Mungai v Mwangi Keng'ara & Co. Advocates (Civil Application E407 of 2022) [2023] KECA 1329 (KLR) (10 November 2023) (Ruling)

Neutral citation: [2023] KECA 1329 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E407 OF 2022

HA OMONDI, JM MATIVO & GWN MACHARIA, JJA

NOVEMBER 10, 2023

BETWEEN

ZIPPORAH MUNGAI ..... APPLICANT

AND

MWANGI KENG'ARA & CO. ADVOCATES ..... RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Okwany, J.) dated 13th October 2022 in HCCOM Misc. E317 of 2021)

RULING

1. By the Notice of Motion dated 8th November 2022 brought under a Certificate of Urgency pursuant to rule 5(2) (b) of the *Court of Appeal Rules*, and supported by the affidavit of even date sworn by Zipporah Mungai, the applicant seeks orders that pending hearing and determination of the intended appeal, there be a stay of execution of the orders of Okwany, J. made on 13th October 2022.

2. The applicant and the respondent had a client-advocate relationship which begun sometimes in the year 2019, when she instructed the respondent firm of Advocates to act on her behalf, as a consequence to which the respondent filed a suit to recover a debt of Kshs.25,667,802.60/- due to her from County Capital Limited and two others on the strength of an Investment Agreement dated 20th December 2017.

3. The suit was challenged on grounds of the trial court's jurisdiction in handling the dispute between the parties as the subject matter of the said suit had an arbitration clause which provided that all disputes arising therefrom were to be referred to arbitration; the trial court held that it had no Jurisdiction to entertain the dispute; and referred the same for arbitration. Consequently, an arbitral award of Kshs.40,620,875/- was made in the applicant's favour, although she has not recovered any part of the award as according to her, the judgment debtors are impecunious and have no known assets.

4. Anyway, arising from acting for the applicant in the said suit, the respondent filed two (2) bills of costs namely:

    i. Misc. No. 314 of 2021 to recover a sum of Kshs. 1,322,031.60 related to filing Nairobi CMCC 4672 of 2019.

    ii. Misc. No. 683 of 2021 to recover the sum of Kshs. 1,928,187 for acting for the applicant in the arbitration proceedings.

5. Subsequently, the applicant applied to the taxing officer seeking to strike out the Advocate/Client bill of costs filed in Misc. E314 of 2021 on the grounds, inter alia, that the subject matter in the court proceedings in Nairobi CMCC 4672 of 2019, was referred to arbitration for hearing and determination; that an arbitral award having been made, the instruction fees in respect of the said dispute merged in the award and that the advocate could not claim instruction fees twice in respect of the same transaction, that is instruction fees to institute the Magistrate's Court matter, and instruction fees in respect of the same dispute which had been referred to arbitration; that to file two bills of costs against her in respect of executing one transaction for recovery of the said sums due to her under the Investment Agreement amounted to condemning the applicant to pay twice for the same services.

6. The bills of costs were both taxed at the sums of Kshs.980,621/- and Kshs.1,553,253/- respectively; with the taxing officer stating whether the suit took off or not, the advocate was still entitled to full instructions fees. The applicant paid the taxed costs of Kshs.1,553,253/-, arising out of the representation in the arbitral proceedings. The claim was dismissed by the taxing master of his own motion without an application by the respondent advocates, and the bill was taxed at Kshs.980,621/-.

7. The applicant paid the taxed costs in respect of the arbitration of Kshs.1,553,253/-, then filed a reference to the High Court seeking to set aside the taxation, and that the bill of costs in the lower court be struck out as the matter was referred to arbitration and the advocate could not claim instruction fees twice; and that the lower court lacked pecuniary jurisdiction to handle the claim. The applicant's contention was that the taxing officer fell into an error of principle by failing to appreciate among other things that an incompetent suit filed before a court that lacked Jurisdiction could not be the basis of a lawful claim for fees under the Advocates Remuneration Order.

8. The High Court held that the taxing officer competently addressed all the issues that were presented before her for determination and applied the correct schedule in taxing the costs, without any error in principle; and the amount billed was not too high to amount to an unjust enrichment. The reference was thus dismissed with costs and judgement entered in favour of the respondent on the taxed costs of Kshs.980,621/- together with interest.

9. The applicant being aggrieved by the decision has filed a Notice of Appeal to the Court of Appeal, challenging the refusal of the High Court to set aside the taxation Ruling of the taxing officer which she maintains was premised on erroneous principles of taxation as the learned Judge: erred by making a finding that the bill of costs was properly taxed, when in actual fact the taxing officer had misdirected himself and erred in principle in unilaterally amending the value of the subject matter so that he could cloth himself with the jurisdiction to tax the said bill; failed to consider that the respondent firm had filed a multiplicity of bills of costs seeking multiple instruction fees in respect of having acted for the respondent in execution of one transaction that is Misc. No. E314 2021 and Misc. No. E683 OF 2021; failed to appreciate that the respondent filed Nairobi CMCC No. 4672 of 2019 to recover a sum of Kshs.25,667,802.80 on behalf of the appellant, a suit which in fact the subordinate court lacked Jurisdiction to handle and this could not be the basis of a lawful claim for instruction fees by the respondent.

