

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA (P), MURGOR & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. E127 OF 2024

BETWEEN

ATUL SHAH.....APPLICANT

AND

NGONZE & NGONZE ADVOCATES.....RESPONDENT

***(An intended appeal from the decision/ruling of the
High Court of Kenya at Mombasa (J.K. Ng'ang'ar, J.)
delivered in on 29th October 2024***

in

Misc Civil Application No. 227 of 2021)

RULING OF THE COURT

This matter arises out of a dispute between ***Atul Shah, the Applicant,*** and ***Ngonze & Ngonze Advocates, the Respondent,*** concerning taxation of an advocate- client bill of costs.

The Respondent filed an Advocate-Client Bill of Costs in

Mombasa High Court Misc. Civil Application No. 227 of 2021
seeking taxation of legal fees alleged

to be due from the Applicant. The Bill of Costs was taxed and a Certificate of Costs issued in the sum of Kshs. 5,500,000. The Applicant filed a reference to the High Court, which culminated in a ruling delivered on 29th October 2024 which upheld the taxed costs and paved way for enforcement.

The Applicant contended that prior to the impugned ruling, the parties had executed a consent marking the matter as settled following a written fee settlement agreement dated 7th June 2023 entered into pursuant to **section 45** of the **Advocates Act**. According to the Applicant, the learned Judge failed to recognize and give effect to the consent and settlement agreement, thereby erroneously upholding the taxation and allowing enforcement proceedings to proceed.

Aggrieved by the ruling, the Applicant lodged a Notice of Appeal and by a Notice of Motion dated 12th November 2024 brought pursuant to **section 3A** and **3B** of the **Appellate Jurisdiction Act, rule 5 (2) (b)** and **rule 43** of the **Court of Appeal Rules** seeking an order of stay of execution of the ruling and all consequential orders arising therefrom pending the hearing and determination of the intended appeal and that the

cost of this application be provided for.

The Applicant's Motion is brought on several grounds including that, the intended appeal is arguable and has high chances of success; that the appeal is

arguable as, the learned Judge failed to consider that both the Applicant and the

Respondent had, by consent, marked the matter as settled with no orders as to costs and that the court file in *Misc. Civil Application No. 227 of 2021* be closed forthwith; that the consent was executed following the full performance of a settlement agreement dated 7th June 2023 between Nakumatt Holdings Limited (Under Administration) and Ngonze & Ngonze Advocates. It is the Applicant's contention that the consent and the settlement agreement were binding upon the parties, having been reduced into writing and signed, in compliance with **Section 45** of the **Advocates Act**, which permits an advocate and client to enter into a remuneration agreement that is valid and binding provided it is in writing and duly executed.

The Applicant further avers that the learned Judge was in error in law in failing to consider and give effect to the existence of the consent on the basis that there was no proof of its formal adoption as an order of the court. In that regard, the Applicant invokes **Article 159(2)(d)** of **the Constitution** which provides that justice shall be administered without undue regard to procedural technicalities, and asserts that the court ought to have been guided by that constitutional imperative; that the

application has been filed without inordinate delay and that unless the orders sought, including stay of execution of the ruling and consequential orders, are granted pending the hearing and determination of the application and the intended appeal, the appeal will be rendered nugatory or a

mere academic exercise. The Applicant further avers that he stands to suffer unjustifiable prejudice, loss and irreparable damage if the Respondent proceeds with execution before the appeal is heard and determined, and therefore it is in the interests of justice, due process and fairness that the orders sought be granted.

The Application is supported by the affidavit of **Samuel Aduda**, counsel for the Applicant, in which he reiterates the grounds set out in the Application, save to add that the consent was executed following the full performance of a settlement agreement dated 7th June 2023 between the parties; that it was a term of that agreement that Ngonze & Ngonze Advocates would be paid an all- inclusive sum of Kshs. 5 million as legal fees for various matters handled on behalf of the company and the Applicant, including *Mombasa High Court Misc Civil Application No. E227 of 2021*.

It was deposed that upon payment of the last instalment on 11th December 2023, the Advocate/Respondent, at the request of the company's and the Applicant's representative, sent an email dated 16th January 2024 attaching consent letters in respect of the

agreed matters to be marked as settled with no further orders as to costs and for the concerned files to be closed forthwith, including the instant matter; that he duly executed the consent letters and returned them via email dated 17th January 2024 for further action, annexing copies of the respective emails.

