



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI [MILIMANI]

MISCELLANEOUS CIVIL APPLICATION NO. 3 OF 2017

IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION FOR THE TAXATION OF COSTS AS BETWEEN
ADVOCATE AND CLIENT**

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES.....APPLICANT

AND

NAIROBI CITY COUNTY ASSEMBLY.....RESPONDENT

RULING

1. This ruling revolves around two applications. In their amended Notice of Motion dated 29th June, 2017, the Respondents herein, **Nairobi City County Assembly**, seek the following orders:

- 1) That the application be certified urgent and service be dispensed with in the first instance.**
- 2) That the Honourable Court be pleased to stay execution of all the proceedings to enforce the Certificate of Taxation dated 2nd May 2017 pending the hearing and determination of this application.**
- 3) That the Honourable Court be pleased to stay execution of all the proceedings to enforce the Certificate of Taxation dated 2nd May 2017 and all other consequential orders pending the filing hearing and determination of a reference against decision of Taxing Officer made on the 10th April 2017.**
- 4) That the costs of this application be provided for.**

2. The other application by the applicant herein, **Prof. Tom Ojienda & Associates**, dated 9th May, 2017 seeks the following orders:

- a. That the Honourable Court be pleased to enter judgment for the Applicant against the Respondent for the sum of Kenya Shillings Eight million nine hundred thirty four thousand one**

hundred thirty four and forty cents only (Kshs. 8,934,134.40/=) as it appears in the Certificate of Taxation dated 2nd May, 2017 with interest from the date of filling this application until payment in full.

b. That the Applicant be allowed to execute the judgment herein against the Respondent Nairobi City County.

c. That the costs of this Application be provided for.

3. Since the Respondents are seeking to stay the proceedings upon which the applicant's application is premised, it is my view that it is prudent to deal with the Respondents' application first. This must be so because if the Respondents' application is granted, there would be no need to deal with the applicant's application hence saving judicial time. On the other hand, if the applicant's application was to be dealt with first, and assuming the prayers sought therein were to be granted, it would render the Respondents' application still-born as the Respondents' application is based on the applicant's prayers not being granted.

4. According to the Respondents, they instructed the applicant to represent them in the Judicial Review No. 366 of 2014 in the matter of **Gateway Insurance Limited versus the Nairobi City County Government & 3 Others**. It was averred that the applicant filed in Court on the 7th February 2017 Advocate-Client Bill of Costs dated 30th January 2017 claiming the sum of Kenya Shillings Seventeen Million Twenty Four Thousand One Hundred and Ninety (Kshs. 17,024,190.00) which said Advocate-Client bill of Costs taxed unopposed in a Ruling delivered on the 10th April 2017 at Kenya Shillings Eight Million Nine Hundred and Thirty four Thousand One Hundred and Thirty Four Forty Cents (Kshs. 8,934,134.40) against the Nairobi City County Government and a Certificate of Taxation issued on the 2nd May 2017 in the said sum. Thereafter, the Applicant filed a Notice of Motion dated 9th May 2017 under certificate of urgency seeking judgment for the said taxed amount in the sum of Kenya Shillings Eight Million Nine Hundred and Thirty four Thousand One Hundred and Thirty Four Forty Cents (Kshs. 8,934,134.40).

5. It was the Respondents' case that they only became aware of the Respondents Bill of Costs on the 22nd May 2017 upon service with the said Notice of Motion.

6. According to the Respondents, the in-house counsel one **Mr. Murage** who allegedly received the said Advocate-Client Bill of Costs with his personal stamp does not have authority to receive summons, pleadings and/or applications, etc on behalf of the Applicant. It was the Respondents' case that the said Counsel after receiving the Bill of Costs failed to inform the Director of Legal Affairs of the same casting aspersions on complicity or otherwise on the reasons for not disclosing the same to the head of the department if at all. It was however averred that the Respondent has unequivocally admitted that the Bill of Costs was taxed unopposed which position is confirmed in the reasons for the ruling by the taxing master.

7. It was the Respondents' case that the ground under which their Application was sought constitutes sufficient reason that allows the Court to exercise unfettered discretion in determining this application in favour of the Respondents herein. While appreciating that advocates are indeed entitled to remuneration as their only source of livelihood, they contended that the same must be reasonable to the professional work done. However, that remuneration ought not to be determined on the value of the subject matter merely mentioned in the pleadings, lest it leads to frivolous suits aimed at unjust enrichment.