10. The applicant urges us to consider the hardship she is likely to suffer should stay of execution not be granted as she has to date paid a sum of Kshs.5,912,586/- to the respondent firm of Advocates in respect of various bills of costs that the respondent has filed against her; that prior to the respondent filing various bills of costs against the applicant, she had paid a sum of Kshs.1,812,000/- towards her legal fees.

11. In advancing her arguments, the applicant reiterated that she has paid the respondent firm over Kshs.7 Million and yet she is still to recover a single cent in the matters the respondent firm has handled on her behalf; that she is no longer in gainful employment and will be exposed to financial hardship should she be compelled to pay the taxed costs which she is apprehensive that she will not recover in the event that the appeal succeeds.

12. In opposing the application, the respondent submits that the intended appeal is akin to a second appeal, yet the provisions of rule 11(3) of the *Advocates (Remuneration Order)*, 1962 are clear that where one is aggrieved by the decision made by a Judge upon any objection referred to such Judge under subsection (2), there is a requirement for leave of the Judge to this Court, yet the applicant did not comply with this mandatory requirement. Therefore, the Notice of Appeal dated 26th October 2022 is invalid, irredeemably defective and incompetent for want of leave together with the intended appeal which is founded thereon. In support of this submission, the respondent relies on the decision in *Muriu, Mungai & Co. Advocates vs. New Kenya Co-operative Creameries Ltd* (2010) at paragraph 4, where the Court held that a Notice of Appeal which was filed without leave of the court as required by rule 11 (3) of the *Advocates Remuneration Order* was defective; that in the absence of a subsisting appeal, the prayer for stay is superfluous; that any grievances by the applicant regarding the allegations of incompetent pleadings filed by the respondent were not within the jurisdiction of the Taxing Master but constituted, if at all, an independent cause of action, thus not arguable.

13. The respondent is categorical that the appeal cannot be rendered nugatory as the law firm has operated profitably since 2000, and has the financial means to refund the decretal sum; that there exists a ruling on record in Milimani HCCA No.65 of 2015 where the court held that the respondent is a person of means; that on the other hand the applicant has admitted that she has no gainful employment; that despite being awarded costs in the lower court is now saying that the respondent is not entitled to legal fees; and that the application is an attempt to deny the respondent the fruit of its sweat.

a) Whether the applicant has satisfied the requirements necessary for granting an order for stay of execution.

This Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings the applicable principles are the same. To succeed in an application under 5(2) (b) of this *Court's Rules*, the applicant has to establish that:

i. The appeal is arguable.

ii. The appeal is likely to be rendered nugatory if the stay is not granted and appeal succeeds.

14. In the case of *Wasike vs. Swala* [1984] KLR 591, this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the Court. Also, an arguable appeal is one that is not idle and/or frivolous. Our perusal of the memorandum of appeal and the pleadings herein raises the arguable issue on the jurisdiction of the taxing master in the lower court to tax the bill of costs; the question regarding whether instruction fees are an independent and static item, which does not change irrespective of the outcome of the suit; and that advocates earn their fees from the moment they are instructed whether the suit subsequently fails or succeeds.

15. As to whether an appeal will be rendered nugatory, this Court has held in the case of *Reliance Bank Limited vs. Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the Court is bound to consider the conflicting claims of both sides.

16. In the case of *African Safari Club Limited vs. Safe Rentals Limited*, Nai Civ. App. 53 of 2010 this Court held:

> " ...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

17. In short, the court is to decide which party's hardship is greater. In considering whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of each side and each case has to be determined on merit. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.

18. The applicant has raised the issue that the appeal will be rendered nugatory as she is not in gainful employment and would face financial difficulties if compelled to pay, and that the applicant is apprehensive that the respondent firm will be unable to make good the decretal sum should the appeal succeed.

19. The respondent on the other hand has demonstrated that it is capable of refunding the decretal sum should the appeal succeed by virtue of being a profitable law firm as well as being adjudged to be of means.

20. The respondent also makes a very valid observation that the applicant having been awarded costs in the lower court, why shouldn't the respondent then tax its bill of costs. This is a money decree, and, as such, the same is ascertainable, and should the appeal succeed then the applicant can be compensated adequately by costs. With that in mind, if the applicant's prayer for stay of execution is denied and the appeal eventually succeeds, it is our considered view that the applicant can be adequately compensated by an award for damages, if at all

21. Consequently, we hold that the applicant has shown that indeed she has an arguable appeal, but on the other hand has failed to show how her appeal would be rendered nugatory. Having failed to satisfy both limbs of the test in a rule 5(2) (b) application, this application must, and thus fails; and is dismissed and costs shall be in the appeal. This decision applies to Civil Application No. 408 of 2022 mutatis mutandis.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

H. A. OMONDI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

G. W. NGENYE – MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR