



**Muriu Mungai & Company Advocates v New Kenya Cooperative Creamaries Ltd (Miscellaneous Civil Application 295 of 2014) [2023] KEHC 19216 (KLR) (Civ) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 19216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION 295 OF 2014**

**DO CHEPKWONY, J**

**MAY 3, 2023**

**BETWEEN**

**MURIU MUNGAI & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**NEW KENYA COOPERATIVE CREAMARIES LTD ..... RESPONDENT**

**RULING**

1. Before court is the Applicant's Notice of Motion application dated 23<sup>rd</sup> April, 2021 brought under sections 1A, 1B, 3A, & 63 (e) of the *Civil Procedure Act* and order 42 rule 6 of the *Civil Procedure Rules*. The application seeks for the following orders that; -
  - a) Spent;
  - b) This Honourable court be pleased to stay the re-taxation proceedings in the matter pending the hearing and determination of the intended appeal;
  - c) Costs be provided for.
2. The application is supported by the Supporting Affidavit of David Mukii Mereke and is premises on the following grounds;
  - a) This Honourable Court vide a ruling delivered by Hon. Justice Thurairaja on 6<sup>th</sup> May, 2020 ordered re-taxation of Item No.8 of the Respondent's Advocate/ Client Bill of Costs dated 24<sup>th</sup> March, 2014 and which ruling the Applicant has preferred an appeal.
  - b) The Applicant has an arguable appeal with overwhelming chances of success and which shall be rendered nugatory in the event the Bill of Costs is re-taxed.



- c) Application has been brought without delay.
- d) Unless the orders sought are granted, the applicant will suffer irreparably.
- e) It is in the interest of justice and fairness that the orders sought be granted.

### **Respondents Response**

3. In response to the application dated 23<sup>rd</sup> April, 2021, the Respondent filed a Replying Affidavit sworn by Peter Munge on 4<sup>th</sup> June, 2021. He deposed that the client's application is incompetent, fatally defective and bad in law as the same is filed by the Client's advocates and the Supporting Affidavit is also sworn an advocate on disputed facts.
4. He stated that the Advocates Bill of Costs was filed on 13<sup>th</sup> October, 2014 and the Bill of Costs was taxed on 2<sup>nd</sup> September 2015. Pursuant to the Ruling of 2<sup>nd</sup> September, 2015 a reference was filed with respect to three (3) items in the Advocates Bill of Costs and on 9<sup>th</sup> February, 2015 a consent was recorded by both parties referring the matter back to the Taxing Officer for Taxation of the three (3) items in the Advocates Bill of Costs.
5. He avers that as a consequence of the Consent Order on 9<sup>th</sup> February, 2015 the only pending issues in the Advocates Bill of Costs which had 83 items, were three (3) items which were referred by consent back to the Taxing Officer for Taxation.
6. The Respondent deposed that on 4<sup>th</sup> May, 2015 parties appeared before the Taxing Officer for Taxation of the three items and Counsel from the client made oral submissions where they urged the Taxing Officer to peg the value of subject matter at Kshs.547,038,870/= and in the eventual Ruling delivered on 26<sup>th</sup> February, 2016 the Taxing Officer adopted the client's submissions in determining the value of the subject matter.
7. The Respondent further deposed that the client filed the reference dated 14<sup>th</sup> June, 2016 seeking to set aside the decision by the Taxing Officer on 25<sup>th</sup> February, 2016 and in the said reference the client made attempts to introduce new issues which were not before the Taxing officer prior to the decision under challenge.
8. The reference was determined vide a Ruling delivered on 6<sup>th</sup> May, 2020 where one of the three items was referred back to back to the Taxing officer for fresh taxation. He contends that litigation must come to an end and the client's application is intended to clog determination of this matter.
9. The Respondent contends that the discontinuity of the Advocate/Client relationship between the parties herein resulted to several suits and taxations and therefore a consent was recorded in Misc. Application No.799 of 2007 where that matter was to be the parent file for purposes of reconciliation and parties agreed to stay execution in all matters. He further contends that there is no risk of execution due to the consent recorded on 17<sup>th</sup> April 2013.
10. The client's present application is an afterthought and it has been filed after an inordinate delay as the impugned ruling was delivered on 6<sup>th</sup> May, 2020 whereas the application was filed after lapse of about one year and there is no explanation for the delay. The application is actuated by malice, bad faith and intended to clog litigation without any justification. Under the facts of this matter as deposed the intended appeal has no chances of success.