8. They therefore prayed that the Court the Court reviews its decision sets aside the ex-parte judgment

and stay execution of the same to avoid causing hardship or injustice to the Applicant and grants them unconditional leave to defend on merit.

9. Based on counsel's legal advice, the Respondents contended that their grounds constitute sufficient reason that warrants the Court to exercise unfettered discretion in determining the Application herein in their favour as no prejudice not compensatable by an award of costs would be suffered by the Applicant herein if the Orders sought herein are granted and they are granted unconditional leave to defend the Bill of Cost.

Applicant's Response to the Respondents' Case

10. In response to the Respondents' application the Applicant averred that the Applicant represented the Respondents herein in the Judicial Review No. 366 of 2014 - **Gateway Insurance Limited versus Nairobi City County & 3 Others**. According to the applicant, he tried on various occasions to recover fees from its client, the Nairobi City County, but the same was not fruitful and thus sought to file an Advocate/Client Bill of costs to recover its rightful legal fees. Accordingly he filed a Bill of Cost on the 30th January, 2017 seeking from the Nairobi City County Kshs. 17,024,190.00 which Bill was taxed on the 10th April, 2017 in the sum of Kshs 8,000,055.60.

11. It was averred that though the Respondent's main contention is that they were never served with the Bill of Cost dated 30th January, 2017 and that they are in danger of being condemned unheard to pay Kshs. 8,000,055.60, services were effected severally upon the Respondent's office through their legal department and most of the documents were received by one **Mr. Murage**, in-counsel for the Respondent herein who the applicant believed had been tasked with the duty of ensuring that they attend court and represent the County to the best of their ability. It was disclosed that the Bill of Cost was served upon the Respondent and the in-counsel received and duly stamped the same as received.

12. Despite service, the Respondents never appeared in court for a single mention or hearing and the court duly took notice of this. The applicant noted that the Respondents did not deny that Mr. Murage is indeed an employee of the County but in fact expressly acknowledged that indeed he is an employee of the Nairobi City County. Therefore being such an employee of the Nairobi City County, he is an agent of the Respondent and is allowed to receive any said documents on behalf of the Respondent.

13. It was contended that the Taxing master made serious observations that the counsel for the Respondent never attended and on the occasions the County was represented, other Advocates were holding his brief. However, the County never filed any documents to show that they opposed the said Bill.

14. It was the applicant's case that it is not his fault that the Director Legal never got wind of the said matters as it is the duty of the duly employed staff of the County to inform their bosses of the comings and goings of the said department. To the applicant, the decision of the Court to render the Ruling without the participation of the Respondent was justified as their duly appointed representative failed them and, did not represent their interests.

15. Following the issuance of the Certificate of costs the Applicant filed an Application under section 51 of the **Advocates Act** dated 9th May, 2017 for the certificate to be translated into a judgment. According to the applicant, there is set procedure under the law (Rule 11 of the **Advocates Remuneration Order**) that if a party is not satisfied with the decision of the Taxing Master they are to file an objection and thereafter a reference before the Judge to show that they are not satisfied with the decision of the Taxing Master. As this, the respondent has done, the applicant believed that this is a delaying tactic as

the Respondents do not want to pay the correctly awarded amounts to the Applicant.

16. It was the applicant's case that the County should not blame their misfortune upon the Applicant and let the applicant suffer for their negligence to follow up on their matter. The Court was therefore urged not to grant the instant stay as it has been overtaken by events. In the applicant's view, the Respondents are not being condemned unheard as per their claims since they were served with all the required notices to appear in court, which to their detriment they never appeared and a Ruling was rendered that they pay the Applicant and they should abide by the said Ruling. It was contended that though the ruling was delivered almost three months down the line the Respondents did nothing in form of appeal/Reference to the High Court.

17. This Court was therefore urged not to grant the stay and instead allow the Applicant to proceed with its Application to have the Certificate of cost turned into a judgment.

18. I have considered the issues raised in the instant application. I must stress that the application by the Respondent is at this stage not seeking setting aside the Taxing Officer's decision on taxation. It is simply seeking stay of execution pending such challenge.

