



Rachier & Amollo Advocates v Kenya Bureau of Standards; National Bank of Kenya Limited & 3 others (Garnishee) (Miscellaneous Cause E240, E237, E238, E239, E248, E249 & E241 of 2022 (Consolidated)) [2023] KEHC 18852 (KLR) (Commercial and Tax) (29 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE E240, E237, E238, E239,
E248, E249 & E241 OF 2022 (CONSOLIDATED)**

JWW MONG'ARE, J

MAY 29, 2023

BETWEEN

RACHIER & AMOLLO ADVOCATES APPLICANT

AND

KENYA BUREAU OF STANDARDS RESPONDENT

AND

NATIONAL BANK OF KENYA LIMITED GARNISHEE

THE CO-OPERATIVE BANK OF KENYA GARNISHEE

KENYA COMMERCIAL BANK LIMITED GARNISHEE

SAFARICOM LIMITED GARNISHEE

RULING

1. The ruling here relates to the two applications, the first one filed by the Judgment-Debtor/Client on 9th May 2023, seeking for leave to file an appeal against the Judgment of this court issued on 28th April 2023 and the second application is a Garnishee application, filed by the Judgment-Creditor/Advocate on 8th May 2023.
2. On 8th May 2023, pursuant to an ex-parte application by the Judgment-Creditor/Advocate, this court issued Garnishee nisi against the funds of the Judgment Debtor held in The National Bank of Kenya Limited, The Co-operative Bank of Kenya Limited, Kenya Commercial Bank Limited and Safaricom Limited. All the Garnishees confirmed that they were ready and willing to comply with the orders of the court once the other interim issues were dealt with.



3. Both applications are opposed by the two parties and both parties filed skeleton submissions and orally submitted before me, which I have considered. In the Application of 9th May 2023, brought by the Judgment-Debtor, the Applicant seeks leave to bring an appeal in the Court of Appeal, to vacate the judgment of this court issued on 28th April 2023. Similar applications have been filed in Misc. Cause Nos. E240 of 2022 and E241 of 2022 which I will consider together.
4. The Applicant in the Application filed on 9th May 2023 is seeking leave of the court pursuant to Paragraph 11(3) of the Advocates Remuneration Order, to move to the Court of Appeal and challenge the decision made by this court in all the 7 matters herein. In the same application, the Applicant has urged this court to stay the execution of the judgments in the said 7 matters and confirms that in light of the provisions of Order 42 Rule 6 (2), that the Judgment-Debtor will abide by any orders that the court shall make as regards security for costs in the stay of execution orders sought alongside the orders to move to the Court of Appeal to file an appeal for review and setting aside the judgment of this court.
5. The Applicant, pursuant to the application thereto, has filed an intended Memorandum of Appeal and a Notice of Appeal in the to signal its serious intend to appeal. The intended Memorandum of Appeal contains several grounds of appeal and the Judgment-Debtor argues that its intended appeal has a realistic chances of success. The intended appeal is premised on several grounds; to wit; whether instructions fees can be levied more than once, whether the decision of 28th April 2023 went against the holding in *Joreth Ltd v. Kigano & Associates* (2002)eKLR, whether the court erred in awarding similar instructions fees to both the firm of Rachier & Company Advocates and Paul Muite Advocate, SC, whether there were sufficient grounds to enhance instruction fees for defending the Garnishee proceedings inter-alia. The Applicant cited several decided cases to buttress its arguments and urged the court to grant them leave in light of Article 50 and 159 of *the Constitution* of Kenya, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21, Laws of Kenya.
6. The Judgment-Creditor opposed the application for leave to file an appeal at the Court of Appeal. The Judgment-Creditor stated that its notice of Preliminary Objection was going to operate as its grounds of opposition. The Judgment-Creditor argued that firstly, leave to appeal could not be grated when there was no right of appeal in the first place. The Judgment-Creditor argued that a consent order is not appealable. It was the position taken by the Judgment-Creditor that during the hearing of the reference subject matter of this application, the Applicant in its filed grounds supported the application for reference and that subsequently, the orders of the court thereafter amounted to a consent order as no opposition had been raised to the reference application, at least in the Misc. Application Cases No. E240 and E241 of 2022. Having categorically stated that the Judgment Debtor was not opposed to the granting of the prayer 1 & 2 in the application, then subsequently the decisions made thereto amounted to a consent order.
7. Secondly, the Judgment-Creditor argued that, leave to appeal cannot be granted when the intended appeal will not be arguable. The Respondent argued that there is no automatic right to the Court of Appeal from a decision of the taxing master in an advocate-client bill of costs. It was the Judgment-Creditor's position that the grounds raised in its Memorandum of Appeal were primarily against the action of the Deputy Registrar, the taxing master herein, and that what the High Court had done in its decision was to maintain the same decisions save for corrections of the error of principle by the taxing master. The Judgment-Creditor further stated that Grounds of the intended appeal such as whether instructions fees could be charged more than once, whether to charge instructions fees on the Garnishee applications separately, and whether it was proper to pay the two sets of advocates, those were all decisions taken by the Deputy Registrar and not of the court.



