



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 415 of 2004

NYAKUNDI & COMPANY ADVOCATES PLAINTIFF

VERSUS

KENYATTA NATIONAL HOSPITAL BOARD DEFENDANT

RULING

This Application brought under Order XLI Rule 4 and Order L Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law is seeking one main order. This is that there be a stay of any further proceedings herein pending the hearing and determination of the Defendant/Applicant's High Court Misc. Application No.425 of 2004.

The main reasons for the application are:

1. that the Applicant has an arguable Reference with a high probability of success;
2. that unless the application is granted the Applicant will suffer irredeemable and irreparable loss and that
3. The Respondent will suffer no prejudice if the order prayed for is granted.

The Application is supported by two affidavits sworn by John Irungu Wachira Advocate and Nzuki Mwinzi a Senior Legal Officer of the Applicant.

The Respondent opposed the Application and filed a Replying Affidavit sworn by Kibagendi Assa M. Nyakundi Advocate.

The Application was ably canvassed before me on 22nd and 24th November 2004 by Mr. Wandabwa Learned Counsel for the Applicant and Mr. Waweru Learned Counsel for the Respondent. At the Center of the dispute is a certificate of Taxation issued on 13th July 2004; pursuant to taxation by the Deputy Registrar of the Respondent's Bill of costs on 8th July 2004. Counsel for the Applicant submitted that on 21st July 2004 a notice of objection to the taxation was lodged with the Deputy Registrar and in the notice reasons for taxation were sought. The reasons have not been furnished to pave way for filing a reference to a judge. In the interim, the Respondent has sought judgment for the sum of Kshs 7,140,574/= in the Certificate of Taxation. It is this Application which the Applicant seeks to stay pending the Applicants intended reference.

Counsel further submitted that the intended reference is arguable as the sum awarded of 7,140,574/= is manifestly excessive taking into account that the subject matter giving rise to the taxation is defamation and an award of Kshs 7 million may not be even be made in the suit in the event of success. There is therefore an error in principle committed by the Deputy Registrar. Counsel further submitted that the Deputy Registrar appears to have based instructions fees on the value of a contract mentioned in the defamation suit which value was not the subject matter of the suit. In his view therefore, the intended reference is not idle or frivolous. It has high chances of success.

It was further submitted for the Applicant that this Court has jurisdiction to entertain the Application for stay of proceedings and in the interest of justice this jurisdiction should be exercised in favour of the Applicant which stands to suffer irreparable loss unless the Application is granted. On the other hand the Respondent will suffer no prejudice if the order of stay is granted pending a determination on the intended reference.

Counsel relied upon several authorities on jurisdiction to grant stay of proceedings and the conditions for the grant of the same. I will not quote them here but I will keep them in mind in my ruling on this Application.

Mr. Waweru in opposing this Application argued that this Application is premature as there is no threatened execution. All that the Respondent seeks is Summary Judgment in respect of sums awarded on taxation. Therefore the submissions in respect of alleged substantial loss has no basis. He further submitted that the jurisdiction of this Court has been wrongly invoked. In his view Order XLI cited in the Application has no application as there is no pending appeal by the Applicant.

Counsel further submitted that the Applicant has not objected to the taxation. There is therefore no basis for a stay of proceedings. This submission was based on the fact that the purported notice of objection is addressed to no one. The Deputy Registrar cannot therefore react to it. In Counsel's view the Applicant should seek enlargement of time to file a reference. This application is therefore incompetent.

In any event it was Counsel's view that the Applicant has no arguable reference. There is no error in principle shown by the Applicant. The Deputy Registrar considered all the material before her including the fact that there was a separate claim for Kshs 50 million in addition to the defamation claim. The matter was also complex. Documentation was extensive and for all these the sum of Kshs 4 million awarded as instructions fees was not so excessive as to suggest an error in principle.

Finally Counsel submitted that the Applicant in other proceedings has admitted the sum awarded to the Respondent and has in those proceedings gained judicial advantage on the basis of the Respondent's claim. This according to Counsel is an abuse of the process of the Court.

Counsel too relied on several authorities in support of his submissions. I do not propose to cite the authorities here. I will however, have the relevant principles in mind in this ruling.

In a brief reply Mr. Wandabwa, submitted that the Applicant has not admitted the Respondent's claim. The claim is merely reflected in its books of accounts. He also argued that he has properly invoked the jurisdiction of the Court as a reference is in the nature of an appeal. Regarding the notice of objection, he submitted that the same is valid and has been duly lodged with the Deputy Registrar who has acknowledged the same. In any event the objection raised by Counsel for the Respondent is one on form and does not go to jurisdiction. In Counsel's view the Deputy Registrar is obliged to give reasons for taxation before a reference can be lodged. He reiterated that this Application be allowed.

I have considered the Application, the affidavits and the able submissions by the Learned Counsels. I will first deal with what I consider to be the technical or legal obligations raised against this application. It has been submitted for the Respondent that this Application is premature as there is no imminent threat that could cause harm to the applicant, as all that the Respondent seeks is Summary Judgment for their costs. No execution is threatened. I do not find this argument attractive because the Applicant desires to challenge the same costs for which Judgment is sought. It does not have to wait until the threat of execution crystallizes for it to take remedial measures.