He further deposes that by virtue of **Section 45** of the **Advocates Act**, an advocate and client may enter into a remuneration agreement before, after or in the course of contentious business in a civil court, and that such agreement is valid and binding provided it is in writing and signed by the client or his duly authorised agent; that both the agreement and the consent were neither unconscionable, exorbitant nor unreasonable and have not been set aside, varied, rescinded or vacated, and the learned Judge was wrong in failing to appreciate the existence of the consent for lack of proof of its formal adoption as an order of the court.

It was further deposed that the intended appeal is arguable and has high chances of success, and that if stay is not granted, the Respondent may proceed with execution, thereby rendering the intended appeal nugatory and occasioning the Applicant irreparable loss.

Annexed to the Application is a notice of appeal dated 6th November 2024 and a memorandum of appeal raising the grounds inter alia, that the learned Judge was in error in failing to consider that both the applicant and respondent had by consent

marked the payment of outstanding fees as settled with no orders as to costs and the court file *in Misc Civil Application No 227 of 2021* closed forthwith, which consent was signed following the full performance of a settlement agreement dated 7th June 2023 with the payment of an all-inclusive

amount of Kshs. 5 million being the legal fees in respect of various matters which he was handling on behalf of the company and the Applicant.

Another ground was that the learned Judge failed to consider that by dint of **Section 45** of the **Advocates Act**, that an Advocate and his client may before, after, or in the course of any contentious business in a civil court make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both. Such remuneration agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent.

By way of a Replying Affidavit sworn on 24th July 2025, by Daniel M. Ngonze, the proprietor of Ngonze & Ngonze Advocates, the Respondent, the application was opposed, and the allegations denied. The Respondent further deposed that the Applicant consciously elected to mislead the Court through swearing a false affidavit and intentionally committing perjury, and therefore ought to face appropriate sanctions, including committal to civil jail for contempt of court; that the application has not met the threshold requirements for grant of stay pending appeal as the

proceedings are between Atul Shah, an individual natural person, and Ngonze & Ngonze Advocates, and that Samuel Aduda had not demonstrated the requisite capacity or locus standi, to depose matters on behalf of Atul Shah.

He further deposed that although the deponent alleged that a consent had been signed before the High Court, no duly filed consent appears anywhere in the annexures, and nor are there any proceedings adopting such consent as an order of the court. He also pointed out that the decision the Applicant intends to appeal against has not been presented before this Court.

The Respondent averred that the Appellant had been adjudged by the High Court to pay legal fees in the sum of Kshs. 5,500,000 vide a decision rendered on 20th April 2022 in *Mombasa HCJR Application No. 19 of 2018*, and that as at the date of this reply, the Respondent's legal fees remained unpaid. He deposed that the agreements dated 7th June 2023 between Nakumatt Holdings Limited (Under Administration) and Ngonze & Ngonze Advocates were entered into for settlement of legal fees for services already rendered, but that the entity defaulted in its commitment, whereupon the firm invoked its right of rescission and unequivocally rescinded the agreements, thereby remaining at liberty to pursue all payments due less any amounts paid under the agreements; that the legal fees remain wholly payable by the Applicant, who has failed to remit the amounts due and remains

unwilling to compensate the firm, and that the Applicant has consistently misled both the court and the firm regarding payment or settlement of the legal fees due and owing.

When the application came up for hearing on a virtual platform, the parties had filed written submissions which they briefly highlighted. Learned counsel **Ms. Wairange** appeared for the Applicant, while learned counsel **Mr. Ngonze** appeared for the Respondent.

Counsel for the Applicant begun by submitting that the Mr. Aduda was entitled to swear the affidavit in support of the application as he was clearly deponing to matters that were well within his knowledge. It was further submitted that the Applicant had satisfied the well-settled twin principles under **rule 5(2)(b)** of this Court's Rules namely; that the intended appeal is arguable and that, unless stay is granted, the appeal would be rendered nugatory; that the intended appeal raises substantial issues, including that, the trial Judge failed to recognize the binding consent executed by the parties' advocates marking the matter as settled under **section 45** of the **Advocates Act**, and that the trial Judge misapprehended **Article 159(2)(d)** of **the Constitution**.

On the nugatory aspect, counsel submitted that execution of the impugned ruling would result in enforcement proceedings in

violation of the consent and settlement agreement, thereby occasioning irreparable loss and undermining the substratum of the appeal, and that for this reason, stay of execution should be granted pending the hearing and determination of the appeal.

In their written submissions, counsel for the Respondent opposed the Motion in its entirety and submitted that it was fatally defective, wholly unmerited and incompetent. Counsel argued, as a preliminary issue, that the supporting affidavit was sworn without requisite written authority from the Applicant, contrary to **Order 1 rule 12** of the **Civil Procedure Rules**. Reliance was placed on **Research International East Africa Ltd vs Julius Arisi & 213 Others [2007]** eKLR, where this Court held that in the absence of written authority filed in court, one party cannot validly swear an affidavit on behalf of others.

On stay of execution, counsel relied on **JK Industries vs Kenya Commercial Bank Ltd & Another (1987) eKLR and Madhupaper International Ltd vs Kerr [1985] KLR 840**, submitting that stay should not be granted where it would inflict greater hardship or where the appeal is frivolous. Counsel concluded that the Motion failed to meet the threshold for stay under **Rule 5(2)(b)**, that it was defective for want of locus and non-presentation of the impugned decision, and urged the Court to dismiss it with costs.

We have considered the motion, the reply, the preliminary objection and the parties' submissions. Two issues arise for determination, the Respondent's preliminary objection and whether or not we should grant the stay of execution orders sought.

Beginning with the preliminary objection that Mr. Aduda, the Applicant's counsel was not eligible to swear the affidavit on behalf of the Applicant, a consideration of the matters deponed to discloses that they relate to questions surrounding a settlement agreement, and the taxation of an Advocate- client Bill of costs. These all being matters that would be well within the advocate's knowledge, would render him to be better placed to swear such an affidavit in support. We therefore decline to allow the preliminary objection which we hereby dismiss.

On the stay of execution orders sought, this Court's jurisdiction under **Rule 5(2)(b)** is original, independent, and discretionary. However, the court must exercise this discretion judiciously and rationally, and not out of impulsiveness or sympathy.

As set out above, the Applicant is seeking a stay of execution of the ruling of the High Court under **rule 5 (2) (b)** of this Court's Rules. The principles that guide this Court in determination of an application under **Rule 5 (2)(b)** of this Court's rules are well settled. These principles are summarised in **Stanley**

Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013]

eKLR to wit; an applicant

must demonstrate that the appeal or intended appeal is arguable; and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.

And as restated in the case of **Trust Bank Limited and Another vs Investech**

Bank Limited & 3 Others [2000] eKLR:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

With respect to whether an appeal is arguable, we are cognizant that the appeal need not necessarily be one that will succeed.

In the case of **Guardian Bank Limited vs. Book point Limited & Another [2018] eKLR**, this Court stated:

“29. Mindful, as we are, that an arguable appeal is not one that must necessarily succeed but simply one that is deserving of the Court’s consideration, [See Dennis Mogambi Mong’are vs. Attorney General & others [2012] eKLR]”.

The applicant’s intended appeal against the High Court’s decision is, inter alia, the learned Judge’s failure to recognize and give effect to a duly executed consent that marked the matter as

settled, the legal effect of a written remuneration agreement entered pursuant to **Section 45** of the **Advocates Act**; and the propriety of disregarding **Article 159(2)(d)** of **the Constitution** on substantive justice.

Without expressing any definitive view on the merits of the intended appeal, the questions surrounding the legal effect of a signed but unadopted consent, and whether or not it is binding on the parties raises bona fide arguable questions for consideration of this Court, that are not frivolous or idle. On this basis we consider the appeal is arguable.

Turning to the second prerequisite to be satisfied, an Applicant should demonstrate that unless stay is granted, the success of the appeal would be rendered nugatory. This Court has variously held that whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. See **Julius Wahinya Kang'ethe & Another vs Muhia Muchiri Nga'ng'a [2017] eKLR.**

The gravamen of the intended appeal concerns the taxation of the Advocate- Client bill of costs notwithstanding the alleged existence of a binding settlement agreement and consent marking the matter as settled. It becomes clear that if execution of the taxation proceeds and enforcement is carried out before

the appeal is heard, the very substratum of the appeal, namely, payment of legal fees by the Applicant to the Respondent, would substantially undermine the appeal, particularly if the Respondent has already received payment for the legal services rendered. Permitting execution to proceed against the Applicant

would fundamentally alter the position of the parties and risk rendering the intended appeal academic.

In sum, the Applicant having met the two requirements being the basis on which the orders of stay of execution under **Rule 5 (2) (b)** can be granted, the Notice of Motion dated 12th November 2024 is merited and is allowed. Costs in the intended appeal.

It is so ordered.

Dated and delivered at Mombasa this 10th day of April, 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

A. K. MURGOR

.....
JUDGE OF APPEAL

JAMILA MOHAMMED

.....
JUDGE OF APPEAL

***I certify that
this is a
True copy of the***

original Signed

DEPUTY REGISTRAR