



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO. 591 OF 2003**

**KENYA COMMERCIAL BANK LIMITED .....PLAINTIFF**

**VERSUS**

**MUTURI, GAKUO & COMPANY ADVOCATES.....DEFENDANT**

**R U L I N G**

Following the ruling of Justice Ibrahim, hereof, whereby he struck out the plaint, the plaintiff has moved to court seeking orders of stay.

The present suit prayed for a declaration that the defendant has been paid the total legal fees due to it, and is therefore not entitled to any further fees. The defendant through HC MISC. no. 764 of 2003 Filed a bill of costs for taxation against the plaintiff hereof. That is advocate/client bill of costs.

The present application is brought under Section 3A & 63 (e) of the Civil Procedure Act, Section 45 of the Advocates Act and Order 41 rule 4 of the Civil Procedure Rules. The prayer sought by the plaintiff is: "That this Honourable court be pleased to order that the hearing of HC MISC. APPLICATION NO. 764 OF 2003 be stayed pending the hearing and determination of the intended appeal.

Following the striking out of the present plaint, the plaintiff filed a notice of appeal and sought certified proceedings and ruling.

Learned counsel for the plaintiff, Mr. Munyu, argued that if stay is not granted, that is stay of taxation HC MISC 764 OF 2003, and if a certificate of taxation is issued the plaintiff will be precluded from objecting to the taxation and the only objection that it can raise thereafter is under paragraph II of the Advocates (Remuneration) Order. This counsel said would only render the intended appeal academic. Plaintiff relied on the case of, HC MISC APPLICATION NO. 721 OF 2000 GATHENJI & CO. ADVOCATES – V – WAIHENYA CHOMBA where Justice Mbaluto stated as follows in regard to section 51 (2) cap 16:

**“My understanding of the above provisions is that a certificate of the taxing officer who has taxed a bill of costs shall be final as to the amount of the cost covered thereby and the advocate may, as he has done in the instant suit, where the retaineer is not disputed, apply for judgment for the sum certified to be due with costs.”**

The plaintiff also relied on the case of HCCC NO. 154 OF 2004, **THE BOARD OF TRUSTEES NATIONAL HOSPITAL INSURANCE FUND – V – KIPKORIR, TITOO & KIARA ADVOCATES** where Justice Azangalala held as follows: -

**“In my view the interest of Justice lean in favour of granting stay of the taxation. The reason is that taxation determines the quantum payable. It does not address the issue of whether or not any fees have been earned. Taxation can therefore wait.”**

The plaintiff quoted the case of CIVIL APPLICATION No. NAI 325 OF 2000 VIPIN MAGANLAL SHAH – AND – INVESTMENT & MORTGAGES BANK LTD, to support its submission that it had an arguable appeal. Plaintiff’s counsel said that the intended appeal is not frivolous and should be heard before the defendant tax the bill of costs. He pointed out that the defendant was seeking costs of kshs 26 million.

Counsel submitted the substantial loss, which the plaintiff stands to suffer, is that if taxation does proceed it shall be finalized by the issuance of a certificate of taxation.

Counsel denied that the application is res judicata, he said that what was previously granted was a stay of HC MISC 764 OF 2003 pending the determination of this suit; that was discharged by the ruling of Justice Ibrahim. The present application, counsel said, sought stay of that suit pending appeal of Justice Ibrahim’s ruling.

The defendant’s learned counsel Mr. Masese opposed the application. He began by attacking the plaintiff prayer. He said that it is clear that the prayer does not seek stay of the decree and accordingly the party is bound by its prayers, which prayers were incompetent.

Defence argued that the plaintiff has failed to satisfy Order 41 rule 4 in that they had not shown substantial loss will be suffered.

Defence counsel also argued that the court should estopp the plaintiff for making several applications, which are res judicate. The issue of section 51 counsel argues is already settled by the ruling of Justice Ibrahim.

Defence counsel also disagreed with plaintiff’s counsel on the interpretation of Section 51 cap 16, he said that it was not true that a taxation is ‘cast in stone’ once a certificate is issued, and the plaintiff having enjoyed stay for two years the balance of convenience tilted in favour of the defendant.

As I begin to consider the opposing arguments it is necessary to have in perspective the provisions of Section 51 (2) Cap 16. it provides: -

**“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby .....**”

It is indeed evident that it is built within that section provision of setting aside or altering the certificate of

taxation. The question I need to consider is should the plaintiff be put in a position of having to set aside taxation rather than being granted stay. I will later on in this ruling come back to that question.

Parties hereof spent their time arguing on whether the applicant had demonstrated substantial loss or had provided security for stay to be granted in compliance to Order 41 rule 4. Those argument in regard to the present application, are to my mind misconceived. An application for stay of proceedings is a matter of judicial discretion. The discretion is judicial which then means that like all judicial discretion it must be exercised rationally and on the basis of evidence. In exercise of that discretion I am of the view that I should consider the speeding disposal of the appeal and whether the plaintiff has an arguable appeal.

In regard to the first, the ruling being appealed from was delivered on 22nd February 2005. The plaintiff stated that on the file being brought to this registry the plaintiff filed a notice of appeal and applied for proceeding and ruling on 24th February 2005. The present application for stay was made on 4th March 2005. That to my mind shows a party who cannot be said to be guilty of delay.

The second issue, without seeming to sit is an appeal to my brother's ruling, can be said that the plaintiff's intended appeal is not frivolous, it is one which, to use the plaintiff's words, where, *"the highest court of the land be given the opportunity to consider the intended appeal."*

I have considered the defendant's argument that the present application is res judicata, but that is an argument I reject. The plaintiff in the present application seeks stay pending appeal; in the earlier application the plaintiff sought stay pending the determination of this suit. I also reject the defence argument that the plaintiff having been struck out the plaintiff had no basis to make the present application. The ruling to strike out the plaintiff having been appealed against the plaintiff is entitled to move the court for stay. The circumstances would have been different if all the plaintiff was seeking was stay without any intention of appealing.

In view of the court's finding that the plaintiff has brought itself within the purview of the exercise of the court's discretion in its favour, should the court in view of section 51 (2) cap 167 grant the stay sought. In my view, not only would it be a waste of judicial time to allow taxation to proceed, which if the appeal is successful, may be set aside, but I also consider that; and here I am taking judicial notice that the plaintiff being one of the major banks in Kenya, would be able to pay the defendant the amount that will be eventually taxed, if taxation does in future proceed. On the other hand if the amount in the bill, that is kshs 26 million is paid to the defendant, there is no evidence that the defendant, if the appeal is successful, will be in a position to repay the same to the defendant. Balancing the two I am of the view that the court's discretion should be exercised in favour of the plaintiff

I do not accept the defence argument that the prayer in the plaintiff's application is defective; the same is capable of being granted.

The order of the court is: -

**(1) That this court does hereby stay the hearing of HC MISC APPLICATION NO. 764 OF 2003 pending the determination of the plaintiff's intended appeal of the ruling of 22nd February 2005.**

**(2) That the costs of the application dated 3rd of March 2005 be in the cause.**

Dated and delivered this 26th day of April 2005.

**MARY KASANGO**

**JUDGE**

Read and delivered at Nairobi by Azangalala J, this 26th day of April 2005

**F AZANGALALA**

**JUDGE**



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