



Kioko (Suing as legal representative of the Estate of the Late James Mutunga Kioko) v Mwololo & 2 others; JA Makau & Co Advocates (Applicant) (Civil Appeal E82 of 2020) [2023] KEHC 24148 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E82 OF 2020
FR OLEL, J
OCTOBER 25, 2023**

BETWEEN

CHRISTINE JAMES KIOKO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JAMES MUTUNGA KIOKO) PLAINTIFF

AND

LUCAS MUTUA MWOLOLO 1ST DEFENDANT

JULIUS MWANIKI 2ND DEFENDANT

FRANCIS MUTUKU NYAA 3RD DEFENDANT

AND

JA MAKAU & CO ADVOCATES APPLICANT

RULING

A. Introduction

1. Before court are two application for determination. The first application is dated 2nd February 2023, which is brought pursuant to provisions of Section 51(2) and rule 7 of the *Advocates (Remuneration) order* and *Advocates Act* Cap 16 laws of Kenya, Section 3 & 3A of the *civil procedure Act* laws of Kenya, Order L rule 1 of the civil procedure rules and all other enabling provision of law. The main prayers sought for in the said application are that;
 - a. That this Honourable court be pleased to adopt the taxation award issued by the Deputy registrar of the High court Misc Civil case No E82 of 2020 *J.A.makau & Co Advocates v Christine James Kioko(Suing as legal representative of the estate of the late James Mutunga Kioko)* on 20th September 2021 and consequently judgment be entered in the sum of Kenya shillings



Forty one thousand, six hundred and ninety six and Five cents (Ksh.41,696.5) only as against the respondent herein.

- b. That this Honourable court be pleased to award interest at 14% from 14th September 2020 until payment in full.
 - c. That costs of this application be born by the Respondent.
2. The 2nd application is the one dated 11th April 2023, brought pursuant to provisions of Section 3A of the Civil Procedure Act, and Order 5 rule 1 of the Civil Procedure Rules. The plaintiff/applicant seeks for orders that;
 - a. That this honourable court be pleased to issue an order of stay of proceedings with regard to the application Notice of motion dated 02.02.2023 pending the hearing and final determination of an application pending before the chief Magistrate court- Machakos in CMCC No 1163 of 2008 challenging the judgement delivered in favour of the Respondent on 26.04.2012 Mwikali Julius has filed an application seeking to have judgment set aside.
 - b. That the costs of this application be in the cause.
3. The 1st application dated 02.02 2023 is supported by the grounds on the face of the said application and the supporting affidavit of Mutua J Makau. He depones that he acted for the plaintiff/respondent in the primary matter being Machakos CMCC No 1163 OF 2008 and eventually judgment was delivered in her favour on 26th April 2013. The client/respondent thereafter withdrew instruction and the firm was compelled to file advocate-client bill of costs, which was taxed at Ksh.41,696.5/= on 20th September 2021. There was no dispute on retainer and thus it was in the interest of justice to have the taxed costs be adopted as judgment of this court and interest be levied thereon at the statutory rate of 14%.
4. The plaintiff/Respondent did oppose this application and filed her replying affidavit dated 6th April 2023. She admitted the contents of paragraph 2, 3 and 5 of the advocates supporting affidavit, but denied withdrawing instructions from the said advocate. To the contrary it was the advocate who withdrew from acting for her after she had filed a complaint at the complaints commission as against the law firm, due to the firm's failure to enforce the judgment. She had already made substantial payments with regard to the advocates costs and thus it was only fair that the issue of the costs be kept in abeyance as she perused the finalization of her case before the chief Magistrate court.
5. Further she did state that the defendant in the primary case Julius Mwaniki had filed an application seeking to set aside the judgment, which had been entered against him. The said application was pending determination and that was a justifiable ground upon which the court urged to exercise its discretion in her favour and stay hearing of the advocates application pending determination final determination of the application filed before the chief magistrate court.
6. The 2nd application dated 11.04 2023, was supported by the grounds on the face of the said application and the supporting affidavit of Cristine James Kioko. The client did acknowledge the fact that the advocate did act for her in the primary suit and after judgment had been entered in her favour, the legal firm ceased acting for her when she complained over delay in recovery of the compensation due to her. In November 2019 the respondent/advocate maliciously sought to restrain her from withdrawing sums already deposited in court and as a result she paid the advocate Kshs 119,400/= . She was apprehensive that the advocate/applicant had ill motive, yet She was yet to be paid the entire decretal sum. She had only been paid part of it being Kshs 840,000/= of the expected decretal sum of Kshs 2,900,000/=.



