S. Nyamogo & Nyamogo, Advocates (Nyamogo)** to defend the suit. Eventually that suit was settled at Shs.48,000 for general damages and Shs.41,792 for party and party costs which ALICO settled. ALICO also settled a Fee Note submitted by Nyamogo in that matter towards their fees in the sum of Shs.42,135/=. That was in March, 2002.

About one year later in February 2003, KBS was surprised to receive a notice of taxation of an Advocate/Client Bill of Costs filed by Nyamogo demanding in excess of Shs.222,000 in respect of services rendered in Busia SRMCC No. 211 of 2001. They immediately instructed the Firm of **M/S. Onyancha Bw'Omote & Co. Advocates (Bw'Omote)** to object to the taxation before the Deputy Registrar in Busia High Court sub-registry. Despite a preliminary objection raised by Bw'Omote to the effect that there was no Advocate/Client relationship between KBS and Nyamogo, the taxing officer proceeded to tax the Bill at Shs 160,868/= in favour of Nyamogo. Nyamogo then commenced execution proceedings and on 10th July, 2003 attachment warrants were issued against KBS. One week later on 16th July, 2003, the auctioneer, one **Boaz Mathews Ouma-Awiti** of **M/S. Leggos Enterprises** proceeded to attach some four KBS buses which he valued at Shs.2 million. At about the same time (15th July, 2003), Bw'Omote was filing a notice of objection to the taxation under **rule 11(1)** of the Advocates Remuneration Order, in Busia. He then moved to Bungoma High Court registry on 21st July, 2003 and filed a motion seeking an order for stay of execution and a further order that the reference by way of objection proceedings be heard at Bungoma. It was **Misc. Application No. 147 of 2003** and it was premised on **Order XLI r 4, Order XXI r 22** of the Civil Procedure Rules and **Sections 3A, 15, 18 and 63** of the Civil Procedure Act. An order for temporary stay was made and was extended with the consent of the parties until the application was argued at length in February and March 2004 before Sergon J. In his ruling made on 14th May, 2004, Sergon J. struck out the application for incompetence stating that he would not deal with the merits thereof since the wrong procedure had been followed. In his own words: -

“It is clear from the above provisions of the law that this court can only have jurisdiction to hear and determine disputes based on taxation pursuant to paragraph II (2) of the Advocates Remuneration order. I hold the view that there is no room for a party aggrieved to introduce the provisions of other statutes like in this case.

The applicant has averred that an application for stay of execution was made before the taxing officer and she refused (sic). However the proceedings in that case have not been annexed to enable me see whether to or not exercise my inherent power. I am of the view that this application should have been presented in the first instance before the Deputy Registrar of this court acting in her

capacity as the taxing officer. This is a step which the applicant should have followed before coming before me. The provisions of the Civil Procedure Act and rules which have been cited by the applicant are inapplicable in this instance.”

It is that ruling which provoked the intended appeal and the application made before us.

Soon after the ruling of Sergon J, (6 days later), Nyamogo proceeded to attach a bus belonging to KBS and KBS was thus forced to settle the decretal sum of Shs.176,266 to Nyamogo and Shs.165,696 to the auctioneer for their handling charges. Despite the payment, KBS still complained that the bus had not been released by the time the application was filed here on 27th May, 2004. Finally KBS lamented that there were 10 other similar taxations filed by Nyamogo and in eight of them, including this matter, no reasons had been given by the taxing officer to enable KBS to file references to the High Court. Nyamogo nonetheless continued to harass KBS with threatened executions and attachments thus causing havoc in the operations of KBS. Indeed Mr. Bw’Omote sought and was granted an order by a different bench of this Court for all the ten files complained about to be brought up for perusal when this application is argued. The files were subsequently made available and we have looked at them. It is not surprising therefore that Mr. Bw’Omote felt passionate about the predicament facing his client. In his view, there was flagrant disregard of the law by Nyamogo and that is why he sought from this Court the same orders he sought in the superior court including an order that the money paid out to Nyamogo and the auctioneer be deposited with this court pending appeal and taxation of the auctioneer’s costs.

For his part Mr. Nyamodi Ochieng – Nyamogo who appeared for the respondent, Nyamogo, found nothing unlawful about the claims made by Nyamogo or the procedure adopted in pursuing their rights. In both the claims and the procedure, there were precedents and authorities to back them up and there was no basis therefore for KBS to complain. Some of those authorities were cited before the superior court. As regards the matter before us, he submitted that there was no jurisdiction for appealing against an order of taxation by a taxing officer and all that was open to KBS was to await the reasons for taxation and then file a reference to the High court. If no reasons were forthcoming, as they were not in this case, since the taxing officer was said to have been swept away in the so-called “*radical surgery*” of the Judiciary, then directions could have been sought from the High Court but not by way of the appeal intended to be filed. It was proper therefore, in his submissions, for Sergon J. to strike out the application made before him. The intended appeal before this Court is therefore frivolous and the application now before us does not lie. As for execution of the decree after taxation, he submitted that the procedure was lawful and, furthermore, there was no order for stay in existence. It was not true as stated by KBS that the attached bus was not released after settlement of the decretal sum and the auctioneer’s charges as indeed it was as confirmed by the auctioneer in his affidavit and a signed document signed by KBS acknowledging receipt of the bus on 27th May, 2004. Nyamogo had received the decretal sum and had spent it. An order for deposit of the money as sought by Bw’Omote would not therefore be efficacious. For those reasons, Mr. Nyamodi Ochieng called for dismissal of the application.

We have anxiously considered the application and we appreciate the gravity of the complaints made by Mr. Bw’Omote and the ramifications our decision may occasion in the entire Advocate/Client saga. We must remember nevertheless that we are only seized of one matter here and not ten. That is the notice of motion dated 27th May, 2004 relating to **H.C. Misc. application No. 147 of 2003** whose original file is properly before us. The other nine files are all from the High court registry in Busia and involve the same parties in different matters of taxation of Advocate/Client costs. We do not see any order from the taxing officer or the superior court that all those matters shall either be consolidated or otherwise considered together. We have no doubt that appropriate orders will be made on the merits of each case as and when relevant applications are made before the appropriate court. For that reason the files ought to be returned to the appropriate court registry.

The application before us is expressly made under **rule 5(2) (b)** of the rules and therefore prayer (1) of the application would have squarely fallen for consideration under that rule. The applicant would then have had to satisfy us, firstly, that the intended appeal was not frivolous or was arguable, and secondly, that unless we grant the order sought, the intended appeal, were it to succeed, would be rendered nugatory. As stated earlier, however, that prayer was abandoned at the hearing of the motion and is not

for consideration. The abandonment, we believe, was a realization of the fact that execution had already taken place and so the application was overtaken and that the court would not in the circumstances be expected to make any order in vain.

The second prayer in the application is at best nebulous and Mr. Bw'Omote did not specify what particular orders were required by the applicant and under what provisions of the law. As stated earlier, we suspect the reference to provisions of the Civil Procedure Act and Rules as well as the Appellate Jurisdiction Act was meant to support the issuance of the order for stay sought before Serگون J. That, in our view, would result in obtaining through the back door what was not possible through the front door and we are not prepared to countenance such abuse of process. In appropriate cases this Court has applied and would continue to apply the provisions of **Sections 3(2) and (3)** of the Appellate Jurisdiction Act but we are afraid this is not one such case. The provisions of **Section 3A** of the Civil Procedure Act and **Order XLI r 4** of the Civil Procedure Rules are not applicable here and we will not apply them.

For those reasons the notice of motion is not for grant and we order that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Kisumu this 15th day of June 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR