



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 480 OF 2014**

**N.W. AMOLO**

**B.W. KIBANYA**

**(practicing as Amolo & Kibanya Advocates).....APPLICANTS/RESPONDENTS**

**-VERSUS-**

**SAMSON KEENGU NYAMWEYA.....RESPONDENT/APPLICANT**

**RULING**

1. This ruling was triggered by the Notice of Motion dated 22<sup>nd</sup> January, 2020 filed by the respondent/applicant (“*the applicant*”) in which he sought for an order for stay of execution pending the hearing and determination of an appeal against the judgment delivered on 19<sup>th</sup> December, 2019.
2. In support of the Motion are the grounds set out on its face and the facts stated in the affidavit of the applicant.
3. In his affidavit, the applicant averred that he is aggrieved by the judgment delivered in favour of the applicants/respondents (“*the respondent*”) on 19<sup>th</sup> December, 2019 and intends to challenge the judgment by way of an appeal to be lodged in the Court of Appeal and has already filed a Notice of Appeal in that regard.
4. The applicant went ahead to state that the respondent has commenced the process of executing the decree and the applicant is concerned that if such execution proceeds, the decretal sum amounting to Kshs.4,278,490/ may not be recoverable upon determination of the appeal in favour of the applicant.
5. In close reference to the foregoing, the applicant asserted that his intended appeal raises arguable grounds which ought to be heard on merit.
6. *Neville Walusala Amolo* advocate, put in a replying affidavit on behalf of the respondent to challenge the Motion in which he stated that the applicant is not at all deserving of the prayer sought since he has taken the habit of filing numerous applications to hinder the respondent from the fruits of its judgment.
7. The deponent further stated that in instances where judgment has been entered on an Advocate-Client Bill of Costs, there is no automatic right of appeal which is to say that leave must be sought by any party desirous of appealing against a decision entered under the provisions of Section 51 of the Advocates Act. That since no leave was sought by the applicant, the application is ripe for automatic dismissal.
8. It was also the deponent’s contention that should this court find otherwise, then a stay ought only to be granted on the condition that the applicant deposits the total sum of Kshs.6,502,603.40 constituting the judgment sum of Kshs.4,278,490/ plus interest at 9%p.a. from 3<sup>rd</sup> June, 2014 to 28<sup>th</sup> February, 2020 amounting to Kshs.2,214,113.40 together with costs assessed at Kshs.10,000/ to be paid within 30 days from the date of the order made.
9. At the hearing of the Motion, *Mr. Ombati* learned advocate for the applicant relied on the averments in the Motion and its supporting affidavit though he further submitted that the applicant is ready and willing to abide by any orders that this court will make on the provision of security for the due performance of the decree.
10. In reply, *Mr. Omollo* advocate for the respondent argued that he stands to suffer prejudice in the event that the judgment and decree are stayed in the sense that he rendered services to the applicant from way back in 2008 and which services the applicant has declined to pay for; further reiterating that in the circumstances of the matter at hand, the applicant ought to have sought for leave to file an appeal against the judgment but he did not, hence his application is unwarranted.

11. Mr. Ombati rejoined with the brief submission that his client paid the respondent for legal services rendered. The counsel also relied on the provisions of Section 3A of the Civil Procedure Act on the issue of leave to appeal.
12. I have considered the grounds set out on the face of the Motion, the facts deponed to in the affidavits supporting and resisting the Motion, and the rival oral arguments which I have laid out hereinabove.
13. Before I can consider the merits of the Motion, I must determine the question on whether the applicant required leave of the court to lodge his appeal.
14. It is significant to note that upon taxation of the Advocate-Client Bill of Costs, the taxing master issued a certificate of taxation, the sum of which was adopted by this court through its decision made on 19<sup>th</sup> December, 2019 which the applicant is now seeking to challenge on appeal.
15. Further to the foregoing, the record shows that prior to the aforementioned decision, the applicant had filed an application seeking to have the certificate of taxation set aside and/or varied, which application was heard before my brother, Honourable Mr. Justice J. Serگون and in the end dismissed with costs to the respondent.
16. **Paragraph 11(3) of the Advocates (Remuneration) Order** expresses that:
 

*“Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.”*
17. From the foregoing, it is clear that the aforesaid provision concerns itself with appeals against decisions on an objection to taxation. Judging by the record, it is well settled that the applicant has not challenged the ruling delivered on 19<sup>th</sup> December, 2019 arising from the reference.
18. Suffice it to say that since the Advocates Act and Remuneration Order are silent on appeals against a judgment entered on a certificate of taxation, it is my reasoned view that this court’s ruling which followed the decision on the reference would by implication be the result of the objection/reference thereby making it a mandatory requirement for leave of the court to be sought prior to lodging an appeal.
19. On that note, the applicant did not demonstrate that he sought for and was granted leave to appeal against this court’s decision which is to say that there is essentially no valid appeal in place. As such, I see no reason to consider the merits of the Motion.
20. Consequently, the Motion dated 22<sup>nd</sup> January, 2020 is hereby struck out with costs to the respondent.

**Dated, Signed and Delivered at Nairobi this 5<sup>th</sup> day of March, 2020.**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Applicants/Respondents

..... for the Respondent/Applicant