



**Sheikh and Company Advocates v Mustek East Africa Limited (Miscellaneous Case E043 of 2022) [2024] KEELRC 1770 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1770 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS CASE E043 OF 2022**

**MN NDUMA, J**

**JULY 4, 2024**

**BETWEEN**

**SHEIKH AND COMPANY ADVOCATES ..... APPLICANT**

**AND**

**MUSTEK EAST AFRICA LIMITED ..... RESPONDENT**

**RULING**

1. The claimant/applicant filed notice of motion application dated 23<sup>rd</sup> April 2024 seeking an order in the following terms:-
  1. Spent
  2. Spent
  3. Spent
  4. That pending hearing and determination of the appeal against the ruling and order of this court given on 18/4/2024, there be a stay execution of the decree of the court given on 24<sup>th</sup> October, 2023 and all consequential orders and execution proceedings arising therefrom against the applicant herein and the said order do apply to a series of similar matters between parties namely ELRC Misc. App. No E039/2022 to E044/2022 wherein decrees of similar date and terms were given.
2. The application is premised on grounds (i) to (vi) set out on the face of the application and buttressed in the supporting affidavit of Cornie Combrink, the Managing Director of the applicant's company the nub of which is that the court delivered a ruling dated 18/4/2024 dismissing the applicant's application dated the 7<sup>th</sup> and 8<sup>th</sup> February 2024 which sought a stay of execution of the decree of this court given on 24/10/2022, an order to set aside the said default decree and judgment and leave to the respondent to defend the advocates' amended application dated 3/10/2023.



3. That the applicant has lodged a notice of appeal against the said ruling and order of court given on 18/4/2024 which raises arguable appeal against the ruling and order with high chances of success.
4. That unless the application is granted, the applicant will suffer substantial loss as advocate – decree holder herein will at any time cast away the applicant’s goods and tools of trade and sell them in execution of the decree.
5. That the application has been brought without unreasonable delay.
6. That the applicant is willing to abide by the conditions attendant to the application by depositing the decretal sum within 45 days of the order.
7. The applicant has attached memorandum of appeal to the court of appeal against the ruling and order of this court.
8. That on 2/2/2024, the decree holder had through its auctioneers proclaimed the applicant’s tools of trade and goods in execution of decrees given in a series of similar matters in ELRC Misc. Appl. No E039 of 2022 to E044/2022 in execution of the decree in issue in the impugned ruling in respect of which the appeal has been preferred.

**Replying affidavit.**

9. The respondent deposes that the matter is about the claimant’s non-payment of fees of the advocate for legal services rendered in a series of five employment claims before this court. Following prolonged refusal and failure by the claimant to pay legal fees for work done, the advocate filed its bills of costs for taxation in the series of five matters ELRC Mis. Appl. No E039; E040, E041, E042 and E042 of 2022.
10. Taxation of advocate/claimant costs was done inter parties via exchange of written submissions where the claimant was ably represented by Litono and Omwebu advocates still on record. The deputy Registrar taxed and certified the costs on 23/9/2022 for each of the five files.
11. That subsequent to the taxation ruling, no reference was filed in any of the five files, to date. The days contemplated in Rule 11 of the Principal *Advocates Remuneration Order* expired and the taxed and certified costs stand unchallenged to date. The advocate has refused to pay the costs to-date.
12. The court allowed the advocates’ amended application for entry of judgment dated 3/10/2023 on the taxed and certified costs in all five files with interest at 14% PA.
13. The applicant did not oppose the application for entry of judgment and they were absent despite having been duly served with both the application and its hearing notice.
14. Once judgment on certified costs was entered on 24/10/2023 no appeal has never been filed as against that entry of judgment and decree.
15. That despite there being no reference, the claimant filed an application dated 8/2/2024 seeking for stay of execution of the taxed and certified costs in the five files. The application was dismissed by a ruling dated 18/4/2024. The court held proper service was done on the application and no reference had been filed from the taxation.
16. That this is the second time the applicant applies for stay of execution orders alleging a pending appeal.
17. This instant stay application dated 23/4/2024 is resjudicata as this court already dismissed the applicant’s initial application for stay of execution vide the ruling of 18/4/2024. The claimant cannot have a second bite of the cake as they continue to buy time. This is a disguised appeal from the ruling



of the court delivered on 18/4/2024 that refused stay of execution. This court lacks jurisdiction to sit on appeal over its own orders and the instant application should be struck out.

