



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**MISC. APPL NO. 6 OF 2017**

**BARCLAYS BANK LIMITED**

**APPLICANT**

v

**PAUL K. OLE YIAILE t/a NASIOKI AUCTIONEERS**

**RESPONDENT**

**RULING**

1. On 11 December 2015, the Court found and held that the termination of the employment of one Michael Muriithi Maina by Barclays Bank Ltd (applicant) was unfair and awarded him Kshs 1,060,672/- together with costs.
2. The applicant was dissatisfied with the judgment and it filed a Notice of Appeal and an application for stay of execution pending the appeal.
3. The applicant and the Claimant entered into a consent whereby they agreed to a stay of execution pending appeal on condition that the decretal amount was deposited into a joint interest earning bank account in the name of the parties advocates.
4. By the time the consent was being entered, the Claimant had instructed Nasioki Auctioneers, and the auctioneer had moved and executed the warrants of attachment.
5. After being presented with the consent stay order and realising the applicant had the paid the decretal amount and advocates costs, the Auctioneer (current Respondent) filed and had its bill of costs taxed at Kshs 202,995/-.
6. On 8 May 2017, the applicant moved Court seeking orders
  1. ...
  2. THAT this court is hereby pleased to issue a temporary stay of execution of the auctioneer's certificate of costs pending the hearing and determination of this application.
  3. THAT this Honourable Court is pleased to set aside the orders of the registrar and the certificate of costs dated 19<sup>th</sup> April 2017 be and is hereby declared null and void.
  4. THAT the costs of this application be provided for.
7. The motion was placed before a Judge in Nairobi on 8 May 2017 because this Court was not sitting and the Court allowed orders 1 and 2 as sought in the motion and directed that the motion be served for *inter*

*partes* hearing on 24 May 2017.

8. On 24 May 2017, the Court in Nairobi directed that the file be transferred back to this station for further proceedings. The *ex parte orders* were extended.

9. The application was urged on 22 June 2017, after 2 false starts.

10. The substantive order pending determination is proposed order 3, as Order 2 was to preserve the *status quo* pending *inter partes* hearing which has now been concluded save for the ruling.

### **Applicant's case**

11. The applicant's four pronged case is that because there was a consent order of stay of execution, it was not open to the Claimant or the Respondent to proceed to tax and execute in respect of the auctioneer's charges.

12. Secondly, it was asserted that the process used to extract/obtain the decree and resultant warrants were marred with irregularities.

13. Thirdly, the applicant contended that the bill presented by the Respondent was equally irregular because it contained double charges.

14. Lastly, the applicant's advocate contended that the Respondent served the bill of costs upon the applicant directly instead of serving the advocate on record.

### **Respondent's position**

15. The Respondent in opposing the application contended that it proclaimed and attached the applicant's properties on 22 July 2016 before the order of stay was issued and served upon it on 1 August 2016, and it thereafter filed its bill of costs and that a taxation notice was served upon the applicant on 24 March 2017, but the applicant failed to appear before the Taxing Officer, who being satisfied with the service proceeded to tax the bill.

16. The Respondent also contended that because it was not a party in Cause No. 168 of 2014, *Michael Muriithi Maina v Barclays Bank Ltd*, it was not bound by the consent order of stay and that in any case it was entitled to its charges because of the work done prior to the stay orders.

17. The Respondent further urged that the procedure used by the applicant to approach the Court was not known to law as it should have filed a Reference and umbrage was sought in *Odera Obar & Co. Advocates v Aly Enterprises Limited & 3 Ors* (2015) eKLR and *Muganda Wasulwa t/a Keysian Auctioneers v National Cereals & Produce Board* (2015) eKLR.

### **Whether stay of execution pending appeal stays all other processes**

18. This issue is closely intertwined with the question the Court will delve into next but a few words are in order.

19. Although the applicant did not cite any express legal precedent on the point, this Court is ready to assume that as a general principle of law, a stay of execution of judgment and/or decree pending appeal should preserve the status obtaining before the execution, but there are exceptions to the general principle.

20. The exceptions may arise, for instance, where the litigating parties reach a consent providing for express conditions or exceptions to the stay of execution; the Court granting stay of execution prescribes the exceptions, or may be where there are incidental proceedings to the main suit or Cause.

21. The exceptions will invariably depend on the circumstances of each case.

22. In the instant case, the parties fashioned a stay of execution on their own terms in a situation where execution had commenced and auctioneers had moved in without making provision for payment in respect of the services rendered by the Respondent that far.

23. The Respondent therefore presented a bill for the services it had rendered prior to the stay consent and the same was taxed.

24. At the time the Respondent was proclaiming/attaching the Respondent's properties, there was a valid decree on record which had not been stayed.

25. In my view therefore, and subject to the substantive law on liability for auctioneers' charges, the Respondent would have been entitled to payment of the charges for services rendered prior to the stay order, as an exception to the general principle.

### **Prematurity of bill of costs/taxation**

26. It is true that there was a stay of execution pending appeal consented to by the parties.

27. Equally it cannot be disputed that by the time the consent on stay of execution was being issued and served, the Respondent had already moved and proclaimed the applicant's properties. The parties did not bother to provide for auctioneer's charges in that consent.

28. Both parties were aware of that reality but they were not prudent or cautious enough to make provision for the expenses incurred by the Respondent up to that stage. That lack of prudence or caution must be the cause of the imbroglio now presented to the Court.

29. It is probable that lack of prudence led the Respondent to file its bill of costs, which was served upon the applicant directly, instead of through its advocates on record.

30. That the applicant had knowledge about the bill of costs and the date for taxation cannot be denied. It has not attempted to explain why it did not bother to inform its advocate on record about the bill and taxation notice.

31. In the view of the Court, despite the failure to serve the advocate on record, the irregularity on service of the bill of costs and taxation notice on the advocate should not be determinative of the instant application as the applicant had knowledge of what was going on.

32. The applicant therefore had opportunity to raise all the challenges (double billing, extraction of decree and charges incurred by Respondent up to time stay was agreed and the like) it is raising against the bill and taxation before the Taxing Officer but squandered that chance.

### **Manner of challenging taxation**

33. The law books are now replete with decisions addressing challenges to taxation. The principles were dealt with eloquently by Gikonyo J in the *Odera Obar* case.

34. The mode of challenge should be through a Reference.

35. In this regard, the motion filed by the applicant was/is incompetent.

36. Before concluding, the Court notes that none of the parties bothered to address even in passing the substantive law regulating liability for auctioneer's charges in execution of decrees.

### **Conclusion and Orders**

37. For the above reasons, the Court finds the motion dated 8 May 2017 incompetent and orders that it be

dismissed with costs to the Respondent.

**Delivered, dated and signed in Nakuru on this 31<sup>st</sup> day of July 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For applicant                      Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

For Respondent                    Ms. Mukira instructed by Elizabeth Wangari & Co. Advocates

Court Assistant                  Nixon/Martin