



**Murgor & Murgor Advocates v Kenya Pipeline Company Limited
(Miscellaneous Petition 15 of 2020) [2022] KEHC 17119 (KLR)
(Constitutional and Human Rights) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 17119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS PETITION 15 OF 2020
AC MRIMA, J
DECEMBER 16, 2022**

BETWEEN

MURGOR & MURGOR ADVOCATES ADVOCATE

AND

KENYA PIPELINE COMPANY LIMITED CLIENT

RULING

Introduction

1. Murgor & Murgor Advocates, the applicant/advocate herein, instituted the notice of motion application dated July 16, 2021, (hereinafter ‘the application’). It is supported by the affidavit of Eva Kala deposed to on a similar date.
2. The application was precipitated by this court’s ruling of July 1, 2021 that dismissed the applicant/advocate’s application dated October 12, 2020 which sought to disqualify the firm of Mohammed Muigai LLP from representing Kenya Pipeline Company Limited, the client/respondent herein in taxation proceedings on account of conflict of interest.
3. The application sought the following orders;
 1. Spent.
 2. Spent
 3. That this honourable court be pleased to grant a stay of the taxation proceedings pending the hearing and determination of the advocates/applicant’s intended appeal to the Court of Appeal, against the ruling dated July 1, 2021.



4. That the cost of this application do abide the results of the intended appeal.
4. The applicant sought stay of proceedings before the taxing master on the basis that it had filed a notice of appeal dated July 7, 2021.
5. It was its case that the intended appeal raises arguable points and if this court fails to grant stay of proceedings, the appeal shall be rendered nugatory because the firm of Mohammed Muigai LLP shall continue to represent the client/respondent to its great prejudice.
6. The applicant further stated that the stay ought to be granted to avert substantial prejudice that would be occasioned to it, which could not be atoned by damages, in the event the be appeal was allowed.
7. The applicant stated that the application had been made timeously and was in the interest of justice and fairness that it is allowed so as not to render the intended appeal nugatory.

The Submissions

8. In its written submissions dated September 8, 2021, the advocate/applicant submitted that it was not legally proper for the firm of Mohammed Muigai LLP to represent the client/respondent herein in the taxation proceedings since it was conflicted.
9. It was the applicant/advocate case that the application for stay of proceedings was properly before the court for having been instituted under order 42 rule 6 of the *Civil Procedure Rules* which allow for stay of proceedings where there is an order to that effect from the court appealed from.
10. Support to the foregoing legal position was drawn from the decision in *Imperial Bank Limited (In Receivership) & 2 others -vs- Alnashir Popat & 17 others* (2017) eKLR where the court spoke to the import of order 42 of the *Civil Procedure Rules*.
11. In rebutting the client/respondent’s allegation that the applicant/advocate was undeserving of the prayers sought on account of non-compliance with the Taxation Master’s orders of July 21, 2020, it was submitted that the facts alluded to were a distortion of facts and extraneous and irrelevant to the determination of the instant application.
12. It was submitted that, as established in the case of *Global Tours & Travels Limited*, Nairobi Winding Up Cause No 43 of 2000 the applicant had satisfied the requirements needed for the stay of proceedings. In the case it was observed;

“And I 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 by whether it an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”
13. Further reference was made to the decision in *Imperial Bank Limited (in receivership & 2 others -vs- Alnashir Popat & 17 others* where the following factors were set out;
 - i. That there is sufficient cause to order stay, that it, that substantial loss would ensue from a refusal to grant stay.
 - ii. That the application was brought without delay.



14. It was submitted that the court ought to exercise discretion in a manner that would prevent an appeal, if successful, from being rendered nugatory. Reference to that end was made to the Court of Appeal decision in *Butt -vs- Rent Restriction Tribunal* (1979) eKLR where it was observed;
15. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory.
16. It was submitted that the issue of conflict of interest ought to be determined since its continuance will, in the event of success, will irreparably cause prejudice.
17. On the issue of time, it was submitted that the application was filed on July 16, 2021, 3 days after the applicant was issued with a certified copy of the ruling.