18. In any event the application lacks merit and as per order 42 rule (1) of CPR no appeal shall operate as automatic stay of execution.
19. Further, no legal or other reason is given before the court on why the claimant has refused to pay advocate – client costs which were already taxed and certified on 23/9/2022, now more than one year and 7 months ago. Instead multiple applications have been filed. Litigation must come to an end.
20. As at 23/4/2024, the total sum owed by the claimant including execution costs is Kshs. 2,320,293.12. That the application be dismissed with costs.

#### **Further affidavit**

21. The claimant/applicant filed further affidavit of Olala Mmeli advocate in which is reiterated the contents of the supporting affidavit dated 23/4/2024.
22. The applicant stated that a notice of appeal against the ruling of the court dated 18/4/2024 was lodged on 19/4/2024 and same was served on the respondent. That filing of a notice of appeal under order 42 rule 6(4) of CPR deems an appeal to have been filed against the decision of the court.
23. That the court only need satisfy itself that there is a pending arguable appeal but not delve into the merits of the appeal itself.
24. That no 10 days statutory notice of entry of *ex parte* judgment was served on the applicant rendering the intended execution unlawful.
25. That the application is not resjudicata and allegations made by the respondent in this regard are false. That the respondent has simply misapprehended the law. That the application dated 7<sup>th</sup> and 8<sup>th</sup> 2024 sought to set aside the default judgment, decree and orders following non-attendance of the applicant at the hearing of 24/10/2023 and 24/1/2024 and sought interim stay of execution of impugned decree, while instant applicant is for stay of execution of the impugned decree pending appeal against the decision of the court given on 18/4/2024. That the court has jurisdiction to grant the application.

#### **Determination**

26. The court has considered the deposition by the parties and is satisfied that the present application seeks stay of execution of taxed and certified costs payable to the respondent/advocate by the client applicant pending the hearing and determination of the appeal against the ruling of the court delivered on 8/4/2024.
27. The court in its ruling dated 18<sup>th</sup> April 2024, considered the twin applications dated 7/2/2024 and 8/2/2024 in which the court was asked to stay execution of *ex parte* orders obtained in ELRC Mis. Application No E039 to 044/2022 with regard to taxed and certified costs and decree of the court dated 24/10/2023.
28. The court in the ruling dated 18/4/2024 found no merit in that application and declined to stay execution of the said taxed and certified costs and decree.
29. The court having found that the grounds relied upon by the claimant-applicant, alleging non-service of the amended application dated 3/10/2023 which sought entry of judgment on taxed advocate-client taxed and certified costs and its hearing notice set for 24/10/2023, went further to find that no reference



had been filed to date against the ruling of the Deputy Registrar delivered on 23/9/2022 on the five (5) files within the 14 days in which a reference against the decision of a taxing master may be filed.

30. The court is satisfied that the intended appeal herein given that background is not arguable. See the case of *KCB Ltd v Nicholas Ombaya* [2009] eKLR and *Stanley Kinyanjui v Tonny Ketter and 5 others* [2013] eKLR. The subject matter in question involves claimant's advocate fees and no apparent justification not to pay the said client/costs has been urged by the applicant indicative of apprehension of substantial loss that may be suffered by the applicant if an order for stay of execution prayed for is not granted.
31. Although the orders for stay at this stage are pending an intended appeal, the basic premise of the application had been decided by the court in its ruling of 18<sup>th</sup> April 2024. Indeed, this application is a guised appeal on the ruling of the court dated 18/4/2024, in which the court found no merit in staying execution of the decree in respect of the taxed and certified costs and decree of the court.
32. Accordingly, this application lack merit and is dismissed with costs.

**DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY, 2024.**

**MATHEWS NDERI NDUMA**

**JUDGE**

Appearance:

Mr. Litoro for claimant/applicant

Mr. Evans Ochieng Advocate/respondent

Mr. Kemboi Court Assistant

