



**Journey t/a Bitala & Kakinga Advocates v Mwangangi t/a Mwangangi & Co Advocates
(Miscellaneous Application E001 of 2023) [2024] KEELC 1548 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1548 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E001 OF 2023**

**A NYUKURI, J
MARCH 13, 2024**

BETWEEN

JOHN JOURNEY T/A BITALA & KAKINGA ADVOCATES APPLICANT

AND

**FLORENCE MWANGANGI T/A MWANGANGI & CO
ADVOCATES RESPONDENT**

RULING

1. On 10th January 2023, Bitala and Kakinga advocates took out Originating summons dated even date seeking orders that Florence Mwangangi advocate, the respondent in this suit, be ordered to honour her professional undertaking dated 8th April 2022 requiring her to pay back Kshs. 306,812. 13, being the excess sums paid to her on account of the difference between security for costs deposited with her and the taxed costs. He also sought orders that the respondent releases title documents for two properties namely L.R No. 12648/149 and L.R No. 12648/154. A prayer for costs was also made by the applicant. This Originating summons was based on the fact that Florence Mwangangi advocate rendered legal services to one Angelina Mueni Mbaabu, regarding the above properties, whereof the client deposited with the respondent herein a sum of Kshs. 3,106,093.65 pending taxation of the respondent's bill of costs on the agreement contained in the professional undertaking that after taxation of the respondent's advocate-client bill of costs, any excess amount paid shall be returned to the client. According to the applicant, upon taxation of the respondent's costs on 15th December 2021, the difference between the deposited amount and the taxed amount was an excess of Kshs. 306,812.13, which the respondent must refund to the client as per the professional undertaking.
2. On 1st February, the respondent filed a replying affidavit stating among other matters that the Originating Summons is prematurely filed, as the taxation process upon which the same is premised, is incomplete as the respondent has challenged the ruling on taxation by filing a reference before the Judge.



3. Subsequently, the respondent filed a notice of motion dated 10th February 2023 seeking stay of proceedings in this matter, pending hearing and determination of the respondent's reference filed in Machakos ELC Misc. Application No. E009 of 2023.
4. Therefore, this ruling is in respect of the application dated 10th February 2023 filed by the respondent seeking stay of the proceedings herein.
5. The application is based on grounds on the face of it and supported by the affidavit of Florence M. Mwangangi, the applicant. She deposed that the Originating Summons filed in this suit sought to enforce the decision of the Taxing Officer in the ruling delivered on 15th December 2022 in Machakos Miscellaneous Application No. E022 of 2021, taxing the applicant's advocate/client costs for services rendered to Angelina Mueni Mbaabu.
6. She further stated that she invoked paragraph 11 of the Advocates' Remuneration Order and filed a reference vide ELC Misc. Application No. E009 of 2023, thereby challenging the decision of the taxing officer. She stated that the reference has high chances of success having raised substantial grounds. She maintained that should the proceedings herein be determined before the disposal of the reference; the latter shall be rendered nugatory to her prejudice. She averred that this court had issued interim orders for temporary stay of execution and to the extent that the said orders are interim and not issued herein, the orders sought herein are necessary in the interest of justice.
7. She asserts that the filed reference is an integral part of the taxation process and the same ought not be defeated by proceedings herein seeking to implement the ruling. She attached the bill of costs and ruling; replying affidavit; reference and supporting affidavit; and replying affidavit by the respondent.
8. The application was opposed. In response thereto, Bitala and Kakinga advocates filed grounds of opposition dated 18th March 2023 and filed on 24th March 2023. The respondent stated that the application was made in bad faith and aimed at misleading the court. They stated that the applicant had failed to present grounds arising from the undertaking upon which an order of stay of proceedings can issue.
9. According to the respondents, the application contravenes the principle of equitable and promissory estoppel. Further that the applicant's intention is to use stay orders to wriggle out of fulfilling her professional obligation.
10. They maintained that the applicant and the respondent had executed two professional undertakings dated 8th April 2021 and 9th April 2021 respectively whereof the applicant received a deposit of Kshs. 3,106,093.65 and the parties agreed that upon taxation, any excess amount would be refunded. That the applicant filed 4 bills of costs, and on 15th December 2021, the Taxing Officer delivered four rulings in respect of ELC Misc. Application Nos. 22, 23, 32 and 33 of 2021. That it was the finding of the Taxing Officer that the applicant had been paid over and above what is due to her, in the sum of Kshs. 306,812.13.
11. The respondent also stated that the Originating Summons herein was filed to enforce the professional undertaking made by the applicant and that seeking stay of the proceedings is a display of dishonesty and professional misconduct. The respondent maintains that the professional undertaking meant that the applicant waived her right to oppose taxation of the bills. They stated that the applicant already obtained stay of execution in Miscellaneous Application Nos. 7, 8, 9 and 10 and is estopped from seeking stay orders herein. Further that the applicant has not alluded to any errors in the professional undertaking.