The Client/ Respondent's Case

18. The client respondent opposed the application through grounds of opposition dated July 27, 2021.
19. It was its case that the application sought to further unjustifiably delay in the taxation of the bill of costs after filing of the notice of motion application dated October 12, 2020 and another dated November 12, 2020 which are still pending hearing and determination before the Deputy Registrar.
20. It was its case further that it was inequitable to grant stay of proceedings on account of the applicant's non-compliance with directions and orders issued by the Deputy Registrar of July 21, 2020 for the filing of the applicant. Advocates further affidavit and submissions in support of the bill of costs despite no orders of stay of taxation proceedings being in place to the filing of the application.
21. It further was its case that it was unjust to grant stay of proceedings on account of the respondent/ client's compliance with the directions and orders issued by the Deputy Registrar of July 21, 2021 through the filing of the replying affidavit sworn by Stanley Manduku on August 26, 2020 and written submissions dated August 26, 2020 both filed on August 31, 2020 in response to the bill of costs.
22. It was its case that the application is incompetent, misconceived and abuse of the court process and no justifiable basis has been laid to make this court exercise its discretion.
23. It was urged the court to dismiss it with costs.

Submissions

24. In its written submissions dated October 24, 2021, the client/respondent first stated that the power of the court to grant stay is discretionary to be exercised in the interest of justice.
25. On the principle of substantial loss, it was submitted that court should find persuasion in the decision in *Muri Mwaniki & Wamiti Advocates -vs- Wings Engineering Services Limited* (2020) eKLR where it was observed that;

“A court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from enjoyment of the fruits of his judgment.”
26. While referring to the decision in *Machira t/a Machira & Co Advocates -vs- East African Standard* (2002) eKLR it was submitted that it was the duty of an applicant to demonstrate substantial loss to be suffered.



27. The client/respondent challenged the claim that the appeal would be rendered nugatory should the application not be stayed by relying on the decision in *Stanley Kangethe Kinyanjui -vs- Tony Ketter & 5 others* (2013) eKLR.
28. It was its case that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed, if allowed to happen, is reversible or if it is not reversible, whether damages will reasonably compensate such party.
29. It was its case that any harm that would be occasioned to the applicant/advocate would be reversed since the respondent client will be entitled to appoint another firm of advocates to continue the taxation proceedings to finality.
30. It was submitted further that the applicant has not demonstrated any special circumstances for the grant of stay of taxation proceedings.
31. In the end it was urged that the application be dismissed.

Analysis & Determination

32. From the foregoing respective parties' rival positions, the only issue that arises for determination is whether the application meets the threshold for stay of proceedings.
33. To that end, I will look at the law and the principles as developed by courts that guide the process.
34. Order 42 rule 6 of the *Civil Procedure Rules* provides for stay of execution or proceedings in the following terms;

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

35. In *Kenya Wildlife Service -vs- James Mutembei* (2019) eKLR, the court, in reference to *Halsbury's Laws of England* 4th edition vol 37 page 330 and 332, discussed stay of proceedings in the following manner;

“The 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 proceeding beyond all 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 the case”.

36. The consequence of staying proceedings and the high calling placed upon an applicant for its grant was fittingly discussed in *Kenya Wildlife Service -vs- James Mutembei (supra)*, when the Court observed as follows;

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.

37. In *Kenya Shell Kenya Ltd -vs- Kibiru & another* [1986] KLR 410 the Court of Appeal remarked that the tenets of order 42 must be substantiated by a party seeking stay. The learned judges identified substantial loss as the cornerstone for the grant of stay by remarking as hereunder;

“It is usually a good rule to see if order XLI rule 4 (now order 42 rule 6) of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented.”

38. Further to the foregoing, in *David Morton Silverstein vs Atsango Chesoni* (2002) eKLR the Court of Appeal made the following clarification in respect to stay of proceedings;

“The court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.

39. From the outset, it is common ground that the application was instituted timeously.

40. Therefore, the only issues to consider, whilst applying the foregoing principles are whether substantial loss has been demonstrated and whether the appeal will be rendered nugatory should the taxation proceedings be allowed to proceed.

41. As established in the foregoing authorities, substantial loss is evidence based.

42. In her affidavit deposed to on July 16, 2021, Eva Kala gave evidence detailing the source and nature of conflict of interest the firm of Mohammed Muigai LLP had in respect of the taxation proceedings.

43. She drew the nexus between prejudice to be suffered by continued representation of the client/respondent by Mohammed Muigai LLP as occasioned by conflict of interest.