8. The Judgment-Creditor argued that the Applicant had an opportunity to file a reference if they were dissatisfied by the decision of the Deputy Registrar on the seven Taxed Bills but they did not. Despite not having filed a reference, the Applicant did not bring any evidential material by way of an affidavit for consideration by the court. Instead, to the Respondents' references, in some it simply filed grounds in support and opposition. In any case, the only issue it was opposed to was the grant of the order for payment of Kshs.5,800,000/- that had been awarded by the Deputy Registrar but supported the granting of the other prayers as sought by the Respondents in the said reference.
9. The Judgment-Creditor further contents that the resultant appeal has no realistic prospect of success. This, they argued, was because the intended appeal is premised on a determination made on the basis of facts expressly and impliedly admitted by the Applicant. The Judgment-Creditor argues that the Applicant was served with a reference application that was supported by evidence in the form of evidence. Having chosen not to file a replying affidavit, then it follows therefore the averments in the said supporting affidavits were uncontroverted and therefore expressly admitted, since grounds of opposition cannot controvert averments in an affidavit. In the circumstances, the court's role is to admit those uncontroverted facts into evidence. If parties before a court admit one of the events has happened, then the court is not expected to go beyond the admitted facts.
10. The third ground raised in opposition to the application for leave to appeal by the Judgment-Creditor was that, that the application for leave lacks evidential support to sustain the application. The Judgment-Creditor argued that the affidavit by Collins Wanderi in support of the application herein did not provide a basis for the orders sought. That an affidavit should contain evidence of how and why. The Judgment-Creditor further argued that the desirability of an appeal must be judged on the basis of the evidence presented before it. That the said affidavit by the deponent never featured in court. The only thing that was placed before the court were Grounds of Support and Opposition and the court cannot now be judged on the basis of information that was never placed before it. Further, the affidavit by Collins Wanderi cannot support the application for leave as it is inviting the court to make a determination on matters that are functus officio at this stage of the proceedings. For instance, the affidavit seeks to invite the court to find that the matter in E240 & E241 of 2022 were mere applications and not substantive suits and yet the court already made a determination that these were full suits. Similarly, the court already pronounced itself on the value of the subject matter. It cannot be called upon to make a determination again as it is being invited to do so now. The Judgment-Creditor argued that the doctrine of functus officio is the principle of finality in matters before court.
11. Further, as an appeal to be argued before the Court of Appeal as preferred, is inviting the Court of Appeal to make determinations on matters of fact and not matters of law. This therefore means that the appeal has no realistic prospect of success as the Court of Appeal deals with matters of law on appeals from the High Court and not factual matters.
12. The Judgement-Creditor filed an application to Garnishee the funds of the Judgment Debtor in Accounts held by the National Bank of Kenya Limited, The Cooperative Bank of Kenya Limited, Kenya Commercial Bank Limited and Safaricom Limited. All the four Garnishees confirmed to the court that they would abide by the orders of the court once the preliminary issues were addressed. The Judgment-Debtor however opposed the application to confirm the Garnishee nisi to absolute. The Judgment-Debtor argued that the application was premature and was made without the extraction of the decree to allow the execution application under Order 23 of the *Civil Procedure Rules*. That the application to Garnishee the assets of a Judgment Debtor can only be done when there is an order of the court or a certificate of taxation in a matter.