12. In a rejoinder, the applicant filed a supplementary affidavit dated 3rd April 2023. She reiterated that the application has a good foundation as it is brought in exercise of an unalienable constitutional right to be heard in an appeal. She further deposed that the application is not barred by estoppel and that the reference has a high chance of success as the applicant had raised substantial grounds, inter alia that the Taxing Officer made substantial errors of principle, law and fact. It was her view that the Originating Summons herein was prematurely filed and in a precipitate manner ostensibly to forestall the exercise by the applicant of her right to appeal the taxation process. She denied the allegation that she was trying to wriggle out of the professional undertaking. She stated that the application herein and the reference were timeously filed as time did not run between 21st December 2021 and 13th January 2022. That the orders sought will temporarily suspend the hearing of the originating summons herein.
13. The application was canvassed by way of written submissions. On record are the applicant's submissions dated 3rd April 2023 and the respondent's submissions dated 18th March 2023.

Submissions by the applicant

14. The applicant submitted that it is apparent and on the face of the application that the same is well founded and brought in good faith and that it is not misleading or frivolous or meant to delay or assist the applicant to avoid a professional undertaking. The applicant maintained that the application was brought pursuant to the applicant's inalienable constitutional and natural justice right of being heard in the reference in Machakos ELC Misc. Civil. Application No. 9 of 2023, being an appeal against the taxation ruling in Machakos ELC Misc. Application No. E022 of 2021.
15. Reliance was placed on the case of *Vishva Stone Suppliers Company Ltd v. RSR Stone [2006] Limited* [2020] eKLR for the proposition that the right to be heard is sacrosanct, non-derogable and constitutionally and statutorily protected. The applicant argues that she had demonstrated that on 16th December 2021, she filed objection to the taxation of 15th December 2021 and sought reasons for the decision, for purposes of filing a reference. She argued that although the law provided for 14 days to seek reasons, the applicant made the application within a day, serving the respondent on 19th December 2021, which is merely four days after the ruling.
16. She submitted that as the reference was filed on 26th January 2023, after the court had supplied the applicant with a certified taxation ruling on 23rd January 2023, that therefore this application was timeously filed, as the application for stay could only be filed after filing the reference and reply to the originating summons herein. She argued that according to Order 50 Rule 4, time did not run between 21st December 2021 and 13th January 2022.
17. The applicant submitted that the respondent reacted to the reference by rushing to file the originating summons herein, so as to defeat the applicant's right of appeal against the taxation. The applicant took the position that the respondent's objection to the application herein was based on a grave misconception, real or pretended, that the taxation process stated above ended with the taxation ruling of 15th December 2022, when there was an objection thereto. The applicant argued that it was inconceivable that the respondent would blatantly ignore provisions of Rule 11 (1), (2) and (3) of the *Advocates Remuneration Order* which allow a party dissatisfied with taxation to appeal to the judge and even to the Court of Appeal in view of the numerous reference proceedings filed before judges and appeals in the Court of Appeal. She emphasized that taxations of bills do not conclude at the level of the taxing officer and cited the case of *Cecil G Miller & Company Advocates v. Parin Shariff & 3 Others* [2012] eKLR for the proposition that where the *Constitution* or statute provide a clear procedure of redress of any particular grievance, then that procedure ought to be strictly followed.



18. It was further submitted by the applicant that the respondent cannot invoke the principle of estoppel in this matter as no right of the respondent has crystallized under the professional undertaking signed by the parties herein.