7. In opposing the said application, the advocate/respondent did file a replying affidavit dated 10.05.2023, where he stated that it was not disputed that he acted for the client/respondent and after instructions were withdrawn, he lodged his advocate/client bill of costs, which was taxed on 20th September 2020 at Kshs forty one thousand, six hundred and ninety six and five cents. (Kshs 41,696.05/=) and a certificate of costs issued. A sum of Ksh 300,000/= was deposited in court which the respondent accessed but still refused to settle the taxed costs. He was not a party to Machakos CMCC NO 1163 OF 2008 and this matter was not in any way connected to the said suit, thus there was no need to stay recovery of the taxed costs. The respondent would also not suffer irreparable harm if his application was allowed. The advocate/respondent thus urged that the said application be dismissed.

B. Determination

8. I have carefully considered both applications, Supporting Affidavits, the respective Replying Affidavits as filed and discern that the only issues for determination are; whether the proceeding herein should be stayed pending hearing and determination of the application filed by the defendant in Machakos CMCC No 1163 of 2008 to set aside the said judgment and secondly whether the certificate of taxation dated 20th September 2021 should be adopted by this court and be converted into judgment as against the respondent herein.
9. In *Halsbury's Laws of England*, 4th Edition, Vol. 37 at p. 330, it was stated that;
- “Stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.”
10. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J. in *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000):
- “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 (emphasis added).”
11. What emerges from the discussion above is that the grant of a stay of proceedings in civil matters is a rare and exceptional remedy. As a general matter, a court will only exercise its discretion to grant a stay of proceedings pending an appeal, over an interlocutory matter before a magistrate’s Court or Tribunal



only in exceptional circumstances. While difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of South African authors, *Gardiner and Lansdown* (6th Ed. Vol. 1 p. 750),

“grave injustice might otherwise result or where justice might not by other means be attained.” As the authors correctly write, the Court will generally “hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below.”

12. Based on the facts presented, there are no exceptional circumstance’s which have been shown to exist so as to warrant stay of proceedings nor will there be any grave injustice which otherwise will result if stay is not granted. The client/applicant did expressly admit that indeed she instructed the advocate to represent her in the primary suit and he acted for her until judgment was delivered on 26th April 2019. Further she admitted that the advocate had taxed his advocate/client bill of costs at Kshs 41,696.50/=. The application filed by the defendant Julius Mwaniki in the primary suit does not concern the advocate herein and irrespective of how it is determined, the client’s obligation to the advocate will remain. There is therefore no basis upon which to stay proceeding herein can be granted and the said application is thus dismissed.
13. The 1st application on the other hand is based on straight forward provisions of section 51(2) of the *Advocates Act*, Cap 16 laws of Kenya.

“The certificate of the taxation 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 cost’s covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

14. As already pointed out above, retainer is not disputed, nor has the said taxed costs been set aside. The same remains due and owing and this court has no basis of refusing to enter judgment for the sum taxed as sought. The client/respondent is hereby advised to heed, old wisdom found in the good book at Mathew 5:25; She needs to reconcile with her former advocate and settle this matter quickly and amicably, least she be penalized further due to steep interest accruing.

C. Disposition.

15. The upshot is that this court finds that the clients notice of motion application dated 11th April 2023 is wholly unmerited and the same is dismissed with costs, while the advocates notice of motion application dated 2nd February 2023 is merited and the same is allowed in terms of prayer (1) ,(2) & (3) thereof.
16. The client/respondent will also bear costs of both applications and the same is assessed at Ksh.20,000/= for each application.
17. Stay of execution is granted for 30 days.
18. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL



JUDGE

Delivered on the virtual platform, Teams this 25th day of October, 2023.

In the presence of;

.....for Plaintiff

.....for Defendants

.....Court Assistant