13. The Judgement-Creditor opposed the arguments of the Judgement-Debtor to the Garnishee application and maintained the court did not carry out a fresh taxation but corrected the error by the taxing master and therefore there was a valid order capable of being executed. The Judgment-Creditor argued that there was no appeal filed against the decision of the court and that the court should make the Garnishee orders absolute and allow the payment of the judgment debt in favour of the Advocate. That a decision of the High Court in a reference was final as opposed to a taxation by the Deputy Registrar.

Determination:-

14. Both parties cited several authorities to support their arguments which I have considered. Paragraph 11(3) of the *Advocates Remuneration order* states as follows;

“ 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.”

15. It is precisely because of this provision that the application for leave to appeal by the Judgment-Debtor has been brought. Certain fact patterns emerge and by way of a background I will highlight the same. As deponed in the supporting affidavit by Collins Wanderi sworn on 9th May 2023 for the Judgment Debtor, the matters here were first taxed on 24th June 2022 and a certificate of costs awarded on 1st August 2023. On 2nd August 2022, a garnishee order was issued for Kshs.431,389,356.62/-. A Consent Order was subsequently entered and parties agreed to discuss the matter and settle the same out of court. This out of court did not yield any results and a fresh bill of costs was filed on the 7 matters and on 23rd February 2023, a ruling was delivered on the same for the sum of Kshs.5,800,000/- on each file bringing the total taxed costs to 40,900,000. Subsequently and being aggrieved by the decision of the taxing master, the Judgment Creditor filed a reference challenging the items 1 & 2 of the Bills of costs and urged the court to review the same. The Judgement-Debtor filed its grounds of support and opposition.
16. It is important to note that in Misc. Nos. E240 and E241 of 2022, the Judgment-Creditor supported the reference on the two items but only opposed the application for payment of the then taxed costs of Kshs.5,800,000/- on each of the 7 files. The Judgement Debtor did not offer any evidence to rebut the averments of the Judgment-Creditor in the said applications or at all as no replying affidavit was filed in all the seven references before the court.
17. Suffice to note that the issues being canvassed in this application were not available for consideration during the hearing and determination of the reference before this court. The averments by Collins Wanderi should have been made during the hearing of the reference application to allow this court to consider the same when it was properly seized of the matter. The Judgment-Creditor opted not to file any evidential material before the court, instead, it invited the court to re-evaluate the decision of the taxing master by supporting the Judgment Creditors application at that time. It is a little late in the day for that information to be placed before the court as the court cannot reopen a matter that it has conclusively considered and pronounced itself on.
18. I have considered the Memorandum of Appeal and the grounds set therein. While I am not persuaded that the appeal has a realistic chance of success, I am also not convinced that the same is frivolous. In any event, this court is being urged to use its discretion to grant leave to appeal judiciously and to be



guided by the tenets of the Constitution in doing so by virtue of Article 50 and 159 of the Constitution, 2010. Article 50 of the constitution provides as follows;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.” While Article 159(2)(d) states as follows;” In exercising judicial authority, the courts and Tribunals shall be guided by the following principles;

- a
- b
- c
- d. justice shall be administered without undue regard to procedural technicalities”.

19. In the case of Wambugu Kariuki & Associates v Invesco Assurance Company Limited (2018) eKLR the court stated as follows; “I have considered the application, Rule 11(3) of the Advocates (Remuneration) Orders requires a party to obtain leave from the Judge to appeal against the ruling on the taxation of the bill of costs. The court is called upon to exercise discretion. The discretion of the Court must be exercised fairly and judiciously in the interest of justice. This is more so because a party is at the mercy of the court as what he seeks from the court is not available as of right. One of the consideration a court has is whether the adverse party would be prejudice and whether a just cause has been shown by the applicant to deserve the exercise of the courts discretion.” It is these facts that a court must consider when deciding to grant leave to appeal to a party who does not have an automatic right. Guided by the law and the tenets of the Constitution and taking into consideration all the facts of the case before me, I will grant leave to the Judgment-Debtor to proceed with its appeal to the Court of Appeal as prayed in the application of 9th May 2023.

