



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 64 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 1<sup>st</sup> October, 2018)**

**JELIC MUNYASYA.....CLAIMANT**

**VERSUS**

**BRICKS SECURITY SERVICES LIMITED.....RESPONDENT**

**RULING**

1. The Application before the Court is dated 21<sup>st</sup> May, 2018, where the Applicant seeks for orders:-

- 1. That this application be certified as urgent and be heard ex parte in the first instance.*
- 2. That there be a stay of execution of the decree and certificate of costs herein, and specifically the warrants of attachment of moveable property dated 9<sup>th</sup> May, 2018, pending the hearing and determination of this application.*
- 3. That there be a stay of execution of the decree and certificate of costs herein, and specifically the warrants of attachment of moveable property dated 9<sup>th</sup> May, 2018, pending the hearing and determination of the intended reference.*
- 4. That this Honourable Court be pleased to enlarge the time within which to file a reference against the decision of the taxing master delivered on 15<sup>th</sup> February, 2018.*
- 5. That the costs of this application be provided for in any event.*

2. The Application is premised on the grounds:-

- 1. That by a ruling delivered on 15<sup>th</sup> February, 2018 the Taxing Officer Honourable W. Ngumi (Mrs) allowed Kshs. 88,782 as the total amount taxed as per the Claimant/Respondent's Bill of Costs dated 11<sup>th</sup> September, 2017.*
- 2. That the said ruling was delivered in the absence of the Objector or its Counsel.*
- 3. That the Applicant's Counsel had not received a notice of the Ruling but subsequently collected the belated notice from its post office box on 16<sup>th</sup> February, 2018 when the ruling dated had already passed.*
- 4. That the Applicant's Counsel then sent their clerk to the registry on Monday, 19<sup>th</sup> February, 2018, to go and peruse the Court file and collect a copy of the Ruling.*
- 5. That the Counsel's clerk was informed that the file was still in the Deputy Registrar's Chambers awaiting delivery of the ruling, apparently re-scheduled to 27<sup>th</sup> February, 2018.*
- 6. That on 27<sup>th</sup> February, 2018, the Applicant's Counsel was informed again by the Court clerk that the ruling would be delivered on notice. No other notice was issued since then. Counsel was therefore not aware that the ruling on taxation had been delivered in their absence.*

**7. That now the Respondent in execution for the decree and costs has instructed Auctioneers who have moved in and proclaimed the Applicant's property on 16<sup>th</sup> May, 2018 with a notice of 7 days before attachment.**

**8. That the 7 days' notice given to the Applicant expires on 23<sup>rd</sup> May, 2018 and the Applicant's property will imminently be carted away for the purposes of sale.**

**9. That from the copy of the warrant of attachment dated 9<sup>th</sup> May, 2018, the Applicant's Counsel discovered that the ruling on costs had actually been delivered without their knowledge.**

**10. That upon perusal of the Court file it is evident that the costs as taxed are manifestly higher than the award that was given to the Claimant and the Applicant intends to file a reference against that decision to petition for review.**

**11. That the reference would have been filed earlier and on time had the Applicant's Counsel been aware of the decision delivered on 15<sup>th</sup> February, 2018.**

**12. That is therefore in the interest of justice to extend the time within which to file a reference as the failure to do so within the timelines allowed was not intentional but it was inadvertent.**

**13. That the Applicant is apprehensive that if the orders of stay of execution are not granted, the attachment and sale will proceed and the Applicant will suffer irreparable loss and damage.**

**14. That it is in the interest of justice that execution be stayed to avoid a situation where the intended reference is rendered nugatory should it succeed.**

3. The Claimant/Respondent has filed a Replying Affidavit in opposition to the application and states that the application lacks merit as the Respondent was duly notified of the date for delivery of the Ruling. That it is common knowledge that judgment notices are normally issued when the judgment is ready and as such the allegation by the Respondent's Advocates that they sent their Clerk to confirm the position of the file from Court at which point he was informed that the ruling had been differed to 27<sup>th</sup> February, 2018 and thereafter they were informed that the judgment was to be delivered on notice is not true.

4. That the perusal note annexed to the application is not supported by a receipt for payment of perusal fees thus it cannot be authenticated. That had a perusal actually been done they would have discovered that the ruling was delivered on 15<sup>th</sup> February, 2018. He also claims that the Respondent has been aware of the judgment since August 2017, and has never settled the decretal sum to date.

5. The Claimant avers that the bill taxed by the taxing master is based on the law and the amount taxed is reasonable in the circumstances. Furthermore the Respondent has not shown that the intended reference is likely to succeed by pointing out how the taxing master erred had.

6. The Applicant through its Human Resource Manager one Raymond Nzioka, filed a further affidavit in response to the Claimant's Replying Affidavit wherein he states that they were not served with a certificate of costs after the delivery of the ruling, nor were they involved in the drafting and approval of the same and hence they remained in the dark until the execution process began.

7. That the intended reference is based on the grounds:-

**a. That the taxing master awarded costs that are way too high and way above the amount that the Claimant had been granted in judgment.**

**b. That the taxing master awarded amounts that were too high for drawing routine letters when there was no justification for the same.**

**c. That the taxing master failed to exercise her discretion judiciously while taxing the Bill of Costs and hence failed to tax off the repetitive items.**

**d. That the taxing master, in writing her ruling, failed to give reasons for her decision.**

8. That it is in the interest of justice to extend the time within which to file a reference as the failure to comply within the timelines prescribed was not intentional and this application was brought without delay.

#### **Applicant's Submissions**

9. It is submitted that the firm of Advocates representing the Applicant inadvertently failed to appear during the ruling on the bill of costs. That the circumstances that caused the confusion leading to non-appearance on the ruling date were beyond the control of Counsel and as such the Respondent/Applicant should not be condemned for it.

10. That the failure to attend the ruling has also caused a delay in filing a reference against the taxed bill which it is submitted was not deliberate as the Respondent's Counsel were genuinely unaware of delivery of the ruling. They cite the case of **Mumias Sugar Company Limited vs Tom Ojienda & Associates (2018) eKLR** where the Court observed that:-

*“... I have considered the facts leading to the delay in filing the reference and I am of the view that the reasons given by the applicant’s advocate are reasonable and plausible. I also find that the failure to attend Court was not deliberate. I do not think the client should suffer from the mistakes of its advocates particularly where the advocate has made disclosure of the fact of inadvertence. I have also taken into account the period of delay from 29<sup>th</sup> November, 2017, to 8<sup>th</sup> December, 2017, and I cannot say that is inordinate...”*

11. That the intended reference has arguable grounds namely:-

*1. That the taxing master awarded costs that are way too high and way above the amount that the claimant had been granted in judgment – it is submitted that the award of Kshs. 88,782/= in costs against the award of Kshs. 66,500 in judgment cannot be fair and just considering the fact that the Advocates Remuneration Order, 2009, gives that taxing master the discretion to increase or decrease what is in the bill of costs in the interest of justice.*

*2. That the taxing maser awarded amounts that were too high for drawing routine letters when there was no justification for the same – It is submitted that the taxing master was wrong to award the Respondent costs under the items ‘drawing of letters to client’ which were not proved as having been done or that they were indeed necessary in the first place.*

*3. That the taxing master failed to exercise her discretion judiciously while taxing the Bill of costs and hence failed to tax off the repetitive items – it is submitted that the taxing master failed to exercise her discretion under the Advocates remuneration order to tax off the items that were repetitive and did not call evidence to prove that such items were necessary.*

*4. That the taxing master in writing her ruling failed to give reasons for her decision – it is submitted that every decision that is given by a judicial officer must contain the reasons for such a decision. That even where the taxing master cited case law she did not show how the same relates to the case before her.*

12. It is further submitted that the Court has discretion to enlarge time within which to file the reference to avoid the danger of a miscarriage of justice. That in any event the decretal amount has already been deposited in Court as a pre-requisite for the granting of stay of execution orders in the first instance. The Applicant prays for the application to be allowed.

#### **Respondent’s submissions**

13. It is submitted that upon receipt of the notice of delivery of the taxation ruling, Counsel for the Applicant was duty bound to peruse the Court file and not to rely on the word of an undisclosed clerk who allegedly told counsel’s clerk that the ruling had been rescheduled to 27<sup>th</sup> February, 2018. That this explanation does not merit the exercise of Court’s discretion in the Respondent’s favour.

14. That the Respondent has not satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules, in order to be entitled to a stay order. They cited the case of **Labh Singh Harman Singh Ltd Vs. Honourable Attorney General & 2 Others (2016) eKLR** where the Court stated that Order 42 rule 6 is applicable even in a case for stay of execution of a certificate of costs pending reference. That the Application lacks merit and should be dismissed with costs.

15. I have considered the averments of both Parties. I note that there was an interim stay order granted on 24/5/2018 on condition that the decretal sum of Kshs.164,881/= be deposited in Court on or before 29/5/2018. The Applicants complied with this condition.

16. In the circumstances, I find that the Applicants having complied with the condition for stay, the stay order given in the interim is confirmed pending further orders of the Court.

17. In relation to the prayers sought to enlarge time within which Reference can be filed, I believe the Applicants’ action of depositing the decretal sum in Court as ordered by Court is a plausible reason of their good intention.

18. I do not find that the Respondents will suffer irreparable injustice if they are meant to wait a little longer for justice to be done to all.

19. I therefore exercise my discretion and allow the Application to extend time to file the Reference which time will be 15 days with effect from the date of this Ruling. In default the Application will be considered spent.

20. Costs in the cause.

Dated and delivered in open Court this **1<sup>st</sup> day of October, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ombo Malumbe holding brief for Mutua for Respondent – Present

Claimant – Absent