



**Macharia Mwangi & Njeru Advocates v Ecobank Kenya Limited (Miscellaneous Application E298 of 2019) [2024] KEHC 10600 (KLR) (Commercial and Tax) (10 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10600 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E298 OF 2019**

**A MABEYA, J  
SEPTEMBER 10, 2024**

**BETWEEN**

**MACHARIA MWANGI & NJERU ADVOCATES ..... ADVOCATE**

**AND**

**ECOBANK KENYA LIMITED ..... CLIENT**

**RULING**

1. This ruling determines two applications; the application dated 31/1/2020 by the advocate for entry of judgment as taxed by the deputy registrar and the application by the client dated 8/5/2024 for stay of proceedings pending appeal. I propose to start with the application for stay since its outcome will have a bearing on the advocate's application.

**Application dated 8/5/2024**

2. The application is brought under Article 159 of the Constitution of Kenya 2010, sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 rule 1 of the Civil Procedure rules 2010 and the inherent powers of the Court.
3. The application seeks orders for a stay of proceedings pending the ruling on the Notice of Motion COA CAPPSP/E003/2024, *Ecobank Kenya Limited v. Macharia Mwangi & Njeru Advocates* dated 11/1/2024. It further seeks that the stay of proceedings be extended until the client's intended appeal before the Supreme Court is heard and determined. Additionally, the application asks the court to grant orders for safeguarding the subject matter of the appellant's intended appeal to the Supreme Court.
4. The application is based on the grounds stated on the face of the Motion and the affidavit of Ms. Caroline Mbenge sworn on 8/5/2024. The client's case is that the matter involves filing a bill of costs



for taxation, charging the client for instruction fees related to debt collection and the realization of securities for a loan amounting to USD 28,232,287.00, under the all-inclusive scale in paragraph 7(b), Part II of Schedule 5 of the [Advocates Remuneration Order](#).

5. That considering that only one demand notice was issued, the taxing master taxed the advocate's bill under the same scale at Kshs. 43,688,883.40 for instruction fees, which, along with VAT and disbursements, totaled Kshs. 50,689,513/-.
6. Dissatisfied with this outcome, the client filed a reference, whereby Majanja J overturned the decision, ruling that the advocate was entitled to charge instruction fees under paragraph 1, Part II of Schedule 5. The advocate appealed against the ruling and in addressing the issue, the Court of Appeal interpreted section 5, paragraph 7(b), focusing on the word "may," and determined that the advocate was entitled to instruction fees solely under paragraph 7(b).
7. Following that decision, the client filed an application on 11/1/2024, seeking a stay of execution of the judgment and certification that the issue raised substantial questions of law of general public importance. This application was expedited and the Court of Appeal scheduled a ruling date for 20/9/2024. Meanwhile, the advocate was actively pursuing enforcement of the Certificate of taxation through a Motion dated 31/1/2020.
8. The client averred that the ruling on the advocates application was imminent and could be delivered before the Court of Appeal's ruling on the stay of execution, potentially rendering the appeal moot. If the Court of Appeal grants a stay of execution of its judgment, any enforcement orders would be futile.
9. The application was opposed by the advocate through a replying affidavit dated 3/6/2024, sworn by Elijah Mwangi Njeru. He stated that the client had not been truthful by omitting that the Court of Appeal had determined that the Deputy Registrar had properly taxed the costs. He noted that the client had sought leave from the Court of Appeal to certify that the matter raised issues of general public importance and requested a stay of execution of the judgment, for which a ruling date was reserved.
10. That however, the Court of Appeal declined the prayer for status quo and stay of execution. That the current application seeks to override that decision by requesting orders that the Court of Appeal had already denied. The advocate argued that the client should have sought a stay of proceedings from the Court of Appeal, the court from which they intend to appeal. Although he acknowledged that the Court has jurisdiction to stay proceedings pending the hearing and determination of an appeal, he contended that under Rule 38(1)(b) of the [Supreme Court Rules](#), there is no pending appeal unless the client's application for certification is granted.
11. The application was canvassed by way of written submissions which I have considered. The advocate argued that the client's application for status quo orders had already been declined by the Court of Appeal. That the present application was an attempt to override that Court's decision. Counsel emphasized that the client should have sought those orders from the Court of Appeal, not this Court. That in the circumstances, the application was an abuse of the court process.
12. Additionally, the advocate submitted that while the client's application at the Court of Appeal was under the jurisdiction of the Supreme Court, the High Court's jurisdiction had been exhausted after its decision was overturned by the Court of Appeal. Without jurisdiction, the advocate argued, the application was invalid and could not succeed.
13. It was contended that the client had not met the threshold for a stay of proceedings and that the advocate would suffer substantial loss and prejudice if the orders were granted. That this Court could only grant a stay in relation to a pending appeal before it, not concerning a pending application for a stay at the Court of Appeal.