## Analysis and Determination

11. I have considered the application, the affidavits both in support and opposition of the application, the written submissions filed on behalf of the parties as well as the authorities relied upon.
12. I wish to point out that although parties submitted lengthily on whether or not stay of execution should be granted within the confines of Order 42 Rule 6 of the Civil Procedure Rules, 2010, it is my respectful and humble view that indeed the issue for determination here is whether the court may order the stay of re-taxation proceedings with respect to item No.8 of the Advocates/Client Bill of Costs dated 24<sup>th</sup> March, 2014, pending the hearing and determination of an Intended Appeal. That issue for determination can also be deduced from the prayers sought in the application wherein the sole prayer pending (i.e prayer (b) is framed in the following words;

“This Honourable Court be pleased to stay the re-taxation proceedings in the matter pending the hearing and determination of the Intended Appeal”

13. Therefore, this Court will limit the discussion herein on whether a case has been made for stay of re-taxation proceedings as opposed to stay of execution which parties chose to submit on. It should be noted that stay of proceedings should not be confused with stay of execution pending appeal. Whereas the latter is granted to an Applicant who meets the ingredients and threshold set out under order 42 rule 6 of the *Civil Procedure Rules*, stay of proceedings is a grave judicial action which has the effect of seriously interfering with the right of a litigant to conduct his/her/its litigation. Infact, stay of proceedings impugnes the right of access to justice, right to be heard without delay and the overall and jealously guarded right to fair trial. (See also the case of *Kenya Wildlife Services v James Mutembei* [2019]eKLR.
14. It should not be lost that stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion which should be exercised sparingly and in the interest of justice. Therefore, the sole question is whether it is in the interest of justice to order stay of proceedings in their case, and if it is, on what terms? I adopt the words of Ringera J. in the case of *Global Tours and Travel Limited v Nairobi HC Winding Up Cause No.43 of 2000*, where he persuasively stated:-

“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 arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

15. In addition to that, this court and others have adopted the practice that stay of proceedings should generally not be imposed unless the proceedings, beyond all reasonable doubt ought not to be allowed to continue. Thus, the test for stay of proceedings has a higher stringent and ought to be exercised sparingly and only in exceptional cases.
16. In the present case, the Applicant vide the affidavit sworn by its advocate, M/S David Mukui Mokera, averred that it is aggrieved by the decision of Justice J. Thurania (as she then was) delivered on 6<sup>th</sup> May, 2020 where she ordered re-taxation of Item 8 of the Advocate’s Bill of Costs dated 24<sup>th</sup> March, 2014. It then indicated it was desirous of preferring an appeal against the said ruling and even went ahead to file a Notice of Appeal which is annexed to the application as ‘DMM-2’. That the Applicant then proceeded to request for certified copies of the said ruling for purposes of compiling the record



of appeal but the same has so far not been availed. Instead the Applicant has set out the grounds of appeal as per a Memorandum of Appeal indicated to be dated 15<sup>th</sup> September, 2021.

17. The intention to appeal was also communicated to the Taxing Master on 20<sup>th</sup> April, 2021, the Taxing Master proceeded to issue directions on re-taxation of Item 8. The Applicant is thus apprehensive that if the re-taxation is allowed to proceed, it will be prejudicial in view of the intended appeal which might be rendered nugatory.
18. Having read through the grounds upon which the application is premised and the grounds advanced in the opposition thereof, alongside the parties submissions filed in support of their respective position, it is worth-noting that the impugned ruling by the Taxing Master was delivered on 6<sup>th</sup> May, 2020 and the application herein brought in April, 2021. It is also not in dispute that the application was filed after a period of about one (1) year and no explanation has been advanced for this. The record also confirms that the contested Bill of Costs was filed on 15<sup>th</sup> October, 2014 and taxed on 2<sup>nd</sup> September, 2015, after which a reference dated 14<sup>th</sup> June, 2016 was filed seeking to set aside three items, which was heard and determined on 14<sup>th</sup> June, 2016 and is now subject of this application under consideration. Clearly, there has been a delay in having the issue of taxation settled in the matter, although the Applicant explain that the same was caused by the opportunity it gave the Advocate/Respondent to reconcile all the matters as per the consent dated 17<sup>th</sup> February, 2014 under MA No.799 of 2007. A perusal of the said consent is annexed to the Advocate's Replying Affidavit shows that the parties agreed to take internal reconciliation of all the taxations and matters between themselves. The consent has not specified the matters and excluded this instant one.
19. Also, although the Applicant indicated that they intend to appeal and have an arguable appeal with overwhelming chances of success, it has not annexed a draft Memorandum of Appeal for the court to appreciate the grounds of the intended appeal and pronounce itself on whether they have an arguable appeal or not, irrespective of whether it will succeed or not. The Applicant has only introduced the Memorandum of Appeal alleging dated 15<sup>th</sup> September, 2021 in its submissions which cannot be sufficient evidence to invoke this Court's exercise of discretionary power.
20. Further, the Applicant has not shown that the re-taxation proceedings are frivolous, vexatious or harassing or manifestly groundless so as to prejudice it. It will therefore not serve the interest of justice for this Court to exercise its discretion in favour of the Applicant by granting stay of the re-taxation proceedings but instead it will only serve the purpose of delaying the matter further.
21. Accordingly, I find the application is devoid of merit and the same is hereby dismissed. Each party shall bear its own costs of the application.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3RD DAY OF ...MAY... 2023.**

**D.O CHEPKWONY**

**JUDGE**

Court Assistant - Mwenda