44. She was categoric there will be substantial loss and will not be in the interests of justice and prudent use of judicial time to allow the taxation proceedings to proceed at the same time as the appeal.

45. As pointed out by the Court of Appeal in *Kenya Shell Kenya Ltd -vs- Kibiru & another* [1986] KLR 410, substantial loss exists in various forms. To the extent that there is the possibility of the Court of Appeal barring Mohammed Muigai LLP from representing the client/respondent, substantial loss in



- the form of delay, expense and hardship is is likely to be visited, not only upon the parties but also on the court's time. There would be wasteful use of judicial time if taxation is allowed to proceed.
46. I find that the foregoing runs contrary the overruling objective in disposal of civil disputes which places an obligation upon courts to focus on meeting the ends of justice without unreasonable delay, expense and hardship to the parties.
47. In Civil Application No Nai 173 of 2010, *Abdirahman Abdi also known as Abdirahman Mubumed Abdi v Safi Petroleum Products Ltd & 6 others*, the Court of Appeal spoke to the foregoing principles as follows;
- “The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...”
48. Coming back to the issue of substantial loss, the court in *Machira t/a Machira & Co Advocates -vs- East African Standard No 2* (2002) KLR spoke to it in the following terms;
- “In attempting to convince a court that substantial loss is likely to be suffered so that whatever he intends to achieve by his intended recourse to some other authority will be nugatory if ultimately, he prevails, the applicant is under a duty to do more than merely repeating to the court words of the relevant statutory rule or general words used in some judgment or ruling of a court in a decided case cited as a judicial precedent to guide. It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.”
49. In view of the wider interests of justice, it is my finding that the advocate/applicant has attained the high and stringent test for the grant of stay. (See *Machira t/a Machira & Co Advocates -vs- East African Standard* (2002) eKLR and *Kenya Wildlife Service -vs- James Mutembei* (2019) eKLR.)
50. On the issue whether the appeal will be rendered nugatory in the event it is successful, it was the applicant/advocate's case that damages could not sufficiently atone the prejudice it will have suffered.
51. The client/respondent's rival view was that any harm that would be occasioned to the applicant/advocate would be reversed since the respondent/client will be entitled to appoint another firm of advocates to continue the taxation proceedings to finality.
52. The *Black's Law Dictionary* 11th edition Thomson Reuters Publishers, defines the term 'nugatory' as follows;
- “of no force or effect; useless; invalid”
53. The question that arises is, in the special circumstances of the dispute, will the appeal be of no force, effect, useless and invalid, in the event it is successful?
54. The circumstances of this case are that, if stay is not granted, taxation will proceed before taxing master. Whereas that scenario seems to favour expeditious disposal of the case, in the event the appeal is successful and by that time the taxation proceedings are over, the outcome of the appeal will indeed be rendered nugatory.
55. The client/respondent's position that the firm of Mohammed Muigai LLP will be changed is simplistic as it fails to consider far reaching implications of not granting the stay. Essentially therefore, in the event the appeal is successful, it will be of no force or effect, if by that time, taxation proceedings would have been completed and executed.



56. The foregoing finds favour on the decision in *Machira t/a Machira & Co Advocates -vs- East African Standard No 2* (2002) KLR where Kuloba J as he then was observed as follows;

“A court will not order a stay upon a mere speculation; there must be the clearest ground of necessity or execution, if he shows facts which point to a conclusion that to allow execution or further proceeding to go ahead before appeal concluded would let an impecunious party to pocket and squander or pilfer what may be needed in restitution if appeal succeeds and is allowed. Another common factor is favour of the applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal. So really, stay is normally not to be granted, save in exceptional circumstances.”

57. I find that the applicant/advocate’s circumstances align with foregoing requirements as to render nugatory the intended appeal if it succeeds.

Disposition

58. In the end, find that the application meets the minimum requirements for the grant for stay of proceedings and the following final orders hereby issue;

- i. The application dated July 16, 2021 is allowed and an order is hereby issued staying taxation proceedings.
- ii. Costs of the application to be in the appeal.

59. It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 16TH DAY OF DECEMBER, 2022.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of: -

Mr. Murgor SC and Miss Kala Learned Counsel for the Applicant/Advocate

Miss Ngige Learned Counsel for the Client/Respondent.

Kirong/Regina – Court Assistants.

