



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ELECTION PETITION NO. 2 OF 2008

JANE NJERI WANJIRU KIHARA.....PETITIONER

VERSUS

CHRISTOHER L. AJEL

(Returning Officer Naivasha Constituency)..... 1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA 2ND RESPONDENT

JOHN MICHAEL NJENGA MUTUTHO 3RD RESPONDENT

RULING

1. On 19/12/2019, this Court gave a Ruling on this matter which has been in litigation since 2008. The Ruling was on taxation. The Applicant herein, Jayne Njeri Wanjiru Kihara was the Petitioner in the original suit. She had lost the case at the High Court. She appealed to the Court of Appeal with the same result. A few years later, the 3rd Respondent (John Michael Njenga Mututho) moved to tax the costs. The Applicant objected to the taxation on various technical grounds discussed in the ruling of 19/12/2020. In dismissing those objections and affirming the decision of the Taxing Master, this Court expressed hope, now vain, that it had seen the last of the dispute. The Court remarked:

25. This dispute has been in the Court system for more than ten years. The Petitioner lost at the Court of Appeal. She was ordered to pay the costs. The costs were taxed more than three years ago. To my mind, there is nothing eminently excessive about the taxed amount. In any event, the challenge to the process of taxation and the taxed amounts has been too late in coming. Litigation must come to an end. It is time to bring the curtains down on this one.

2. The two issues canvassed in that ruling was, first, whether the firm presently representing the 3rd Respondent could appropriately sue for costs since that firm had not represented him from the beginning of the suit. The second issue was whether the Applicant herein was time-barred from challenging the assessed costs.

3. The Court decided both issues against the Applicant herein. The reasons are contained in the ruling of 19/12/2021. The Applicant is persuaded that this Court was wrong on both counts. She is, of course, entitled by our constitutional design to believe so until the Court of Appeal decides on the question. However, there is no “glaring error on the face” of that ruling to warrant a review of the ruling. The Applicant simply disagrees with the Court’s ruling. That forms grounds for appeal; not review. To this extent, I will, at the outset dismiss the Applicant’s prayers asking for a review of the Court’s ruling. Let the Court of Appeal deal with the issues raised.

4. I will also readily grant leave to the Applicant to appeal against the ruling of 19/12/2019. While the 3rd Respondent has made some attempts to resist this prayer, there are no good grounds to deny it. The Applicant makes a good argument that while Rule 11(3) of the Advocates Remuneration Order does not provide the criterion which the Court should use in deciding whether to grant leave to appeal or not, Article 50(1) generally militates in favour of such leave being granted where such a contemplated appeal is not frivolous or manifestly inarguable.

5. In the present case, the Applicant maintains that the Court was wrong to rule that an advocate who comes on record pursuant to a consent with a second advocate who was otherwise not the advocate who performed the legal work to be taxed (but the legal work was done by a first advocate on record) is entitled to file and recover costs from a litigant as per the Court order. This is notwithstanding that another High Court Judge had adopted the consent order between the second and third advocate and adjudged the third advocate properly on record. It may be that the Court of Appeal would see the position differently. To be arguable, an argument raised on appeal does not need to be one sure of success; just one with logical probability of prevailing is sufficient.

6. There is also the question whether, as a factual matter, the Applicant had been furnished with reasons for the taxation for the fourteen-day statutory period to begin running. This Court formed the opinion that the reasons had been furnished in the Taxing Master's Ruling dated 12/10/2017. The Applicant still awaits more elaborate reasons. The Court of Appeal will, likewise, need to form an opinion whether the Taxing Master's Ruling dated 12/10/2017 forms the reasons contemplated in paragraph 11 of the Advocates Remuneration Order.

7. I am also persuaded that the Applicant's counsel did not get notice of the delivery of the ruling dated 19/12/2019 until there were attempts at execution. This mistake is highly regretted but it seemed to have been a function of some operational inefficiencies in the Court's staff to effectively inform all the parties of the new dates for the ruling when it was first re-scheduled due to illness. It is, therefore, not true, as the 3rd Respondent's advocates argue that the Applicant has been merely tardy and delinquent in bringing this Application long after the Ruling of 19/12/2020. I will give the Applicant the benefit of doubt on this one.

8. In short, I believe that the Applicant did not inordinately delay bringing the present Application and has raised arguable points of law fit to move forward on appeal and deserves the chance to take them up.

9. I now turn to the really sticky question. Should the Applicant, then, be granted stay of execution?

10. The appropriate provisions of the law which govern the grant of stay of execution pending appeal is Order 42, Rule 6 of the Civil Procedure Rules. The Rule provides as follows:

(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.

(2) No order for stay of execution shall be made under sub-rule (1) unless—

i. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

ii. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

11. The 3rd Respondent complains that the Applicant has not demonstrated how her appeal will be rendered nugatory if the stay is not granted considering that it is a money decree. He says that it has not been demonstrated or even claimed that the 3rd Respondent is incapable of reimbursing the decretal sum if the same is paid to him. He also states, with justification, that the Applicant has not, in her affidavit, met one of the requirements for the grant of stay: furnish security for costs.

12. Counsel for the Applicant conceded in his oral submissions that, indeed, they had not furnished security for costs but pointed out that the Supporting Affidavit had stated that she was willing to abide by any conditions placed by the Court. He, however, undertook, as an officer of the Court that her client was willing and able to give a bank guaranty for the entire decretal amount. As for the substantial loss to be suffered by the Applicant, the Applicant's counsel argued that the amount in question is extremely large especially given the prevailing economic circumstances. The prevailing economic circumstances are those wrought by the global COVID-19 Pandemic, counsel argued.

13. In my view, there is no controversy that the 3rd Respondent would be able to reimburse any amounts paid to him. There is also no controversy that the amount in question is very large – verging on Kshs. 10 Million when interest on the taxed amount is added. Even considering the total monthly emolument of a Member of Parliament like the Applicant, that is a large sum of money for an individual to raise especially in circumstances where she believes that she will ultimately not be obligated to pay it. So while there is no demonstrated real likelihood that the 3rd Respondent will be unable to repay the decretal sum if paid, ordering the Applicant to repay the full sum in the circumstances could put her in a perilous financial position and needlessly jeopardize her right of appeal.

14. In the circumstances, the Court is required to balance the prospect that an appeal may be rendered nugatory in the absence of a stay, against the principle that the successful party in the proceeding

should be entitled to the fruits of the judgment especially since the Applicant has already demonstrated that there is at least an arguable ground of appeal.

15. Applying this test to the case at hand and all circumstances considered, I am of the opinion that it is possible to balance the rights and interests of the parties by requiring the Applicant to pay part of the decretal amount while she posts a bank guaranty for the remaining amount. The appropriate amount, in my view, is half of the initial decretal amount (Kshs. 7,523,107). The Applicant shall pay half of that amount to the 3rd Defendant while she will furnish a bank guaranty for the remaining half.

16. The upshot is the following:

i. The prayer to review, vary or set aside the order made in the Ruling dated 19/12/2019 is declined.

ii. Leave is granted to the Applicant to file an appeal against the Ruling/decision delivered by this Court on 19/12/2019.

iii. Pending the hearing and determination of the appeal to be filed under the leave given in (ii) above, there will be a stay of execution or any further execution of the Ruling/decreed/order arising from the Ruling/decision dated 19/12/2019 on the following conditions:

i. The Applicant shall pay to the 3rd Respondent half of Kshs. 7,523,107 within 45 days of today;

ii. The Applicant shall deposit a bank guaranty for half of Kshs. 7,523,107 within 45 days of today;

iii. This stay of execution shall remain in force only for one calendar year (365 days) from today. If the Applicant shall require an extension of the stay of execution granted herein beyond that time, the Applicant shall move the Court of Appeal for extension of this order or prosecute her appeal at the Court of Appeal within that time. For avoidance of doubt, the extension of this stay of execution, if needed, shall be sought at the Court of Appeal and not at this Court.

iv. The Applicant/Petitioner shall pay the costs of this Application.

17. Orders accordingly.

Dated and Delivered at Nakuru this 24th day of June, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.