



**National Bank of Kenya Limited as the successor to Kenya National Capital Corporation  
& another v Rachuonyo & Rachuonyo Advocates (Miscellaneous Civil Application  
263 of 2019) [2022] KEHC 120 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 120 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION 263 OF 2019  
DAS MAJANJA, JA  
FEBRUARY 18, 2022**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED AS THE SUCCESSOR TO KENYA  
NATIONAL CAPITAL CORPORATION ..... 1<sup>ST</sup> APPLICANT**

**KENYA NATIONAL CAPITAL CORPORATION ..... 2<sup>ND</sup> APPLICANT**

**AND**

**RACHUONYO & RACHUONYO ADVOCATES ..... RESPONDENT**

**RULING**

1. By a ruling dated 15<sup>th</sup> December 2021, I dismissed the Applicants' (collectively referred to as 'the Bank') Reference made under Rule 11 of the *Advocates Remuneration Order* challenging the ruling of the Deputy Registrar dated 26<sup>th</sup> January 2021 following taxation of an Advocate/Client Bill of Costs dated 15<sup>th</sup> August 2019 and amended on 26<sup>th</sup> May 2020 effectively awarding the Advocates KES. 109,895,288.70. Following the decision, the Bank evinced its intention to appeal by filing the Notice of Appeal dated 15<sup>th</sup> December 2021.
2. Further, the ruling has precipitated several applications by the parties which are now before me for consideration. The Bank filed a Notice of Motion dated 22<sup>nd</sup> December 2021 seeking stay of execution and enforcement of the Certificate of Taxation in this matter pending the intended appeal. The Bank also seeks leave to appeal against the ruling of the Deputy Registrar under Rule 11(3) of the Advocates Remuneration Order. The application is supported by the affidavit and supplementary of Samuel Wanjohi Mundia. It is opposed by the Advocates through the affidavit of one of its partners, Clifford Rachuonyo, sworn on 17<sup>th</sup> January 2022.



3. The Advocates followed up the matter with their own Notice of Motion dated 17<sup>th</sup> January 2022 under section 51(2) of the *Advocates Act* (Chapter 16 of the Laws of Kenya) seeking judgment on the Certificate of Costs issued in this matter. The application is supported by the affidavit of Clifford Rachuonyo sworn on 17<sup>th</sup> January 2022. It is opposed by the Bank through the affidavit of Samuel W. Mundia sworn on 10<sup>th</sup> February 2022.
4. The Bank also filed another Notice of Motion dated 7<sup>th</sup> February 2022 seeking, in the main, an order staying further proceedings consequential upon the Advocates' Notice of Motion dated 17<sup>th</sup> January 2022 filed by the Advocates seeking judgment on the Certificate of Costs. The application is supported by the affidavit of Samuel W. Mundia, sworn on 7<sup>th</sup> February 2022. The Advocates have opposed the application by the Grounds of Opposition dated 11<sup>th</sup> February 2022.
5. The parties filed written submissions in support of their respective positions and from the totality of the material on record, several issues fall for determination. First, whether the court should grant leave to appeal against the ruling dismissing the Reference. Second, whether the court should stay execution and further proceedings and last, whether the court should enter judgment upon the Certificate of costs in favour of the Advocates.
6. An appeal against the decision on a reference under the Advocates Remuneration Order is not a matter of right and leave is required under Rule 11(3) thereof. The general principle applicable is that the grant of leave is discretionary and should not be denied unless the court is satisfied that the intended appeal has no realistic prospect of success. In *Machira T/A Machira & Company Advocates v Mwangi & Another* [2002] 2 KLR 391 the Court of Appeal observed 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 prospects 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 maybe one which the Court considers should be 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 is clarifying. There must however almost always be a ground of appeal which merits serious judicial consideration.
7. Although the Advocates suggest that the appeal has no prospects of success, I think the issues raised by the Bank are not entirely frivolous. For example, whether the point of reference for determining instruction fees in the appeal arising from the primary suit is the memorandum of appeal filed in the Court of Appeal or the pleading in the main suit giving rise to that appeal. Counsel for the Bank has pointed to the fact that decision appealed from conflicts with an earlier decision made on the same point which may need to be resolved by the appellate court. I am therefore inclined to grant leave to appeal.
8. On the issue of stay, I note that there are two applications. The first application dated 22<sup>nd</sup> December 2021 seeks stay of execution and enforcement of the Certificate of Taxation in this matter pending the intended appeal. As a matter of principle, the court cannot grant the application on the ground that execution was not possible since the Certificate of Taxation had not crystallised into a judgment hence there was nothing to be stayed by the time the first application was filed. It is when the Advocates filed the application for judgment that the Bank applied for stay of proceedings in the subsequent application in order to forestall the judgment.



9. In my view, therefore the question then is which application should be determined first. Since the Bank had the opportunity to apply for stay of proceedings in the first instance but it did not whereupon the Advocates filed the application for judgment. I shall therefore deal with the application for judgment first.
10. The Advocates had filed a Notice of Motion dated 17<sup>th</sup> January 2022 made under section 51(2) of the [Advocates Act](#) seeking judgment against the Bank for the certified taxed sum of KES. 109,895,288.70. Section 51(2) provides that:

The certificate of the taxing officer by whom a bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs 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.
11. The Certificate of Costs is conclusive as to the amount unless set aside by way of a reference under Rule 11 of the Order. In this case, the Reference has been dismissed and there is nothing to stop the court from entering judgment since the retainer is not disputed. Following entry of judgment, execution becomes imminent hence the question whether the court should stay the proceedings pending the hearing and determination of the intended appeal as requested in the second application by the Bank.
12. The general principle governing the grant of stay of proceedings was elucidated by Ringera J., in *Re: Global Tours and Travels Ltd NRB HC Winding Up Cause No. 43 of 2006 (UR)* cited in [Kenya Wildlife Service v James Mutembei](#) MRU HCCA No. 40 of 2018 [2019] eKLR as follows:

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.
13. The Bank is entitled to exercise its undoubted right of appeal while the Advocates are entitled to realise the fruits of labour that have crystallised in the certification of costs in their favour. The Bank does not dispute the retainer hence and ultimately any successful appeal will be limited to the quantum of instruction fees which may or may not be reduced on appeal. In making the order for security, I have taken into account the fact that Respondent is a reputable Bank which may ultimately meet an award made against it.
14. In order to secure the interest of both parties, I order as follows:
  - (a) The Applicants/Clients be and is hereby granted leave to appeal against the ruling dated 15<sup>th</sup> December 2021.
  - (b) Judgment is entered be and is hereby entered for the Respondents/Advocates against the Applicants/Clients for KES. 109,895,288.70 with interest at 14% per annum from 26<sup>th</sup> January 2021 until payment in full.



- (c) There shall be a stay of further proceedings pending the hearing and determination of the intended appeal from the ruling dated 15<sup>th</sup> December 2021 on conditions set out hereafter.
- (d) The Applicants/Clients shall pay the Advocates/Respondent KES. 3,000,000.00 and provide a bank guarantee for the sum of KES 10,000,00.00 from a reputable bank other than the Respondent to be agreed upon by the parties within 45 days from the date hereof.
- (e) The stay of execution shall remain in force for a period of one year from the date hereof unless otherwise extended by this court or the Court of Appeal.
- (f) In default of any condition of this order, the order of stay shall stand discharged.
- (g) The costs of this application shall be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF FEBRUARY 2022.**

**D.S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Ms Matunda instructed by Moronge and Company Advocates for the Clients/Applicants.

Mr Amuga instructed by Amuga and Company Advocates for the Advocates/Respondent.

