



REPUBLIC OF KENYA



**Muthaura Mugambi Ayugi & Njonjo Advocates v Corporate and Pension
Trust Services Limited (Miscellaneous Application E021 of 2021)
[2023] KEHC 3877 (KLR) (Constitutional and Human Rights) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION E021 OF 2021**

HI ONG'UDI, J

APRIL 27, 2023

BETWEEN

MUTHAURA MUGAMBI AYUGI & NJONJO ADVOCATES ADVOCATE

AND

CORPORATE AND PENSION TRUST SERVICES LIMITED CLIENT

RULING

1. The client/applicant filed a Notice of Motion dated 7th December 2022 under Sections 1A, 1B, 3 of the *Civil Procedure Act* and Order 42 Rule 6(1),(2) and (4) of the *Civil Procedure Rules, 2010*, seeking the following orders:
 - i. Spent;
 - ii. Pending hearing and determination of this application, this honourable Court be pleased to grant an order of stay of further proceedings herein.
 - iii. Pending the hearing and determination of the intended appeal this honourable Court be pleased to grant an order of stay of further proceedings herein.
 - iv. This honourable Court does issue such further orders or directions that it may deem fit to grant.
 - v. Costs of the application be in the cause.

The Client/Applicant's case

2. The application was supported by Anthony Kilavi's affidavit dated 7th December 2022, a supplementary affidavit dated 6th March 2023 and the grounds on the face of the application.



3. He deponed that following this Court's Ruling dated 18th November 2022 which they were dissatisfied with, they filed a Notice of Appeal dated 23rd November 2022.
4. For context, the impugned Ruling dismissed the applicant's Notice of Motion dated 20th September 2021, which sought to have the client/applicant's name struck out and substituted with the then intended respondents, namely Kenya Railways Corporation and Kenya Railways Staff Retirement Benefits Scheme. This was with reference to the Advocate - Client Bill of Costs dated 20th July 2021 in the case of Nairobi High Court Constitutional Petition No.353 of 2012 between *Tom Kusienya & 7 others v Kenya Railways Corporation, Corporate & Pensions Trust Services Limited and Retirement Benefits Authority*. While dismissing the application, this Court allowed the taxation proceedings to proceed before the Taxing Officer.
5. He deposed that they were apprehensive that by the time the appeal is heard and if at all successful, the taxation proceedings will have been concluded and the intended appeal which is arguable would have been rendered nugatory. This in effect would occasion prejudice that cannot be compensated by an order of costs. It is on this premise that the applicant seeks an order to stay the instant proceedings pending the hearing of the intended appeal.
6. In the supplementary affidavit, he deponed that their delay in filing the record of appeal was occasioned by a delay in receiving the typed proceedings from this Court. He noted that they were informed by the Deputy Registrar that the typed proceedings were only ready for collection on 7th February 2023.

The Advocate/Respondent's Case

7. In response, the advocate/respondent filed its replying affidavit dated 17th January 2023 as sworn by Jomo Nyaribo, one of the partners in the law firm. In opposing the application, he deposed that the client/applicant had not satisfied the conditions precedent for grant of stay of proceedings pending appeal as stipulated under Order 42 Rule 6 of the *Civil Procedure Rules, 2010*.
8. He pointed out that the client/applicant had filed a Notice of Appeal and not a Record of Appeal before the Court of Appeal. He likewise deponed that during the Court session of 18th November 2022, the client/applicant was granted leave to appeal within 30 days, which had not been done.
9. He further deposed that the client/applicant had failed to demonstrate the substantial loss it stood to suffer if the orders sought were not granted. He averred that it is the advocate/respondent that would suffer prejudice if the orders are granted, due to the continual denial of their fees.
10. He in addition averred that the client/applicant was required to provide a security undertaking which they had failed to do. He therefore urged the Court to only allow the application on condition that the client/applicant submits Ksh.8,087,604.60 which was the stated amount in the bill of costs as security.

The Client/Applicants' submissions

11. The client/applicant through the firm of Millimo Muthomi and Company Advocates filed written submissions and a list of authorities dated 7th March 2023 in support of their application.
12. While relying on Order 42 Rule (6)(4) of the *Civil Procedure Rules* counsel opposed the advocate/respondent's argument that there was no substantive appeal before the Court of Appeal due to lack of a Record of Appeal. He submitted that an appeal to the Court of Appeal is deemed filed when the Notice of Appeal is issued. He however noted that at the time of filing these submissions the matter was already before the Court of Appeal in Nairobi Civil Appeal No.E123 of 2023, *Corporate and Pension Trust Services Limited v Muthaura Mugambi Ayugi and Njonjo Advocates & others*.



13. On the issue as to whether the application had been filed with unreasonable delay, Counsel answered in the negative. He noted that the instant application had been filed 18 days after the Court's Ruling. He pointed out that the client/applicant's intention to file the Record of Appeal before the instant application had been curtailed by a lack of the typed proceedings.
14. On whether the client/applicant had established sufficient cause for grant of the order of stay of proceedings, Counsel submitted that the draft Memorandum of Appeal contained arguable grounds of appeal. Majorly, he noted that one of the issues that would be addressed by the Court of Appeal would be the right party who should be ordered to pay the legal fees. In its view the right parties are Kenya Railways Corporation and Kenya Railways Staff Retirement Benefits Scheme. He noted as such that if the appeal was successful, the taxation proceedings would be rendered futile.
15. In support reliance was placed on the case of *Muthee Giciaini & another v Kevin Oduor Odiambo* (2021) eKLR where it was observed that the Court may also make orders to stay proceedings where the ends of justice so require under Section 3A of the *Civil Procedure Act*. Also see *Re Global Tours & Travel Limited* HCWC No.43 of 2000 (UR).
16. In closing, Counsel argued that the requirement to provide security as advanced by the advocate under Order 42 Rule 6(2) of the *Civil Procedure Rules* only relates to stay of execution of a judgement or decree and not stay of proceedings. He therefore urged the Court to allow the application.

The Advocate/Respondent's Submissions

17. In opposing to the application, the advocate/respondent filed written submissions and a list of authorities dated 13th March 2023. He commenced by submitting that the client/applicant had not satisfied the conditions precedent for grant of stay of proceedings pending appeal as highlighted in the cases of *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* (2014) eKLR and *Lucy Waitibera Kmanga & 2 others v John Waiganjo Gichuri* [2015] eKLR. That there was nothing to make the court to exercise discretion in its favour.
18. Counsel while reiterating the contents of their affidavit enumerated the conditions for grant of the order of stay of proceedings. These are: (i) that there must be a sufficient cause, (ii) that the applicant may suffer substantial loss unless an order of stay is granted, (iii) that the application was brought without unreasonable delay and that the applicant must give an undertaking as to security.
19. Counsel cited the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR and submitted that an order of stay of proceedings is a grave judicial action that ought to be used sparingly and exceptionally in cases as it infringes on a right of a litigant to conduct his litigation, right of access to justice, right to be heard without delay and overall the right to a fair trial. In light of the above he urged the Court not to allow the application.

Analysis and Determination

20. From the foregoing account, the only key issue for determination is:

Whether the client/applicant has satisfied the condition for grant of an order of stay of proceedings pending hearing of the intended appeal

21. The client/applicant avidly contended that it is essential to stay the instant proceedings as they will suffer prejudice and irreparable loss if the taxation of the bill of costs dated 20th July 2021 proceeds.



This was opposed by the advocate/respondent who asserted that the client/applicant had not satisfied the threshold for grant of the order for this Court to exercise its discretion in its favour.

22. The jurisdiction of this Court to stay proceedings pending appeal flows from Rule 32 of the *Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013*. I find it prudent to reproduce this rule verbatim to put the matter into context:

Stay pending appeal.

32.

- (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.
- (2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.
- (3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.

23. What becomes clear from a reading the above provision is that an appeal or intended appeal does not operate as an automatic right to stay of proceedings. In fact the Court in the case of *Kenya Wildlife Service v James Mutembei* (*supra*) discussed the serious nature of stay of proceedings as follows:

“...Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent. See Ringera J in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

- (5)

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

24. The Court in the case of *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014] eKLR outlined the principles which ought to be considered before grant of stay of proceedings as follows:

“To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;



- i. Whether the applicant has established that he/she has a *prima facie* arguable case.
 - ii. Whether the application was filed expeditiously and
 - iii. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”
25. It is worth rehashing that the overriding objective of this Court is to facilitate access to justice for all persons as required under Article 48 of the Constitution. This means that the Court while making its determination must consider both positions.
26. From the onset, it is appreciated that though the client/applicant filed the application 4 days late than what is stipulated in the Rules it did so in a reasonably timely manner, and also stated the reasons for the delay. A look at the material before the Court reveals that the premise of the appeal is the client/applicant’s opposition to being the party responsible for the payment of the Advocate – Client’s bill of costs.
27. The advocate/respondent had stated that throughout their engagement the firm had received instructions from the client/applicant and had not been privy to the client/applicant’s contractual engagement with the then intended 2nd and 3rd respondents. In the end, this led to the instant suit as the Advocate - Client Bill of costs remained unpaid by the client/applicant.
28. The client/applicant then argued that there was a risk that their intended appeal would be rendered nugatory if the taxation proceeded. It is discernable that the client/applicant was the principal party in the main suit. It was represented by the advocate/respondent whom it had retained and issued instructions to in the matter until its end. Understandably at the conclusion of the matter the advocate/respondent sought to be paid his fees.
29. Evidently in light of all these facts the client/applicant fails to establish sufficient cause why this Court should exercise its discretion in its favour. I say so because while the client/applicant opposes payment of the advocate’s fees it neither denies benefiting from the legal services rendered by the advocate/respondent or issuing the said instructions throughout the main suit. This in itself created an advocate – client relationship which in the end necessitated payment of the fees as is the legal norm. Considering this, the client/applicant cannot now turn and deny the existence of the relationship by declining to honour the bill of costs. The client/applicant has not presented a compelling reason to cast out any doubt that the taxation proceedings should not be allowed to proceed.
30. It is imperative to reiterate that the exclusive question in deciding whether or not to grant an order of stay of proceedings is whether such a grant or not is in the interest of justice. In my opinion, grant of this order in the circumstances of this case would not be justified and would be contrary to the interest of justice. This is because the balance of inconvenience and prejudice leans more toward the advocate/respondent. The reason being that it is his rightful legal income that will be held in further abeyance for a matter concluded on 13th November 2013. At the same time the client/applicant’s loss in the event of a successful appeal can be compensated in monetary terms as between it and the supposed rightful parties.
31. It is my finding that a blanket grant of an order for stay of the taxation proceedings will cause unnecessary delay which will go against the principles set out under Article 159(2) of the Constitution and optimum utilization of judicial time. In the circumstances I will grant the order sought on condition that the Client/Applicant deposits a sum of Kshs.5,000,000/= in an interest earning account



and in the joint names of the Applicant and Respondent within 30 days from today's date. Failure to comply will lead to automatic vacation of the order staying the Taxation proceedings.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 27TH DAY OF APRIL 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

