Kenyariri t/a Kenyariri & Associates Advocates v First Community Bank Limited (Now Premier Bank Kenya Limited) (Civil Application E159 of 2024) [2025] KECA 160 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KECA 160 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E159 OF 2024

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

FEBRUARY 7, 2025

BETWEEN

CHRISTOPHER O KENYARIRI T/A KENYARIRI & ASSOCIATES ADVOCATES ..... APPLICANT

AND

FIRST COMMUNITY BANK LIMITED (NOW PREMIER BANK KENYA LIMITED) ..... RESPONDENT

(An application for stay of further proceedings pending the hearing and determination of the intended appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (J.W.W. Mong'are, J.) delivered on 18th March 2024 in HCCOMM No. E145 of 2021)

RULING

1. Before the court is the applicant's notice of motion dated 4th April 2024 brought under rule 5(2)(b) of the Court of Appeal Rules 2022, seeking two substantive prayers; to set aside the judgement and decree of the High Court, issued on the 18th of March, 2024; and a stay of further proceedings, pending the hearing and determination of the intended appeal.

2. The application is supported by the grounds on the face of it and the affidavit of the applicant sworn on the 4th of April 2024, where he averred that being aggrieved by the judgment of the High Court, he lodged a notice of appeal and served it upon the respondent; he has an arguable appeal with high chances of success; the respondent has failed to remit VAT amounting to Kshs.18,983,846 based on the retainer agreement between them and as a result the Kenya Revenue Authority (KRA) is likely to commence recovery of the same from the applicant; the judge failed to make a finding on VAT and other statutory deductions which the respondent is bound to pay and that KRA is laying the burden of payment of the VAT amount of Kshs.18,983,846 on the applicant, yet the respondent is withholding

the same; further the respondents were awarded costs, and unless a stay is granted, the applicant will suffer loss from the recovery of tax and costs.

3. In the annexed draft memorandum of appeal, the applicant contends, amongst other grounds, that the learned judge erred in law and fact by failing to find that the retainer agreement dated 15th April 2019 was governed by sections 45(1) and 45(2) & 2(A) of the *Advocates Act* ('the Act') and that the respondent was bound to invoke section 45(2) of the Act if aggrieved by the retainer agreement and the respondent did not raise any counterclaim against the applicant.

4. On its part, the respondent, through its Manager of Legal Services, Claris Ogombo, filed a replying affidavit sworn on 16th April 2024. She deposed that the application is incompetent as the notice of appeal was not filed by the firm of Kinyanjui & Company Advocates on record for the applicant, and therefore, this Court lacks jurisdiction to entertain an application under rule 5 (2)(b); further, the memorandum of appeal does not raise any arguable grounds; at the core of the intended appeal is the claim that the judge of the superior court failed to make a finding on the remittance of VAT and other taxes, yet the applicant did not raise the issue of VAT and the statutory deductions in his pleadings and evidence; and that the applicant is inviting this Court to sit as a trial court in disguise to determine the said issue being raised on appeal.

5. On section 45(2) of the Act, it is deposed that the respondent was not aggrieved by the agreement but by how the applicant had handled its cases, thus withdrawing instructions; hence, section 45(2) of the Act was not applicable; and further that taxation of costs awarded to the respondent will not render the appeal nugatory as the same is reversible; the instant application is not made in good faith and is only intended to deny the respondent its costs unreasonably; as regards the prayer seeking for an order that the judgment and the decree issued on 18th March 2024 be set aside, it is averred that this Court cannot set aside a judgment or decree as this is for determination at the hearing of the substantive appeal.

6. The applicant filed a further affidavit sworn on 17th April 2024 stating that the respondent's replying affidavit was filed outside the court's directions. He further deposes that after the delivery of judgment on 18th March 2024, the firm of J. Harrison Kinyanjui & Co. Advocates entered into a consent with the firm of Kenyariri & Associates Advocates and agreed that the applicant acts in person; that the consent forms part of the record of appeal; further the plaint filed by the applicant before the superior court raised the issue of VAT.

7. The applicant filed his submissions and a list of authorities dated 18th April 2024. On whether the appeal is arguable, the applicant has rehashed the grounds on the face of the application, the affidavit, and the draft memorandum of appeal to demonstrate that he has an arguable appeal. On whether the appeal will be rendered nugatory should the application be rejected, the applicant submits that the total VAT withheld by the respondent is Kshs. 18,983,846; a colossal amount of money, and should KRA commence recovery against the applicant, he may be rendered destitute. He will be unable to practice law as an advocate, and the appeal will be rendered nugatory as serious prejudice will be occasioned to the applicant, resulting in irreparable loss and damage.