20. Having granted leave to appeal to the Judgment-Debtor, I am alive to the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules which provide as follows;

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the Appellate Court to have such order set aside.”

The Judgment-Debtor in seeking for leave to appeal to the Court of Appeal also sought for stay of execution of the decision of this court issued on 28th April 2023. The Judgment-Creditor argued that the appeal would be rendered nugatory if stay of execution is not granted and that the Judgment-Debtor was ready to abide by the orders made by this court pursuant to the same. The Judgment Debtor further argued that since it was a government body that was not going anywhere and that should the appeal be defeated; the Judgment-Creditor could always collect its costs at any time.

21. The Judgment-Creditor in its response urged the court not to stay the execution of the decree and noted that from the history of the suit, the only time the Judgment-Creditor honoured its debts was through an order of Garnishee of its accounts and never willingly.



22. I have considered both arguments in respect of the order for stay of execution. In the case of the County Government of *Tana River v. Miller and Company Advocates* (2021) eKLR, the court observed as follows:-

“The Statutory anchorage of the discretion to consider stay of execution rests on order 42 rule 6 (1) of the *Civil Procedure Rules*. It is on the basis that the Reference is a path way for an aggrieved party from the Certificate of Cost of the taxing master it may be argued correctly that the principles shall apply Mutatis Mutandis. The Court has considered numerous cases laid down for the exercise of judicial discretion. The guiding principles for determining whether or not to stay execution are; - i. Where special circumstances of the case so require. ii. There is proof of substantial loss that may otherwise result. iii. There is substantial question of law to be adjudicated upon by the appellant court. iv. Where if the stay is not granted, the appeal is successful, would be rendered nugatory..... The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

23. Flowing from the above reasoning, the court in granting a stay of execution is called upon to balance the rights of the Judgment-Debtor and those of the Judgment-Creditor. In the matter before this court, the Judgment-Creditor has on several occasions attempted to collect their fees for services rendered without much success. On two occasions the Judgment-Creditor has been forced to apply to garnishee the accounts of the Judgment Debtor. It would be unfortunate to condemn the Judgment-Creditor to the said fate for a third time, should this appeal fail. Secondly, no material has been placed before this court to persuade it that should the appeal succeed, the Judgment-Creditor will not be in a position to pay back any funds so far paid to them in partial satisfaction of the judgment debt. This court will therefore grant a stay of execution on the part payment of 50% of the judgment debt in all the 7 matters herein to the Judgment-Creditors herein and to reserve the balance for the appeal not to be rendered nugatory ab initio. Noting that this court has already issued a Garnishee nisi in respect of accounts held in four different institutions and noting that the said institutions have already confirmed indeed they hold funds in favour of the Judgment-Debtor, the Garnishee nisi herein is made absolute in respect of 50% of the judgment debt in the 7 files under consideration.

24. The Garnishees herein are entitled to reasonable costs to be paid from the said funds for their participation in the application herein. The Judgment-Debtor, upon meeting the said conditions may proceed and prosecute its appeal at the Court of Appeal.

25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF MAY 2023.

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J. W. W. MONG'ARE

JUDGE

In the Presence of: -



Mr. Ligunya holding brief for Dr. Arwa for the Judgement-Creditor/Advocate/Client.

Mr. Rotich for Judgment-Debtor/Client/Respondent.

Mr. Mutua for the 1st Garnishee.

Mr. Wanga for the 2nd Garnishee.

Ms. Ndirangu for the 3rd Garnishee.

Mr. Ojong'a for the 4th Garnishee.

Moses- Court Assistant

