



**Mugambi & Company Advocates v Kiama Wangai & Company Advocates (Miscellaneous Civil Appeal 310 of 2016) [2022] KEHC 13414 (KLR) (Civ) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13414 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS CIVIL APPEAL 310 OF 2016**

**JN MULWA, J**

**SEPTEMBER 29, 2022**

**BETWEEN**

**MUGAMBI & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**KIAMA WANGAI & COMPANY ADVOCATES ..... CLIENT**

**RULING**

1. The history of this matter is well known to the parties herein. Briefly, on June 21, 2016, the applicant filed an advocate-client bill of costs dated June 20, 2016 against the respondent. Subsequently, on July 22, 2016, the respondent raised a preliminary objection against the said bill of costs on several grounds inter alia, that the same was statute barred by limitation of actions. By a ruling delivered herein on July 19, 2018, Njuguna J. upheld the respondent's preliminary objection and dismissed the applicant's bill of costs dated June 20, 2016 with costs to the respondent.
2. Aggrieved by the said decision, the applicant filed Civil Appeal No 64 of 2020 - *Mugambi & Co Advocates v Dr Wangai Kiama* in the Court Appeal. On the other hand, the respondent lodged a party and party bill of costs dated August 31, 2018 to recover the costs for defending the taxation proceedings which bill is pending taxation.  
Subsequently, the applicant filed a notice of motion dated December 9, 2020 which is the subject of this ruling.
3. The applicant Mugambi & co Advocates seeks an order for stay of the taxation proceedings pending the hearing and determination of Civil Appeal No 64 of 2020. The application is brought under order 51 rule 1 and 11 of the *Civil Procedure Rules 2010*, as well as section 3, 3A and 63(e) of the *Civil Procedure Act*, as well as the supporting affidavit of John N Mugambi Advocate, the applicant. He avers that the appeal challenges inter alia the decision by Justice Njuguna J to award the respondent costs



in her ruling of July 19, 2018. He contends that it is premature to have the costs taxed at this stage as taxation should only proceed after the final determination of a matter. Further, he avers that the appeal which is still pending determination is arguable and has a high likelihood of success. He is therefore apprehensive that if taxation of the respondent's party and party bill of costs proceeds as scheduled, the respondent will proceed with execution of the taxed costs and his appeal will be rendered nugatory.

4. In response, the respondent filed grounds of opposition. He contended that the application is misconceived and bad in law since there is no positive order capable of being executed and the order sought to be stayed is not the subject of the appeal, and that the application is incompetent as the order being sought shall not advance the intended appeal.
5. The application was canvassed by way of written submissions.
6. The applicant submitted that the fact that his appeal is arguable can be gleaned from the memorandum of appeal lodged at the Court of Appeal which contains eight (8) grounds that raise substantive legal and factual issues. It was his submission that the instant application was made promptly and without unreasonable delay. Further, relying on the case of *Niazons (Kenya) Ltd v China Road & Bridge Corporation (Kenya) Ltd* - Nairobi HCCC No 126 of 1999, the applicant reiterated that the proceedings should be stayed so that his appeal is not rendered nugatory and an exercise in futility as the costs that the respondent seeks to recover are an integral part of the appeal. Further, the applicant contended that order 51 rule 11(2) of the *Civil Procedure Rules* prohibits the taxation of costs awarded on any application before the conclusion of a suit. He relied on the case of *Kabundi v Trust Bank Ltd* [1993] eKLR to support a proposition that an appeal is a continuation of a suit as the definition of suit includes an appeal.
7. On the other hand, the respondent submitted that pursuant to the provisions of section 27 of the *Civil Procedure Act*, a successful party cannot be barred from taxing its bill of costs. He asserted that unless there is an order that alters the costs awarded by Njuguna J., taxation ought to proceed. Further, the respondent argued that the applicant has not demonstrated how the taxation proceedings if allowed to proceed shall render the appeal nugatory; that the applicant has not demonstrated any substantial loss it may suffer if stay orders are denied. Reliance was placed on the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike* - Civil Application No. 238 of 2005 where the court declined to stay taxation proceedings as the applicant had not expressed any reasonable fear about the Respondent's inability to repay the costs if taxation proceeded. In its totality, the Respondent urged that the instant application be dismissed with costs.
8. Order 42 rule 6(1) of the *Civil Procedure Rules* stipulates as follows, regarding stay of proceedings:

“6. (1) 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.”



