



Lubulellah & Associates Advocates v Vinayak Builders Limited
(Commercial Miscellaneous Application E332 of 2022)
[2026] KEHC 1485 (KLR) (Commercial and Tax) (13 February 2026) (Ruling)

Neutral citation: [2026] KEHC 1485 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX

COMMERCIAL MISCELLANEOUS APPLICATION E332 OF 2022

MN MWANGI, J

FEBRUARY 13, 2026

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

-AND-

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

BETWEEN

LUBULELLAH & ASSOCIATES ADVOCATES ADVOCATE

AND

VINAYAK BUILDERS LIMITED CLIENT

RULING

1. The client/applicant filed a Notice of Motion application dated 8th October 2024 pursuant to the provisions of Order 5, Order 10 Rule 11, Order 22 Rule 5, Order 42 & Order 51 of the Civil Procedure Rules, 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Rule 11(3) of the Advocates Remuneration Order, Article 159 of *the Constitution* of Kenya, 2010, and all other enabling provisions of the law. The applicant seeks orders for leave to appeal to the Court of Appeal against the entire Ruling of Honourable Lady Justice Njoki Mwangi delivered on 7th June 2024 and an order for stay of execution of the said Ruling and the Certificate of Taxation dated 2nd November 2022, pending the hearing and determination of the instant application and the intended appeal.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Premji Vekaria, the applicant’s Director. Mr. Vekaria averred that a Ruling was delivered on 7th June 2024 dismissing the applicant’s application dated 18th December 2023, while allowing the Advocate’s application dated 9th December 2022. That being dissatisfied with the decision therein, the applicant intends to appeal against the entire Ruling. He explained that on



the date the Ruling was delivered, the applicant's Counsel on record was not in attendance and was therefore unable to seek a stay of execution, necessitating the instant application. Mr. Vekaria stated that a litigant should not be penalized for the mistake of his Advocate and that justice should not be denied on account of such an error.

3. He further averred that the applicant faces a real and imminent risk of execution and stands to suffer substantial loss if execution proceeds, as it is unlikely that the respondent will be able to refund the decretal sum, thereby rendering the intended appeal nugatory. Mr. Vekaria stated that the intended appeal raises weighty, serious, and arguable issues deserving consideration by the Court of Appeal, and that the application herein has been filed without unreasonable delay and is meritorious. He asserted that no prejudice will be occasioned to the respondent if the instant application is allowed.
4. In opposition to the application, the respondent filed a replying affidavit sworn on 11th March 2025 by Mr. Eugene Lubale Lubulellah, an Advocate of the High Court of Kenya and learned Counsel for the respondent. Mr. Lubulellah deposed that the instant application was filed after an inordinate and unexplained delay of 123 days from the date of the Ruling delivered on 7th June 2024 and is therefore incompetent, having not been made orally at the time of delivery of the Ruling or within the statutory fourteen (14) days as required under Order 43 of the Civil Procedure Rules, 2010. He contended that this Court lacks jurisdiction to grant leave to appeal in the circumstances, as the Advocates (Remuneration) Order does not provide for an appeal against refusal of leave, and that the discretion to grant leave has not been properly invoked or justified.
5. Mr. Lubulellah asserted that the applicant has failed to demonstrate any arguable or meritorious grounds of appeal, has not identified specific findings of the Ruling of 7th June 2024 complained of, and has not annexed a draft Memorandum of Appeal (to his affidavit) to establish prospects of success or issues warranting serious judicial consideration. He maintained that appeals in taxation matters are discretionary and not as a matter of right, and that the applicant has not raised any novel point of law, issue of public interest, or realistic chance of success to warrant leave to appeal to the Court of Appeal. Counsel averred that the applicant has failed to satisfy the mandatory conditions for being granted stay of execution, including demonstration of substantial loss, sufficient cause, provision of security and promptness.
6. He contended that the decree in issue, is a money decree and that no evidence has been adduced to show that the respondent is impecunious or incapable of refunding the decretal sum should the intended appeal succeed. Mr. Lubulellah stated that execution is a lawful process, and in itself, it does not amount to substantial loss. He asserted that mere assertions of loss or the magnitude of the decretal sum are insufficient in law to warrant being granted an order for stay of execution. He faulted the applicant for failing to offer or propose any security for the due performance of the decree, noting that such an offer must come from the party seeking stay and cannot be left to the discretion of the Court.
7. The application herein was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of R.M. Mutiso & Co. Advocates on 10th March 2025, whereas the respondent's submissions were filed on 11th March 2025 by the law firm of Lubulellah & Associates Advocates.
8. Mr. Mutiso, learned Counsel for the applicant relied on the case of Kenya Power & Lighting Company Ltd v Mbothu Limited [2019] eKLR and submitted that unless an order for stay of execution is granted, the applicant will suffer substantial loss, as the respondent is unlikely to refund the decretal sum of Kshs.1,937,300/= should the intended appeal succeed, rendering the appeal nugatory. He further submitted that the impugned Ruling raises issues of public importance and points of law that warrant determination by the Court of Appeal, and that leave to appeal is necessary to safeguard its right of appeal and prevent irreparable prejudice.