Submissions by the respondent

19. The respondent cited the provisions of Order 42 Rule 6 (1) of the *Civil Procedure Rules* and submitted that the application herein has not met the threshold for grant of stay of proceedings.
20. It was submitted for the respondent that it was not true that the originating summons herein relate to execution of the ruling of the Taxing officer of 15th December 2021, because it is based on the professional undertaking dated 8th April 2021. Counsel argued that since the Originating summons was filed pursuant to Order 52 Rule 7 (1) of the *Civil Procedure Rules* and not under Order 22 that deals with executions, the applicant's averments that the same were filed in execution of the taxation ruling is not correct. Further that the originating summons herein are meant to enforce contractual obligations which the applicant is bound to perform. According to the respondent, the applicant had approached this court with unclean hands as the originating summons are the answer to the applicant's reference as the applicant had agreed before filing her bills of costs on what should happen after the deputy registrar taxed her bills.
21. The respondent argued that the applicant was bound by the doctrine of equitable and promissory estoppel because she undertook to comply with the professional undertaking she signed. Reliance was placed on the cases of *Serab Njeri Mwobi v. John Kimani Njoroge* [2013] eKLR and *First Assurance Company Ltd v. Seascapes Limited* [2005] eKLR for the proposition that the estoppel principle precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. According to them, the applicant is bound by the representation made in the undertaking dated 8th April 2021 upon which the respondent reasonably acted by releasing security deposit of Kshs. 3,106,093.65 and that on 9th April 2021, the applicant promised to refund any amount above the taxed amount.
22. On the question of the nature of the detriment to be suffered by the respondent, regarding their argument on the principle of estoppel, the respondent asserted that the applicant has now changed her position at the point of enforcement of the undertaking by filing the application for stay, to the respondent's detriment. The respondent further contended that it would be unconscionable to allow the application herein as that would be letting the applicant wriggle out of the enforcement of her representation.
23. Reliance was placed on the case of *Millicent Wamaitha Njogu v Pauline Nyambura Waweru* (2022) eKLR for the parameters for grant of stay of proceedings which include demonstration of prima facie case; that the application ought to be filed expeditiously and demonstration of sufficient cause that it is in the interest of justice to grant stay of proceedings. The respondent argued that this suit was filed 26 days after the taxation ruling, while the instant application was filed 21 days thereafter, which they maintained, was not expeditious. The respondent submitted that the applicant sat on her rights and only filed the application herein after the suit herein was filed.
24. The respondent also cited the cases of *Kenya Wildlife Service v. Mutembei* [2019] eKLR and *Peter Kariuki Mburu & Another v. Meema Shah* [2021] eKLR for the proposition that cases ought to be expeditiously disposed of and the threshold for granting stay of proceedings is high and stringent.



Analysis and determination

25. I have carefully considered the application, the response and parties' rival submissions. The sole issue that arise for determination is whether the applicant has met the threshold for grant of stay of the proceedings in this suit.
26. Order 42 Rule 6(1) of the [Civil Procedure Rules](#) provides for the power of the court to grant stay of proceedings as follows:-
- No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- No order for stay of execution shall be made under subrule (1) unless—
- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
27. It is clear therefore that granting stay of proceedings pending an appeal (in this case a reference) is purely a discretionary exercise of the court. Before stay of proceedings is granted, the court must be satisfied that the applicant has presented sufficient cause.
28. Staying a suit is not a matter to be taken lightly, because suits once filed ought to be heard and determined with speed in tandem with the Constitutional fiat that justice should not be delayed. As was held in the case of [Kenya Wildlife Service v. Mutembei](#) [2019] eKLR, the threshold for an application for stay of proceedings is higher and stringent than that of stay of execution, because staying any proceedings detrimentally interferes with the parties' right to access to justice and the right to a fair trial enshrined in Articles 48 and 50 of the [Constitution](#). An order for stay of proceedings ought to be granted only where the interests of justice require grant of such order.
29. In the case of [Global Tours & Travels Limited](#); Nairobi HC Winding up Cause No. 43 of 2000 the court stated that: -
- As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.



30. Similarly, in the case of *UAP Insurance Company Ltd v Michael John Beckett* [2004] eKLR the Court of Appeal was of the view that all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.
31. In the instant case, what is clear is that the applicant herein, Florence Mwangangi, an advocate of the High Court of Kenya offered legal services to Angelina Mueni Mbaabu in obtaining title to some properties. In the course of their engagement, on 8th April 2021, the applicant executed a professional undertaking to the effect that upon receipt of Kshs. 3,106,093.65 as security for costs, she would release to counsel for the client, original certificate, deed plan and registered deed of assent for LR. No. 7885/17. That the above sum shall be held as security “pending the filing and taxation of a bill of costs against your client in terms of the court order of 26th February 2021.” She also undertook to refund any amount that may be over and above the taxed amount.
32. Fast forward, the applicant’s four bills of costs against the client were taxed on 15th December 2021 at a sum less than the deposited security of Kshs. 3,106,093.65. Keen to challenge the taxation, on 16th December 2021, pursuant to Paragraph 11 of the Advocates Remuneration Order, the applicant filed objection to the taxation and sought reasons for the decision and certified ruling and proceedings. In the meantime, on 10th January 2023, the Respondent filed the suit herein. On 26th January 2023, the applicant filed a reference against the taxation ruling of 15th December 2021 vide Machakos Miscellaneous Application No. E009 of 2023. She also filed a response to this suit on 1st February 2023 and subsequently filed the instant application on 10th February 2023.
33. Although the respondent insisted that this suit has nothing to do with the ruling in respect of taxation of the applicant’s costs, from the above chronology of events and the contents of the professional undertaking executed by the applicant, the suit herein seeks to enforce a professional undertaking regarding what was deposited with the applicant and what was taxed by the court on 15th December 2021, as the excess amount can only be discerned after taking into account the taxed amount. A reference, according to paragraph 11 of the *Advocates Act*, is an appeal. The respondent’s own prayer number 2 of the originating summons seeks orders in reference to the impugned taxation. In addition, in the grounds supporting the originating summons in paragraph 7 thereof, and paragraph 7 of the supporting affidavit, the respondent has extensively referred to the taxations in Machakos Miscellaneous application Nos. 22, 23, 32 and 33 of 2021 as forming the basis of their claim. I therefore reject the respondent’s argument that the originating summons herein having been taken out pursuant to Order 52, and not Order 22 of the *Civil Procedure Rules*, is not meant to execute the ruling taxation, and that this suit has nothing to do with the taxation; as that line of argument is misguided, outrightly misleading and amounts to splitting of hairs. The mere fact that the originating summons herein is brought under order 52, does not negate the fact that it is a fresh claim made by the respondent for the purpose of effecting the applicant’s professional undertaking, which undertaking has no life without the taxation ruling of 15th December 2021.
34. The respondent also argued that the applicant is precluded from seeking stay because by the undertaking, she waived her right to challenge the taxation. Nothing could be further from the truth. From the professional undertaking filed before court, it is clear that the applicant stated that what is over and above the taxation shall be refunded. There was no mention that the applicant had waived her right to challenge the taxation. A taxation decision is a judicial decision which is appealable in law by virtue of the provisions of paragraph 11 of the *Advocates Remuneration Order*. The right to appeal is a constitutional right that cannot be implied to have been waived. In this case, there was no such waiver.
35. The respondent invoked the doctrine of equitable estoppel and argued that the applicant is barred from using the application for stay to wriggle out of the professional undertaking made.