19. The application is expressed to be brought under sections 1A, 1B and 3A of the **Civil Procedure Act**, Order 22 Rule 25 and Order 51 rule 1 of the **Civil Procedure Rules** and all other enabling provisions of the law. Starting from Order 22 rule 25, the said provision provides that:

Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

20. For this provision to apply, there must be two suits between say A and B. In one suit there must be a decree in favour of A against B. In the other suit, it must be B who is suing A. In this case, the Respondents are seeking stay of execution pending the filing, hearing and determination of the reference against the ruling and taxation in High Court Misc. Cause No. 4 of 2016. In other words the Respondents are yet to file their reference and hence there is no suit by the Respondents against the Applicant.

21. Judicial Review, it was held in **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A of the **Civil Procedure Act** render the application wholly incompetent.

22. That leads me to the issue of the circumstances under which the Court can stay judicial review proceedings. Section 9(3) of the **Law Reform Act**, Cap 26 Laws of Kenya provides as hereunder:

In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

23. First that provision expressly applies to application in which a relief in the nature of an order of certiorari is sought which is not the case in the instant proceedings. Secondly, it applies where either there is an appeal or where the time for appealing has not lapsed. In this case even if the reference was to be equated to an appeal, there is no reference pending. Further, pursuant to the provisions of rule 11(1) of the **Advocates (Remuneration) Order**, if any party should object to the decision of the taxing officer he should within 14 days after the decision give notice of the items of the taxation to which he objects. It is true that rule 11(4) of the **Advocates (Remuneration) Order** gives the court power to enlarge time if the same lapses before a step needed to be done is done or taken. However, the decision whether or not to enlarge time is discretionary and this Court cannot speculate as to how that discretion will be exercised assuming an application for extension of time will be made in the first place.

24. In my view, the only way in which the Respondents can avoid payment where there is a valid judgement of a Court of competent jurisdiction is to show that the judgement has been set aside on appeal or on review or that an order of stay has been issued suspending the execution of the said judgement.

25. The procedure for objecting to a reference is provided for in rule 11(1) of the **Advocates Remuneration Order** which provides that:

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2)The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3)Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4)The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

26. It therefore clear that a person who intends to challenge the decision of the Taxing Master is required to express such intention by giving notice in writing to the taxing officer of the items of taxation to which he objects. In this case, the Respondent has not disclosed the steps, if any, taken by them towards the filing of the reference. They have not stated that they have notified the Taxing officer of the items they are aggrieved with. They have not indicated that they have sought extension of time to commence the proceedings challenging the taxation either.

27. A decision whether or not to grant stay is clearly an exercise of judicial discretion. The exercise of judicial discretion it has been held, is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See **Patel vs. EA Cargo Handling Services Ltd [1974] EA 75; Shah vs. Mbogo [1967] EA 116; Philip Chemwolo &**

Another vs. Augustine Kebende [1982-88] KAR 1036.

28. Being judicial discretion, it must be exercised judicially or in other words upon sound reason rather than whim, caprice or sympathy. It is therefore upon the applicant to place before the Court all the relevant and material facts which would enable the Court exercise such discretion. In this case, it was incumbent upon the Respondent to show that it is keen in pursuing the intended reference and has in fact put into motion steps directed towards the said purpose. There is no such evidence and as such the Applicant's contention that this application is simply meant to delay the applicant from pursuing his costs cannot be without some merit.

29. It is therefore my view that the Respondents' amended Motion dated 29th June, 2017 fails and is dismissed.

30. With respect to the applicant's application dated 9th June, 2017, section 51(2) of the **Advocates Act** stipulates as follows:-

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 recovered thereby; and the court may make such order in relation thereto as it thinks fit, including where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.

31. In this case as retainer is not disputed there is no reason why judgement cannot be entered in terms of the Certificate of Costs. See **Mbai & Kibuthu Advocates vs. Mbo-I-Kamiti Farmers Company Limited Nairobi (Milimani) HCMA No. 659 of 2004.**

32. In the premises I allow the applicant's application dated 9th May, 2017 and enter judgement in terms of the same together with interests at the rate of 9% pursuant to rule 7 of the **Advocates (Remuneration) Order** and costs.

33. Orders accordingly.

Dated at Nairobi this 4th day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Arende for Prof Ojienda the applicant

Mr Mugoye for the Respondent

CA Ooko



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