9. In the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000* Ringera J stated that:

“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 mine]

10. From the above, it is clear to me that courts discretion in deciding whether or not to grant stay of proceedings should be guided by the following three principles;

- a. Whether the applicant has established that he/she has an arguable appeal;
- b. Whether the application was filed expeditiously; and
- c. Whether the appeal would be rendered nugatory.

11. I note that the ruling from which the taxation proceedings arose was delivered on July 19, 2018, and the respondent’s party and party bill of costs dated August 31, 2018 was filed on September 7, 2018. This application was filed over two years later on December 9, 2020. This long period of delay appears to have been occasioned by the fact that that the applicant lodged its appeal in the Court of Appeal much later and the same was only filed after leave of court was duly sought and granted. The instant application was therefore filed without unreasonable delay in the circumstances.

12. On whether the appeal is arguable, it is well settled that it is sufficient if a single bona fide arguable ground is raised for consideration by the court. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004. Indeed, courts have reiterated over and over that an arguable appeal is not one which must necessarily succeed but simply one that is not frivolous; See *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008).

13. The court has carefully perused the grounds raised in the applicant’s memorandum of appeal dated February 21, 2020 filed in the Court of Appeal. The applicant is clearly challenging the costs awarded to the respondent in the ruling of July 19, 2018 which gave rise to the respondent’s party & party bill of costs. On that basis alone, I am satisfied that the appeal is indeed arguable.

14. As to whether the appeal will be rendered nugatory if the taxation proceedings are not stayed, I find guidance in the case of *Christine Wangari Chege v John Juma Weroba & 3 others* [2021] eKLR where the Court of Appeal, while determining a similar application under Rule 5(2) (b) stated that:

“...Turning to whether the intended appeal will be rendered nugatory, we noted that the bill of costs are yet to be taxed, it is common ground that under the law, it is the taxing master who has jurisdiction to tax the bills and to determine any objection any of the parties thereto may wish to raise. From the record, the bill of costs, numerous as they may be, have not been filed in courts arbitrarily. They have been filed in the courts and in the causes where the legal



services were rendered. Indeed, even if they were filed arbitrarily, it would be for the taxing master to deal with such issues in the first instant.

In the circumstances of this application, we are not satisfied that the intended appeal will be rendered nugatory. Having failed to s requirements under rule 5 (2) (b), this application fails and is dismissed with costs to the respondent".

15. Further, in the case of *Deposit Protection Fund v Rosaline Njeri Macharia* [2006] eKLR, Ochieng J while dealing with an application of stay of taxation proceedings, observed as follows:

“...To my mind, the taxation of a bill of costs cannot occasion any loss to the person against whom it is taxed. Therefore, the issue of taxation causing substantial loss does not even arise. The only effect of taxing a bill of costs is the ascertainment of the quantum of costs payable by one person to another. Thereafter, the party whose costs had been ascertained could take out execution proceedings. The applicant did not, in my considered view, make out a case for stay of proceedings, and in particular a stay of the taxation of the defendants’ bills of costs...”

16. Similarly, the applicant in the instant case has not demonstrated how the failure to stay the taxation proceedings would render his appeal nugatory or occasion him substantial loss. Needless to add, he has not even expressed any reasonable fear about the respondent's inability to repay the costs if taxation proceeded.
17. In the premises, the court finds that the applicant has not met the threshold to warrant the court to exercise its discretion in his favour.
18. Consequently, the applicant’s notice of motion application dated December 9, 2020 is not merited. The same is hereby dismissed with costs to the respondent.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**J.N.MULWA**

**JUDGE.**