36. Equitable estoppel is a principle that requires that where a party, who by their conduct induces another party to act to their detriment, such party cannot be allowed to renege on their earlier position. In the case of *Serab Njeri Mwobi v John Kimani Njoroge* [2013] eKLR, the court held as follows;
- The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.
37. In this case, the application before court is for stay of proceedings and not the originating summons and therefore the question of whether or not the applicant is trying to wriggle out of the obligations under the professional undertaking she executed, is a matter that should be raised at the hearing of the originating summons herein and not at this stage.
38. For the above reasons, I find and hold that the doctrine of equitable estoppel relied upon by the respondent has no bearing or application in the application before court.
39. In the instant matter, the applicant has shown that she has appealed against the taxation forming the basis of the undertaking which the respondent seeks to enforce by this suit. She argues that proceeding with this suit before determining the reference would be denying her the right to appeal. I therefore ask myself whether proceeding with the hearing of this suit despite the pending challenge on the taxation would serve the interests of justice. What would be the effect of proceeding with this suit before the reference is determined?
40. Under Article 159 of the *Constitution*, this court is enjoined to facilitate substantive justice expeditiously. Sections 1A and 1B of the *Civil Procedure Act* provides that, with the assistance of parties, the court ought to further the overriding objective of the Act by facilitating the just determination of proceedings; efficient disposal of the business of the court; efficient use of the available judicial time and administrative resources; timely disposal of proceedings and use of suitable technology. It is the responsibility of the court to facilitate just, expeditious, proportionate and accessible resolution of disputes as enjoined in Section 3 of the *Environment and Land Court Act* No. 19 of 2011.
41. As the respondent's Originating Summons are predicated on the taxation ruling, it is my view that proceeding with the Originating Summons before the reference is heard will render the reference nugatory and purely an academic exercise, which will be an affront to the applicant's legal right of appeal. In view of the above provisions, and considering the merited argument of the applicant that should this suit proceed before her reference, the latter will be rendered nugatory; it is my finding that it will serve the interests of justice to stay these proceedings, hear the reference first and revert to determine this suit. That would be an efficient manner of disposing court business and an efficient use of precious judicial time. It will also be proportionate and affordable. Therefore, the order that commends itself in the interests of justice and in the circumstances of this case at this stage, is an order of stay of these proceedings pending hearing and determination of the reference filed by the applicant.
42. I therefore find and hold that the application dated 10th February 2023 is merited and the same is hereby allowed as prayed with costs to the applicant.
43. As similar applications all dated 10th February 2023, plus similar responses and submissions were replicated and filed in Machakos ELC Misc. Application Nos. E002 of 2023, E003 of 2023 and E004 of 2023; for an efficient use of judicial time, I order that this ruling shall apply *Mutatis Mutandis* in regard the said applications in the aforesaid three matters.
44. It is so ordered.



**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 13TH DAY OF MARCH
2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

A. NYUKURI

JUDGE

In the presence of

Mrs. Mwangangi for respondent

Mr. Kakinga and Ms. Murugi for applicant

Josephine – Court Assistant