The Respondent further submitted that this Application is incompetent, as the Courts jurisdiction has been wrongly invoked. In the Respondent's Counsel's view the intended reference is not an appeal. This Application should therefore not have been made under Order 41 Rule 4 of the Civil Procedure Rules. I do agree that the intended reference is not an appeal and the provisions of Order 41 Rule 4 of the civil Procedure Rules do not strictly apply to this Application. However, the principles that are considered when dealing with an Application under this rule could be persuasive when the Court is considering an application under the Advocates Remuneration Order for in both instances an Applicant seeks stay pending the taking of some other step in the proceedings. The Applicant has also come under Section 3A of the Civil Procedure Act and also under all other enabling provisions of the Law. Having done so it is my view that citing Order 41 Rule 4 is not fatal to this Application. I find the provisions of Order 50 Rule 12 of the Civil Procedure Rules persuasive in considering the objection raised regarding incorrect invocation of the Court's jurisdiction.

Counsel for the Respondent further forcefully submitted that the Applicant has not in any event preferred valid proceedings against the Deputy Registrar's decision on taxation. This is because the purported Notice of Objection relied upon by the Applicant is not an objection to the Deputy Registrar. It is not addressed to the Deputy Registrar. It is not indicated on the face of it to be served upon the Deputy Registrar. In the circumstances, the Deputy Registrar has not received any notice of objection to the taxation and no request for reasons for taxation has been made. The intended reference would therefore have no basis. The Applicant does not therefore have any basis for this Application for stay.

I have seen the purported Notice of Objection. It is true, it does not show on its face that the Deputy Registrar should be served. It shows however that an objection is made to a decision of the Taxing Master of 8th June 2004 in respect of the Bill of Costs dated 1st April, 2004. It has the correct title of the Misc. Cause. It has been received by the relevant registry. I hold that there is sufficient information in the notice to qualify as a valid notice of objection. The Deputy Registrar is bound to respond to this notice.

It was further submitted for the Respondent that the Deputy Registrar has already delivered her Ruling on taxation which ruling has the reasons for taxation. The Applicant should therefore have filed its reference within the prescribed period under Rule 11(2) of the Advocates Remuneration Order. There is no evidence that the Applicant even applied for the ruling on taxation. It is therefore not vigilant and as equity aids the vigilant the Applicant is not entitled to the order of Stay.

In my view there is no evidence that even the ruling on taxation has been supplied to the applicant. The Respondent did not demonstrate that the Applicant has the ruling and when the same was supplied. What the record shows is a Notice of Objection to which there has been no response from the Deputy Registrar. The Law is very clear. The Applicant can only file its reference on receipt of the reasons for taxation. There is no shortcut to this.

Counsel for the Respondent further argued that the Applicant does not have an arguable reference. No error of principle has been demonstrated. The intended reference is against the Deputy Registrar's

award in respect of instruction fees which was only shs 4 million. In Counsel's view this was reasonable as the subject matter of the parent suit was not only defamation of character but there was also a separate claim for shs 50,000,000/=. The matter was also complex and involved numerous and complicated documents. The intended reference has therefore no chance of success.

At this stage of the proceedings, I do not have to make a definitive finding on the merits of the intended reference. On a *prima facie* basis however, on the material canvassed before me I cannot say that the intended reference is an idle one. There is the allegation that the Deputy Registrar misunderstood what the value of the subject matter was. There is also the allegation that in the event of success the final award in the parent suit is unlikely to be close to the costs awarded to the Respondent. There is finally the allegation that the sum awarded by the Deputy Registrar is manifestly excessive as to suggest an error of principle. In my view therefore the intended reference is an arguable one.

Finally counsel for the Respondent argued that the Applicant has admitted the Respondents claim. It has indeed obtained judicial advantage in other proceedings using its indebtedness to the Respondent. This in Counsel's view is an abuse of the process of the Court. I do not agree that merely exhibiting a demand letter from the Respondent in other proceedings amounts to an admission of the Respondent's claim. It is also not a bar to a challenge to be made against the order giving rise to the demand.

Having dealt with the objections raised by the Respondent I still must decide whether or not to exercise my discretion in favour of staying these proceedings. The Respondent's proceedings are valid in Law. They should be prosecuted to conclusion. The Respondent's desire to do so without unnecessary hurdles is well understood. On the other hand, the Applicant strongly desires to challenge the decision of the Deputy Registrar. I have already found that if it reaches that stage the challenge will not be an idle one. The Applicant should also not be prejudiced in its legitimate efforts to seek relief against the Deputy Registrar's decision. If finally it fails all that the Respondent will have suffered is a delay to be in funds. On the other hand if it succeeds and judgment has already been entered against it the result will be an application to set aside the judgment and probably the execution that will inevitably follow the entry of Judgment.

The Respondents have not demonstrated that they will suffer any real adverse consequences if these proceedings are stayed. In my view therefore the balance tilts in favour of granting a stay.

In the result I find that there is sufficient cause shown for the Court to invoke its inherent jurisdiction under Section 3A of the Civil Procedure Act, which jurisdiction has been craved by the Applicant on the face of the Application, to grant an order of stay in terms of prayer 4 of the Applicant's Application dated 21st September, 2004. The Respondent will have the costs of this Application.

Either party has liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16th DAY OF DECEMBER, 2004.

F. AZANGALALA

JUDGE

Read in the presence of:-



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