14. In response, the client maintained that the Court had jurisdiction to hear and determine the advocate's application, arguing that the absence of specific provisions for the orders sought should not prevent the Court from determining the matter. That the client's intended appeal was arguable, as was submitted in the Court of Appeal, and that any execution proceedings would undermine the purpose of the intended appeal thereby rendering the proceedings before the Court of Appeal and Supreme Court ineffective. That it stood to lose Kshs 50,689,513.28 if the advocate succeeded in enforcing the
15. I have considered the application, the response provided and the rival submissions by Learned Counsel. The orders sought in the application are for stay of proceedings pending the delivery of a ruling in the Court of Appeal on an application dated 11/1/2024.
16. An order for stay of proceedings and stay of execution is governed by order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides that;

“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.”

17. The principles that a court must consider in an application for stay of proceedings were set out in the case of *Global Tours and Travels Limited Nairobi Winding Up Cause No. 43 of 2000* cited in [Kenya Power & Lighting Company Ltd vs Esther Wanjiru Wokabi](#) 2014 eKLR. In that case, Ringera J (as he then was) stated 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 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”.

18. In [Halsbury's Law of England](#) 4th Edition. Vol. 37 page 330 and 332, it is stated that: -

“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.”

19. Those then are the principles and parameters within which this Court is called upon to consider in determining the client’s application.
20. In this case, the advocate’s bill of costs was taxed by the taxing master at Kshs 50,689,513.28, including VAT and disbursements. The client challenged this decision at the High Court, which overturned the taxing master’s decision. The matter was then taken to the Court of Appeal which upheld the original decision. Dissatisfied, the client has sought to go to the Supreme Court for the determination and what is pending is the application for certification at the Court of Appeal.
21. In the meantime, the advocate has filed a separate application before this Court for entry of judgment based on the certificate of taxation. This situation has led to the current application, where the client seeks a stay of proceedings pending the Court of Appeal’s ruling on the certification application.
22. One of the issues that arise in the application is the jurisdiction of the Court to grant the orders sought. The advocate is adamant that, having made a determination on the reference, the Court lacks jurisdiction to handle the application and the same ought to have been filed in the Court of Appeal. That this Court’s jurisdiction in an application for stay of proceedings is only in respect to appeals pending before it.
23. In the celebrated case of *Owners of the Motor Vehicle M.V. Lillians versus Caltex Oil (Kenya) Limited* (1989) KLR 1, the Court of Appeal held: -

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular court has cognizance of or as to the area over which the jurisdiction shall extend; or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the fact exists where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision a merit to nothing. Jurisdiction must be acquired before judgment. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Facts constitute the evidence before the court...The moment a court determines that it has no jurisdiction it has to down its tools and proceed no further”

24. Determining jurisdiction before addressing the merits of an application is crucial because it defines the court’s authority and scope. In this case, Order 42 Rule 6 of the *Civil Procedure Rules* specifies that a stay of proceedings can only be granted by either the court from which the appeal originates or the court to which the appeal is directed. Given that the appeal is intended to be from the Court of Appeal, the Court’s view is that, it is either the Supreme Court or the Court of Appeal that should entertain the stay application.



25. More-so, it became crystal clear at the hearing of the application, that when the parties were arguing certification application, the client sought the stay from the Court of Appeal, but that Court declined.
26. In light of the forgoing, this Court finds that it would not be proper to exercise a jurisdiction that does not exist. This determination is based on the fundamental principle that jurisdiction establishes the limits within which a court is empowered to act. As set out above, Order 42 is clear as to when an order of stay is to be made, it is either by the court from where an appeal arises or to the court to which an appeal is made. In the present case, neither of the circumstances exist.
27. Given the above findings, it is unnecessary to address the merits of the application or evaluate the grounds for granting a stay of proceedings. I find no merit in the application and the same is hereby struck out with costs.

### **Application dated 31/1/2020**

28. The Motion is brought pursuant to section 51 of the *Advocates Act* CAP 16 Laws of Kenya. It seeks that judgment be entered for the sum of Kshs 50,689,513.28 as taxed and certified by the Deputy Registrar. That interest be charged at the rate of 14% per annum from 19/6/2016.
29. In support of the application, the advocate relied on the grounds on the face of the Motion and the supporting affidavit of Elijah Mwangi Njeru.
30. Under section 51 (2) of the *Advocates Act*, where a taxing master certifies costs, if the certificate has not been altered or set aside, judgment is to be entered accordingly.
31. In *Lubullellah & Associates Advocates vs N. K. Brothers Limited* [2014] eKLR, the court observed that; -

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs.”
32. The court has the jurisdiction to enter judgment on a certificate of taxation when the retainer is not disputed and when there is no reference. In this case, the client challenged the taxation through a reference which has since been determined. With the reference having been determined, the Certificate of taxation remains valid and has not been set aside. Consequently, nothing is standing in the way of entering judgment as per the certificate of taxation. My finding is that the application has met the conditions set out in section 51 of the *Advocates Act*.
33. Accordingly, the application is allowed and judgment is hereby entered in favour of the advocate for Kshs. 50,689,513.28. The advocate prayed for costs and interest. The same is hereby allowed pursuant to Rule 7 of the Advocates (Remuneration) order at 14% from the expiration of one month from the delivery of the advocate’s bill to the client.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