8. On its part, the respondent filed submissions and a list of authorities dated 23rd April 2024. Learned counsel for the respondent drew the court's attention to the celebrated case of Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR, where it was held that a court became seized of a matter upon the notice of appeal being filed. The court also set out the twin principles necessary in considering an application under rule 5(2) (b) of this Court's Rules.

9. On the jurisdiction of this Court, the respondent submits that the consent purportedly entered into by the applicant and the firm of J. Harrison Kinyanjui & Co. Advocates was not endorsed as an order of

the court, and neither was leave granted; therefore, the notice of appeal filed by the applicant in person is both irregular and null and void, as such this Court does not have jurisdiction to entertain the instant application. Learned counsel in urging this point relies on the case of Nairobi City Council vs. Resley [2002] 2 E.A. 493 and Halai & Another vs. Thornton & Turpin (1963) Limited [1990] eKLR.

Regarding the prayer for an order setting aside the High Court's judgment and decree, it is submitted that this Court does not have the mandate to do so under rule 5(2)(b) of the Court of Appeal Rules.

10. On arguability of the intended appeal, the respondent submits that the impugned judgment found that the applicant was bound by the retainer agreement, which in Clause 2(e) provided that the last installment of Kshs.15,000,000 was payable after the applicant completed work; the applicant did not finalize the cases, and the firm of Issa & Co. Advocates was instructed; it is the second law firm that finalized the cases; further that the grounds advanced in the application touching on the issue of VAT and other statutory payments are a departure from the suit before the High Court. In this regard, the respondent relied on the case of Kenya Hotels Limited vs. Oriental Commercial Bank Limited [2019] eKLR.

11. On whether the appeal shall be rendered nugatory, the respondent submits that the judgment against the applicant was a dismissal of the suit with costs and, further, no grounds have been advanced for a stay of taxation of the costs; in any event taxation of the fees awarded will not render the appeal nugatory as the same is reversible and the applicant can be refunded if the appeal is successful. The respondent cites in support the cases of Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme vs. Millimo, Muthomi & Co. Advocates & 2 Others [2022] KECA 491 (KLR) and *Bruton Gold Trading LLC vs. Amadi t/a Amadi & Associates & 6 Others, Civil Application E422 of 2023*.

12. On whether we have jurisdiction to handle the matter, based on the fact that the applicant filed a notice of appeal in person as opposed to the counsel who represented him at trial and without leave of court, the issue is not presently before us. Rule 86 of this Court's Rules stipulates how such a complaint should be dealt with, and we shall not say more, save that we find it misplaced at this point.

13. Rule 5(2)(b) of the Court of Appeal Rules provides that:

> 5(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
>
> (b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

14. From the wording of the rule, the first prayer seeking to set aside the judgment and decree issued by the High Court is certainly not capable of being granted. Indeed, this Court is being asked to make final orders that only a bench dealing with the substantive appeal can handle. The said prayer must, therefore, fail.

15. To succeed in an application under rule 5(2)(b) of this Court's Rules, an applicant must satisfy the twin principles enumerated in many of our decisions. Firstly, an applicant must demonstrate that he has an arguable appeal and, secondly, that the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree or proceedings are not stayed. See the cases of Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others (supra) and David Morton Silverstein vs. Atsango Chesoni [2002] eKLR.

16. The applicant has listed several grounds of appeal in his draft memorandum. From the attached judgment of the High Court that summarizes the pleadings and issues for determination, it appears

that several grounds being raised on appeal were not part of the issues placed before the High Court. Notable is that the threshold for an arguable appeal is low, and the applicant may qualify on this limb of arguability as it is not a requirement that the ground cited would, in the end, succeed.

17. Regarding the second limb, we are not persuaded that there is a need to stay in the taxation proceedings as any sums that may be payable to the respondent due to such taxation are recoverable in the event of a successful appeal. Likewise, this would be equally recoverable should VAT or other taxes be charged against the applicant. It has not been demonstrated how the appeal will not be rendered nugatory absent stay.

18. The consequence of the applicant's failure to satisfy the court on both limbs is that the application is declined with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

P.O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR