



REPUBLIC OF KENYA



Tororei p/a M/S Tororei & Co Advocates v Kebenei (Miscellaneous Civil Application 151 of 2019) [2023] KEHC 924 (KLR) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION 151 OF 2019
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

NATHAN TOROREI P/A M/S TOROREI & CO ADVOCATES APPLICANT

AND

PERIS JELAGAT KEBENEI RESPONDENT

RULING

1. The applicant approached this court vide a Chamber Summons dated June 14, 2022 seeking the following orders;
 - a. There be a stay of execution of the order of the taxing master dated August 9, 2019.
 - b. The notice objecting to the decision of the taxing master expressed through the letter dated March 22, 2022 be deemed to have been properly filed as a reference.
 - c. The costs be included in the taxation
2. The Application is premised on the grounds set out in the said application and the contents of the affidavit sworn in support of the application.

Applicant's Case

3. The Applicant's case is that he filed a bill of costs dated August 9, 2019 which was taxed and he was awarded Kshs 68,902, which he claims was contrary to the provisions of the [Advocates Remuneration Order](#). He contended that tax master disregarded the fact that it is a High Court matter and failed to apply Schedule 6 of the Advocates Remuneration Order, 2014.
4. Upon requesting for reasons for the ruling on March 22, 2022, the taxing master served him with reasons on May 27, 2022 vide a letter dated April 4, 2022. In the circumstances, it is fair, just and expedient that the Court Order a stay of execution.



Respondent's Case

5. There is no response on record for the respondent.

Analysis And Determination

6. I have perused the ruling of the taxing master and the bill of costs dated August 9, 2019. It is apparent that the bill of costs arose from the representation of the respondent in HCCA No 58 of 2017. The taxing master dismissed the objection as according to her the bill arose from the lower court matter/ instructions. The basic jurisprudence in support of stay of execution pending an appeal or reference is laid down in the persuasive authority in *Austrim Nylex Ltd –vs- Kroll & Others (2001) VSC 168* which extrapolated the following parameters for consideration:

- i. It is a fundamental principle that a claimant is entitled to have a proceeding tried in the ordinary course of the procedure and business of the court, subject only to an exercise of the jurisdiction to grant a stay on proper grounds.
- ii. (ii) The power to grant a stay is an 'extraordinary jurisdiction' and it will only be exercised in exceptional circumstances.
- iii. (iii) The applicant must show by evidence that the proceeding is frivolous and vexatious or that for some other reason it should be stayed.
- iv. (iv) Even where an appeal is pending in the primary proceedings, a stay will not ordinarily be ordered or ordered as a matter of course;
- v. (v) The applicant must show that he has some prospect of success on the appeal; and
- vi. (vi) There are other matters to be taken into consideration in the exercise of the discretion to grant a stay.

7. The applicant in this matter is aggrieved by the decision of the taxing master and seeks to file a reference before this court. To vary or set aside the decision. With regard to the present application, I find it inevitable not to rely in the principles set out in the case of: *Samvir Trustee Limited –vs- Guardian Bank Limited Nairobi (Milimani) HCC 795 of 1997* where Warsame J as he then was held as follows:

'Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court. The 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 the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant. For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of



substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss. Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation. At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.'

8. Further to this, the court in *RWW vs EKW (2019) eKLR* made the following observations: 'The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs'
9. A plain reading of the impugned ruling shows there are issues on questions of facts and law which has to be considered by the reference court. Where there is a bona- fide ground against a taxing masters' decision with high chances of success this court ought to exercise discretion in favour of the Applicant. It is my view that the taxing master erred in her determination and therefore the application succeeds as follows;
 1. A stay of execution of the order of the taxing master dated August 9, 2019 is hereby issued.
 2. The notice objecting to the decision of the taxing master expressed through the letter dated March 22, 2022 is deemed to have been properly filed as a reference.
 3. Parties are directed to file submissions on the reference within 7 days, the applicant shall file and serve the same on the respondent within 7 days of this ruling and the respondent shall have 7 days to respond.
 4. The applicant is also directed to serve this order on the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF FEBRUARY 2023.

R. NYAKUNDI

JUDGE

Coram: Hon. Justice R. Nyakundi

M/S Magare Musundi & CO. Adv for the respondent

M/S C.D Nyamweya & CO. Adv for the applicant

