



Nyange'era t/a Nyasae & Associates v Disciplinary Committee, Institute of Certified Public Accountants of Kenya & another (Civil Appeal (Application) E307 of 2023) [2025] KECA 815 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 815 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E307 OF 2023
W KARANJA, K M'INOTI & P NYAMWEYA, JJA
MAY 9, 2025**

BETWEEN

AMOTA NYASAYE NYANGE'ERA T/A NYASAE & ASSOCIATES . APPLICANT

AND

DISCIPLINARY COMMITTEE, INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA 1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY LIMITED 2ND RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi (Thande, J.) dated 3rd March 2023 in HC Const. Pet. No. E403 of 2020)

RULING

1. The applicant, Amota Nyasae Nyange'ra who trades as a certified public accountant of Kenya in the name and style of Nyasae and Associates seeks an order of stay of execution pending appeal from the ruling and order of the High Court of Kenya at Nairobi (Thande, J.) dated 3rd March 2023. The applicant also prays for an order of stay of taxation of the 1st respondent's party and party bill of costs. The application, made by way of Notice of Motion, is dated 18th October 2024.
2. The antecedents of the application are as follows. Sometime in the year 2020, the 2nd respondent, Kenya Tea Development Agency Ltd. lodged a complaint against the applicant before the 1st respondent, the Disciplinary Committee of the Institute of Certified Public Accountants of Kenya, which resulted in disciplinary proceedings against him. On 4th December 2020 the applicant filed a constitutional petition in the High Court challenging the disciplinary proceedings. He alleged that the proceedings were in violation of his constitutional rights and prayed for an order of stay of the



disciplinary proceedings. Before the petition could be heard, the 1st respondent heard and concluded the disciplinary proceedings against the applicant and acquitted him of professional misconduct.

3. On 23rd February 2022, the petition came up for hearing before the High Court and the applicant's counsel informed the court that the disciplinary proceedings had been concluded. He applied for mention of the matter on 23rd March 2022, so that he could present a copy of the 1st respondent's judgment and to consider settlement of the petition, because it had been overtaken by events.
4. On the date scheduled for mention, only counsel for the 1st and 2nd respondents attended court. The applicant's counsel, who had applied for the date of mention, did not attend. Counsel present confirmed to the court that the disciplinary proceedings against the applicant had been concluded in his favour and that the petition was moot. As a result, the court (Mrima, J.) noted that the substratum of the petition had disappeared and marked the petition as settled, with costs to the 1st respondent.
5. On 12th April 2022, the applicant applied to the High Court for review and setting aside of the order of Mrima, J., claiming the order was made ex parte. The applicant was directed to file a further affidavit and on three separate occasions he was directed to file submissions in support of his application, which he failed to do. By a ruling dated 3rd March 2023, Thande J. dismissed the application for review with costs, for lack of merit. The learned judge found that the impugned order was not made ex parte because applicant's counsel was aware of the date of mention but failed to appear in court. The applicant also did not offer any other sufficient reason to justify an order for review. In a pertinent part of the ruling, the learned judge noted:

“It is quite evident that following the judgment of the respondent acquitting the petition of professional misconduct, the substratum of the petition abated. In the premises keeping the petition alive would serve no useful purpose. It is noted that the petitioner had himself informed the court that judgment had been delivered in the proceedings before the respondent. The court after being told that judgment had been delivered, marked the petition as settled. On costs, it is trite law that costs follow the event and are awarded at the discretion of the court. The court in exercising its discretion, awarded costs to the respondent.”

6. On 8th May 2023, the applicant filed yet another application in the High Court, seeking an order of stay of execution of the ruling of Thande, J., pending appeal to this Court. That application was heard and dismissed with costs by L. Mugambi, J. on 26th August 2024.
7. The applicant's next stop was this Court in the application now before us. In his supporting affidavit sworn on 18th October 2024, supplementary affidavit sworn on 22nd January 2025, and undated written submissions, the applicant contends that he has an arguable appeal that risks being rendered nugatory because the 1st respondent was in the process of taxing its party and party bill of costs.
8. As regards an arguable appeal, the applicant merely states without demonstrating how, that the High Court erred by failing to discharge or set aside the orders of 22nd March 2022, by failing to allow his application, by failing to analyse the evidence, and by dismissing his application. In addition, he contends that the High Court erred by failing to hold that there was no formal settlement on record.
9. As regards whether the appeal risked being rendered nugatory, the applicant submits that the 1st respondent has filed its party and party bill of costs and if the same is taxed, execution will follow, thus rendering his appeal nugatory. In support of the application the applicant relied on the decisions of this Court in Ndambuki Ndumba v. National Land Commission [2024] KECA 534; Reliance Bank



Ltd. v. Norlake Investments Ltd. [2002] I EA 227; and Stanley Kang'ethe Kinyanjui v. Tony Keter & 5 Others [2013] eKLR.

10. The 1st respondent opposed the application vide a replying affidavit sworn on 20th January 2025 by Kevin Akidiva, its legal officer, and written submissions dated 21st January 2025. The substance of the response was that the applicant's appeal was not arguable because he does not dispute that his petition had abated nor does he fault the High Court in its exercise of discretion regarding costs. As regards the applicant's claim that he was not heard, the 1st respondent submitted that the applicant's counsel was aware of the date of mention but elected not to attend court.
11. On whether the appeal would be rendered nugatory, the 1st respondent submitted that it is a reputable body established by statute to regulate the profession of accountants in Kenya and is well funded by annual subscriptions from numerous members and, therefore, it is capable of refunding any awarded costs, should the appeal succeed. The 1st respondent emphasised that the applicant had not even suggested that it is incapable of refunding awarded costs.
12. The 2nd respondent neither responded to the application nor filed submissions. At the hearing of the application, its counsel merely informed the Court that the application did not affect his client.
13. We have carefully considered the application. As regards the first part of the applicant's prayer for stay of execution of ruling dated 3rd March 2023, the same is a non-starter to the extent that it seeks stay of execution of a negative order. The ruling in question merely dismissed the applicant's application for review or setting aside of the ruling and order of Mrima, J. The execution of such an order cannot be stayed under rule 5(2) (b). (See George Ole Sangui v. Kedong Ranch Ltd. [2015] eKLR; Exclusive Estates Ltd v. Kenya Posts and Telecommunications Corporation & Another [2005] 1 EA 53; and Western College of Arts & Applied Sciences v. Oranga & Others [1976] eKLR).
14. The only aspect of Thande, J.'s ruling that is amenable to an order of stay of execution is the award of costs. As regards the applicant's appeal against costs, we entertain serious doubt whether the same is arguable granted that costs are at the discretion of the court and in any event, costs follow the events. The parties having confirmed to the court that the proceedings that the applicant was challenging and seeking to stay had been completed and determined in his favour, the petition was moot, and on costs, the High Court appears, prima facie, to have correctly applied the relevant principles.
15. Be that as it may, even if we grant that the applicant's intended appeal is arguable, the applicant has completely failed to satisfy us that the appeal will be rendered nugatory if it succeeds. The 1st respondents' averments regarding its ability to refund any costs awarded to it in the event the appeal succeeds, have not been challenged or controverted by the applicant.
16. Having failed to satisfy the Court that the appeal will be rendered nugatory, it means that the applicant has failed to meet the two conditions upon which a remedy under rule 5(2) (b) is awarded. The application has no merit and is hereby dismissed with costs to the 1st respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2025.

WANJIRU KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

