



REPUBLIC OF KENYA



Ewaso Ngiro North Development Authority v Apa Insurance Limited (Civil Appeal 58 of 2018) [2024] KEHC 3779 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 58 OF 2018
EM MURIITHI, J
APRIL 4, 2024**

BETWEEN

EWASO NGIRO NORTH DEVELOPMENT AUTHORITY APPELLANT

AND

APA INSURANCE LIMITED APPLICANT

RULING

1. By a Notice of Motion under certificate of urgency dated 4th December 2023 brought under Section 1a, 1b, 3 & 3A of the [Civil Procedure Act](#), Order 51 of the [Civil Procedure Rules](#) and Article 159 (2) of [the Constitution](#), the Applicant seeks:
 1. “Spent
 2. That this Honourable Court be pleased to arrest the ruling on taxation scheduled for 7/12/2023 pending the inter-partes hearing and determination of this application.
 3. That upon granting prayer 2 this Honorable Court be pleased to place application dated 2/11/2023 before the honourable judge for directions.
 4. That the costs of the application be provided for.”
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Masamba Sarah Baraka, the Applicant’s advocate sworn on even date. She avers that the application dated 2/11/2023 was filed in court on 3/11/2023 and served upon the Respondent on 6/11/2023. After filing a replying affidavit dated 9/11/2023, the Respondent fixed the matter for taxation on 23/11/2023, and on that date, she encountered internet hitches in seeking directions to have the application of 2/11/2023 heard first before the taxation proceedings. The trial court directed that the Applicant files a response to the bill of costs and the ruling was reserved on 7/12/2023. Unless the said application is heard and determined first, it will be rendered nugatory if the ruling is delivered



as scheduled. The orders sought in the application of 2/11/2023 are substantive in nature and the same should be heard by the judge. The application has been made in utmost good faith and the prayers sought, if granted, will not prejudice the Respondent's case if any.

3. Shelmith Ngiure, the Applicant's legal officer swore a further affidavit on 18/1/2024 in support of the application.
4. The Respondent opposed the application vide the replying affidavit sworn by Kiogora Mugambi, its advocate on 6/12/2023. He avers that the application is frivolous, vexatious, an abuse of the court process and *res judicata* as it is a replica of the application dated 2/11/2023 filed in the lower court. In his view, the orders sought by the Applicant are not available as he was not granted stay of execution of the judgment in which the Respondent was awarded costs. The application is premature as the taxation is designed to determine the quantum of costs. The application is an appeal cleverly cloaked and mischievously disguised as an application to arrest the ruling scheduled for 7/12/2023, and there is no plausible explanation on delay in lodging the application from the date when this court delivered its ruling. He urges the court to dismiss the application and allow the taxation to proceed.

Submissions

5. The Applicant urges that it has lodged appeal No E138/2023 against the judgment of 17/8/2023 which awarded costs to the Respondent, and cites *Re Global Tours & Travel Ltd* Civil Application No NAI 322 of 2006 (UR). It urges that it stands to be greatly prejudiced if the taxation proceedings are allowed to continue as the same would open the door to execution proceedings whereby it will be condemned to pay costs before a final determination is reached which is tantamount to stifling its right of appeal, and cites *Patrick Wafula Kuloba v Director/Chief Executive Officer, Kenya Industrial Research & Development Institute* (2021) eKLR.
6. The Respondent faults the Applicant for failing to indicate what prejudice it stands to suffer if the taxation of the bill proceeds, and cites *Deposit Protection Fund v Rosaline Njeri Macharia* (2006) eKLR. It urges that the issue of taxation of bill of costs is not prejudicial to the Applicant, as it can proceed to apply for stay of execution. It urges that only through taxation can costs be ascertained and the taxation proceedings are independent and not subject of appeal.

Analysis and Determination

7. The issue for determination is whether taxation of costs in this matter ought to be stayed pending the hearing and determination of Meru High Court Civil Appeal No E138/2023.
8. Dissatisfied with the trial court's decisions of 27/2/2018 and 12/6/2018 condemning it unheard, Ewaso Ngiro North Development Authority, the Respondent herein appealed to this court, and the court (S. Chitembwe J) vide its judgment of 18/2/2020 rendered thus, "In the end, I do find that the appeal is merited and is hereby allowed. The ruling of the trial Court of 12th June, 2018 as well as the ex-parte judgment delivered on 27.2.2018 are hereby set aside. The suit between the parties to be heard and determined on its merits. Costs shall follow the outcome of the fresh hearing."
9. The suit was subsequently heard afresh and a determination made on 17/8/2023 awarding costs to the Respondent herein. The Applicant, being dissatisfied with the said decision has lodged appeal No E138/2023, which is the basis upon which the stay of the taxation proceedings is grounded. The Respondent urges that taxation proceedings are independent proceedings within the province of the taxing master and a bill of costs is not subject of an appeal.



10. This court is minded that taxation is a legitimate process of *Advocates Remuneration Order* and the *Civil Procedure Rules*, and the Applicant was duly invited to participate in the consideration of Bill of Costs by filing a replying affidavit, or otherwise challenge the bill of costs. It would, on face value, appear to be prudent for the Applicant to await the conclusion of the taxation proceedings and, if aggrieved, then seek stay of execution pending appeal.
11. But if the appellate court will have made a determination that affects the costs of the suit already taxed, judicial time would have been wasted. I respectfully agree with the Court (Maureen Onyango, J.) in *Parick Wafula Kuloba v Director/Chief Executive Officer, Kenya Industrial Research & Development Institute* (2021) eKLR that “it makes judicial sense to avoid a situation where a taxation will eventually have to be repeated or become redundant depending on the outcome of the appeal.”
12. The overriding objective of the civil process to facilitate an expeditious determination of disputes at proportionate and affordable cost would appear to favour the halting of the determination of taxation of the Bill of Costs.
13. Once a determination on the appeal is made, the taxation shall proceed from the stage it had reached, subject to any directions or further orders of the appellate court at the conclusion of the appeal.

Orders

14. Accordingly, for the reasons set out above, the Court finds that the application dated 4/12/2023 is merited and it is granted.
15. Costs to abide the outcome of the appeal.
Order accordingly.

DATED AND DELIVERED THIS 4TH DAY OF APRIL, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mithega & Kariuki Advocates for the Applicant.

M/S Kiogora Mugambi & Co Advocates for the Respondent.

