



REPUBLIC OF KENYA



Wasuna & Co Advocates v Kajulu Holdings Limited & 3 others (Miscellaneous Application 123 of 2018) [2023] KEHC 19352 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 123 OF 2018**

FG MUGAMBI, J

JUNE 30, 2023

BETWEEN

WASUNA & CO ADVOCATES ADVOCATE

AND

KAJULU HOLDINGS LIMITED 1ST RESPONDENT

LALJI KARSAN RABADIA 2ND RESPONDENT

CHANDRAKANT LALJI RABADIA 3RD RESPONDENT

PRAVIN JADVA RABADIA 4TH RESPONDENT

RULING

1. Before the court is the application dated July 18, 2022 brought under rule 11 sub rule 3 & 4 of the *Advocates Remuneration Order* 2009 (ARO), order 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules*, section 560(1)(d) of the *Insolvency Act*, section 1A, 1B, 3A and 63e of the *Civil Procedure Act* and all other enabling provisions of the law.
2. The applicant seeks the following orders;
 - i. Spent
 - ii. That in the first instance, and thereafter pending the hearing and determination of the application, there be a stay of execution of the judgment of this Honourable court of 17th June 2022.
 - iii. That leave be granted and time be extended to enable the applicants/respondent to file an appeal to the Court of Appeal arising from the judgment of 17th June 2022.



- iv. That the costs of this application be provided for.
3. The application is premised on the grounds on the face of it, supported by the affidavit sworn by Dondo Joseph and submissions dated 19th August 2022. In summary, the applicants' case is that the advocate had represented the 1st respondent in a suit to wit HCCC 732/2010. Arising from that matter the advocate filed a bill of costs against the 1st respondent and its Directors, dated 13th March 2018 which was taxed at Kshs. 46,146,643.60. The respondents filed a reference to set aside the Certificate of Taxation. The reference was dismissed and judgment was entered as per the Certificate of Taxation in favour of the advocate.
 4. The applicants submit that while they were desirous of appealing the decision, leave to appeal was not obtained in good time due to a technical mishap. The respondents aver that their application for leave was mixed up in another file with a similar number but different parties. The inadvertency was allegedly admitted by the ICT Department of the Judiciary. The applicant stated that nonetheless, the appeal had a high chance of success, as the bill of costs could not be drawn against the 1st respondent and its Directors, since the company was under receivership.
 5. With respect to stay of execution counsel submitted that the 1st respondent was under receivership and the 2nd, 3rd and 4th respondent stand to suffer substantial loss and be exposed to civil jail should the application not be granted. The applicant contended that the application was brought without undue delay and was ready to furnish security as the court would deem fit.
 6. The application was opposed by a replying affidavit dated July 22, 2022 sworn by Francis Eric Wasuna for the advocate. The advocate states that the receivership of the company happened before the suit which gave rise to the bill of costs.
 7. The advocate further submitted that the instructions were given by the Directors in their personal capacities, for purposes of opposing the appointment of the receiver/manager. It was also averred that the Directors were sued in their individual capacities thereafter, for enforcement of the guarantees executed in the transaction with the bank. He observed that the applicants had failed to demonstrate that they had an arguable appeal. He termed the application as defective in form for the advocates of the applicant had sworn the affidavit without showing that he had authority to do so.
 8. He further stated that the applicants did not depone that the appeal would be rendered nugatory. The respondent further stated that the applicants had failed to provide security for the due performance of the decree.
 9. Counsel submitted that the applicants were not deserving of an order for stay of execution since they had not demonstrated that they would suffer substantial loss unless the order is granted. Counsel submitted that the applicants had made part payment of the decretal amount and therefore hardship in settling legal debt could not be said to be a ground or stay of execution. It was further submitted that the intended appeal was frivolous and had no chance of succeeding.

Analysis

10. I have considered the pleadings and rival submissions before court. There are two main issues for determination being that of stay of execution as well as leave to appeal. On the first prayer, I note that the same is for stay of execution pending the hearing and determination of this application. Technically, this prayer would be overtaken by events and would stand spent after the date of this order. As worded, the same may not benefit the applicant.



11. As regards leave to appeal, the decision whether or not to grant leave to appeal is discretionary as was stated by the Court of Appeal in *Kenya Shell Limited vs. Kobil Petroleum Limited* [2006] eKLR. The threshold for success in an application for leave to appeal has been set out in many judicial pronouncements including the case of *Machira t/a Machira & Company Advocates v Mwangi & Anor.* [2002] 2 KLR 391 as follows: -

“The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious judicial consideration.”

12. The liability of the respondents is at the heart of the intended appeal. The respondents argue that the 1st respondent as a separate legal person ought to be liable for the bill of costs and not the 2nd, 3rd and 4th defendants. As such, that the advocate should have sought leave to proceed against it and should also enjoin the receiver in the proceedings. The advocate on the other hand argues that instructions were received by the respondents’ in their personal capacities and not as Directors of the 1st respondent. This court is not required at this point to get into the merits of the intended appeal. It is enough to consider whether there is a real arguable case. In my opinion, the Draft Memorandum of Appeal dated June 17, 2022 discloses an arguable appeal which the respondents deserve a right to pursue.
13. I am also satisfied with the reasons that have been given for the mix up in the case numbers, and the evidence on record to prove that the application for leave has been brought to this court without undue delay. I therefore find that there is sufficient reason to grant the prayer for leave to appeal.

Determination and orders

14. For the foregoing reasons, the application is partially successful and it is hereby granted on the following terms:-
- i. That the respondents are hereby granted leave to appeal against the decision of this Honourable court of June 17, 2022.
 - ii. While the prayer for stay pending the hearing and determination of this application is already spent, in the interests of justice and in exercise of my judicial discretion, the respondents are granted 14 days stay of execution to seek further orders from the Court of Appeal. In default of this, the temporary reprieve shall be deemed to have lapsed.
 - iii. In order to expedite the matter, the Record of Appeal shall be filed and served within 21 days.
 - iv. The costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 30th DAY OF JUNE 2023

F. MUGAMBI



JUDGE

Court Assistant: Ms. Lucy Wandiri.

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