9. Counsel argued that the Court of Appeal is better placed to interrogate the issues raised in the Ruling of 7th June 2024. He asserted that due to financial difficulties, immediate execution of the costs order would occasion significant hardship upon the applicant, given the substantial amount involved. Counsel maintained that the balance of convenience favours being granted an order for stay of execution, as the respondent will not suffer prejudice if execution is delayed, pending the hearing and determination of the intended appeal. He asserted that the application herein was filed without undue delay and in good faith, following receipt of proper legal advice.
10. Mr. Lubulellah, learned Counsel for the respondent cited the case of Kenya Shell Limited v Kobil Petroleum Limited [2006] KECA 389 (KLR) and the Court of Appeal case of Machira t/a Machira & Company advocates v Mwangi & another [2002] 2 KLR 391, and submitted that whether or not leave to appeal is granted is a matter within the Court's discretion, which discretion should be exercised judiciously. He referred to the East African Court of Appeal case of Sango Bay Estate Ltd & others v Dredner Bank A. G. [1971] EA 17 and contended that in determining whether or not to grant an order for leave to appeal, the main issue for consideration is whether the intended appeal raises arguable grounds. Counsel submitted that the applicant had not annexed a draft Memorandum of Appeal to the instant application so as to demonstrate that it has an arguable appeal with high chances of success, or that the intended appeal raises any issue of public interest and/or a novel point requiring clarification.
11. On the issue of stay of execution, Mr. Lubulellah relied on the case of Elena D. Korir v Kenyatta University [2014] eKLR and submitted that the applicant has not satisfied the conditions that warrant an order for stay of execution. He submitted that the applicant has not demonstrated that he stands to suffer substantial loss in the event that the instant application is not allowed, and it has not demonstrated that if the taxed sum is paid out to the respondent, the respondent will not be in a position to refund the same to the applicant in the event that the intended appeal is successful. He contended that the above notwithstanding, the respondent has the means to refund the decretal sums to the applicant in the unlikely event that the intended appeal succeeds.
12. Counsel relied on the case of Jaber Mohsen Ali & another v Priscillah Boit & another [2014] KEELC 132 (KLR) and asserted that the absence of an offer of security renders the instant application devoid of merits. Additionally, he contended that the *Advocates Act* is a self-contained statute and does not contemplate stay of execution in taxation matters, and both this Court and the Court of Appeal lack jurisdiction to stay execution of taxed costs. Mr. Lubulellah maintained that the application herein is an abuse of the Court process, as it seeks to unjustly deny the respondent the fruits of a lawful Judgment, and lacks both factual and legal foundation.

Analysis and Determination.

13. I have considered the instant application, the grounds on the face of the Motion and the affidavit filed in support thereof. I have also considered the replying affidavit by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the applicant should be granted leave to appeal against this Court's Ruling delivered on 7th June 2024; and
 - ii. Whether an order for stay of execution should issue.



Whether the applicant should be granted leave to appeal against this Court's Ruling delivered on 7th June 2024.

14. In determining whether or not to grant an order for leave to appeal to the Court of Appeal, this Court has to consider whether the intended appeal raises any arguable grounds, so as to demonstrate that the intended appeal has chances of succeeding. However, before determining whether the application for leave to appeal to the Court of Appeal is merited, this Court has to consider whether the said application was filed in time.
15. From the record, it is evident that the applicant did not orally seek leave of this Court to appeal against its Ruling of 7th June 2024 on the date of delivery of the said Ruling. The respondent has submitted that the application herein has been filed after an inordinate and unexplained delay of 123 days and that the applicant has not sought extension of time and/or leave to file the application herein out of time.
16. The time within which a litigant can file an application for leave to appeal against the decision of the High Court to the Court of Appeal is provided for under Order 43 Rule 1(3) of the Civil Procedure Rules, 2010, which states that –

An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

17. From the said provisions, it is clear that the provisions of Order 43 Rule 1(3) of the Civil Procedure Rules, 2010, are framed in mandatory terms, hence failure to comply with the provisions thereof is ground enough for the Court to decline to exercise its discretion in favour of an applicant. Further, this Court is cognizant of the provisions of Rule 41(1) of the Court of Appeal Rules, which states that –
 1. In a civil matter -
 - a. where an appeal lies with the leave of the superior court, application for such leave may be made –
 - i. informally at the time when the decision against which it is desired to appeal is given; or
 - ii. by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;
 - b. where an appeal lies with the leave of the Court, application for such leave shall be made -
 - i. in the manner laid down in rules 44 and 45 within fourteen days after the decision against which it is desired to appeal; or
 - ii. where application for leave to appeal has been made to the superior court and refused, within fourteen days after such refusal.

18. In light of the above provisions, since the Ruling that the applicant intends to appeal against was delivered on 7th June 2024, the applicant ought to have filed the application herein on or before 20th June 2024. Since the application herein was filed on 9th October 2024, it was filed outside the timelines contemplated by the provisions of Order 43 Rule 1(3) of the Civil Procedure Rules, 2010, and Rule 41(1) of the Court of the Appeal Rules, thus it was filed late. Further, while I appreciate that this Court



has the discretion to extend time within which the application herein could be filed, the applicant has not prayed for either extension of time and/or leave to file the said application out of time.

19. In the premise, this Court finds that the instant application is fatally defective for being filed out of time.
20. Since the application for leave to appeal to the Court of Appeal against this Court's Ruling delivered on 7th June 2024 is found to be defective, I shall not consider and/or determine the issue of stay of execution pending appeal, as that would be an academic exercise.
21. The upshot is that the instant application is hereby struck out with costs to the respondent.
It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2026.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Ndinda h/b for Mr. Mutiso for the judgment debtor/applicant

Mr. Wendoh Lubullelah for the decree holder/respondent

Mr. Kimutai – Court Assistant.

