



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI**

Misc Appli 665 of 2005

KENNETH KIPLAGAT t/a KIPLAGAT & ASSOCIATES.....PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION.....DEFENDANT

R U L I N G

On 29th September, 2005 the Plaintiff's advocate/client bill of costs herein dated 8th August, 2005 was taxed at KShs.29,711,149/25. When presenting the bill at the taxation on the 26th September, 2005, the learned counsel for the Plaintiff submitted that the bill was based on party/party costs already taxed. The certificate of taxation on the party/party taxation was exhibited. Learned counsel also submitted but the money already received on account from the Defendant (who was the Plaintiff's client) had been credited. Learned counsel for the Defendant simply left the matter to the taxing officer. A certificate of taxation dated 13th October, 2005 was duly issued. It would appear that the Plaintiff thereafter filed HCCC No. 555 of 2005 before this division in which it seeks judgment for the taxed costs of KShs.29,711,149/25. The case is pending disposal.

The Defendant has now come to court by chamber summons dated 31st October, 2005 seeking the main order that there be stay of proceedings relating to and/or arising out of the taxing officer's decision of 29th September, 2005, and in particular, HCCC No. 555 of 2005, pending the hearing of an intended reference against the taxation. The application is stated to be brought under section 3A of the Civil Procedure Act, Cap 21, Rule 11 of the Advocates (Remuneration) Order, and on all other (unstated) enabling provisions of the

law. The grounds for the application are:-

- (a) that the Defendant is desirous of appealing against the decision of 29th September, 2005 and has accordingly lodged its objection in terms of Rule 11 (1) of the Advocates (Remuneration) Order;***
- (b) that the Plaintiff has in the meantime filed suit against the Defendant seeking to enforce the said taxation and has filed a motion for summary judgment.....;***
- (c) that the Defendant feels that the taxing master erred in arriving at the decision and the intended appeal has high chances of success;***

(d) that in as far as the Applicants will have occasion to resist the intended appeal, he stands to suffer no prejudice.

(e) that if an order for stay of proceedings is not granted the instant application and the intended appeal will be rendered nugatory; and

(f) that this application has been brought without delay.

The supporting affidavit sworn by one W.K.B. KEITANY, the senior legal officer of the Defendant, is an elaboration of those grounds.

The Plaintiff has opposed the application upon the grounds set out in the grounds of opposition dated 7th November, 2005 which can be paraphrased as follows:-

(a) that the application is fatally incompetent in that the provisions of the law cited do not empower the court to issue the orders sought and that the application is brought in the wrong cause as there are no and cannot be execution proceedings in the present cause;

(b) that the Defendant attended before the taxing officer and did not object to the Plaintiff's bill of costs being allowed as drawn, and it cannot now be heard to say that it wishes to file a reference on the taxation;

(c) that therefore a reference instituted in the circumstances of this case has absolutely no chance of success because the Defendant cannot be allowed to approbate and reprobate at the same time; and

(d) that in the circumstances the application is an abuse of the process of the court and otherwise lacks in merit.

The replying affidavit sworn by the Plaintiff is a submission on those grounds.

I have considered the submissions of the learned counsels appearing. I will accept Mr. Thangei's submission that it was proper to file the application in these proceedings.

Firstly, HCCC No. 555 of 2005 is a proceeding arising out of the taxation herein.

Secondly, the reference contemplated by the Defendant arises out of the taxation herein.

So the court certainly has jurisdiction under its inherent powers to stay that suit pending hearing and determination of the reference. I may add that the application could also be properly brought in HCCC No. 555 of 2005. That is as far as jurisdiction is concerned.

What about merit" That is a different kettle of fish. No objection to the Plaintiff's bill was raised before the taxing officer. The bill was based on an earlier taxation of the party/party costs. Mr. Thangei, learned counsel for the Defendant, informed the court that the Defendant did not raise any objection in the party/party taxation. Mr. Thangei further conceded that the Plaintiff's advocate/client bill of costs was taxed as provided under the law based on the party/party taxation. Bearing in mind that there was no objection before the taxing officer when the party/party bill of costs was taxed, and further, that there was no objection before the taxing officer when the advocate/client bill of costs was taxed, what objection can now be raised before the High Court that could not have been raised before the

taxing officer" I consider that the reference contemplated or intended by the Defendant has absolutely no chance of success. It would therefore be unjust to encumber the Plaintiff by the order of stay sought.

In the circumstances this application has no merit. It must be refused. It is hereby dismissed with costs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF DECEMBER, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 16TH DAY OF DECEMBER, 2005.



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