



**Kenyariri & Associates Advocates v Kenyariri (Miscellaneous Case E002 of 2021)
[2023] KEHC 3956 (KLR) (Commercial and Tax) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CASE E002 OF 2021**

A MABEYA, J

MAY 5, 2023

BETWEEN

KENYARIRI & ASSOCIATES ADVOCATES ADVOCATE

AND

JAMES BICHAGE KENYARIRI CLIENT

RULING

1. Before me is a Motion on Notice dated 20/2/2023 by the client. The same was brought under sections 1A, 3A, 75, 78 and 79G of the Civil Procedure Act and order 42 rule 6(1) of the Civil Procedure Rules.
2. The Motion sought two prayers, to wit:-
.....
 2. That a stay of execution of this Honourable Courts ruling on 23rd May, 2022 and certificate issued on June 13, 2022 be granted pending the hearing and determination of this application.
 3. The Court be pleased to grant a stay of execution on its ruling issued on May 23, 2022 and certificate issued on 13th June, 2022 pending hearing and determination of the application for review and possible appeal against the ruling.”
3. The grounds therefore were set out in the body of the Motion and the Supporting Affidavit of the client dated 20/2/2023. These were that he was aggrieved by the ruling on taxation dated 23/5/2022 and the filed an application for review dated 17/10/2022. That however, that application was filed as a Misc. Appln No. E 763 of 2022 (“the said application”). That if the orders sought were not granted, he stood to suffer substantial loss.



4. That when the Court considered this matter in February, 2023 it never considered the said application as it referred to a Misc Appln No. E 763 of 2021. Which was altogether a different matter. That as a result, the court proceeded and granted Judgment on the Advocate's application dated 17/6/2022. The client prayed that the application be allowed as prayed.
5. The application was opposed by the Advocate vide his grounds of opposition dated 24/2/2023. The Advocate contended that Judgment had been entered and therefore the Court was functus officio; that the Court had found that there was no reference as provided in law against the ruling on taxation and that what the client had been directed to file at the time the ruling for judgment was made was stay pending appeal and not review.
6. The application was argued orally and the Court have considered the submissions.
7. This is an application for stay pending review and/or possible appeal. An application for stay pending appeal must demonstrate that he will suffer substantial loss if the stay is not granted and the appeal turns out to be in his favour. He must also give security for the due performance of the order or decree that would ultimately be binding on him. Further, the application must be made timeously.
8. As to the filing of the present application, the ruling sought to be stayed was delivered on 23/5/2022 and certificate of costs issued on 13/6/2022. The present application was made on 20/2/2023, a period in excess of 7 months. Obviously, there was inordinate delay. The reason why an application for stay should be made timeously is to obviate a possibility of the circumstances of the parties having changed.
9. In the present case, the circumstances have greatly changed as both the ruling and certificate of costs sought to be stayed have already been acted upon and a judgment entered thereon. Indeed, a judgment was duly entered on 17/2/2023. In that regard, I agree with the Advocates contention that the Court has become *functus officio* as far as the impugned ruling and the certificates are concerned.
10. As to substantial loss, the client did not demonstrate that if he paid over the decreed amount of Kshs 501,215/=, the Advocate would not be in a position to refund the same. No substantial loss was proved to warrant a stay being granted.
11. On security, none was offered and accordingly, this court cannot exercise its discretion in favour of the client.
12. There was an issue that the client raised. That he had challenged the impugned ruling and certificate vide an application dated 17/10/2022 which was wrongfully filed in Misc Appln No. E 763 of 2022 instead of this file. The client had not produced the said application when the Court was considering the matter before rendering its ruling of 19/2/2023 in which it gave a final judgment on the said certificate of costs dated 13/6/2022.
13. That application was now produced in the current application. It was a Motion dated 19/10/2022. It was expressed to have been brought under sections 1A, 3A and 63 (e) of the [Civil Procedure Act](#) and Order 12 Rule 7 of the [Civil Procedure Rules](#).
14. In that Motion, the client sought a total of 7 prayers which basically sought the review of the ruling of 22/5/2022. That was completely an improper challenge to the ruling on taxation. That cannot be said to have been a reference against the taxation. To the extent that the same was not a proper reference, it cannot be said that it was a proper challenge to the taxation.
15. In any event, I have looked at the entire application what the client was contesting was that the taxing officer did not consider his replying affidavit which contended that the subject matter of the suit was Kshs. 1,200,000/= and not Kshs. 12,479,177/70/= that the Advocate had indicated in the Bill of Costs.



16. In paragraph 2 of the ruling on taxation, the taxing master observed:

The bill is opposed by was (sic) of a replying affidavit by the Respondent. The date is 21st the month is not legible and the year is 2021. The salient features included objecting to some of the items in the bill of costs. Further, he alleged to have paid Kshs. 150,000/= as instructions fees. That the Bill of Costs should be taxed at less than Kshs. 80,000/= as it was a straight forward matter.”

17. At page 3 paragraph 2 of that ruling, the Honourable taxing master observed: -

“According to the pleadings, the value of the subject matter being the loan was Kshs. 12,479,177.70 and hence the same will be used to calculate the instruction fees....”

18. I have gone an extra mile to consider and set out the contents of the impugned ruling to show how the application before me is unmeritorious. It must be had in mind that this was a second taxation the Court having set aside the earlier one in January, 2022.

19. I think I have said enough to show that the application before me is without merit. The same is dismissed with costs to the Advocate.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

