



**Macharia v Maina & Maina Advocates (Civil Application
38 of 2016) [2022] KECA 794 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 794 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 38 OF 2016
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA
JUNE 24, 2022**

BETWEEN

EDWARD MWANGI MACHARIA APPLICANT

AND

MAINA & MAINA ADVOCATES RESPONDENT

*(An application for stay of execution and further proceedings pending
determination of an intended appeal against the Order/Ruling of the Deputy
Registrar of the High Court of Kenya at Nairobi dated 18th June, 2015 and
19th November, 2015 in HC (Nairobi) Misc. Civil Application No. 20 of 2013)*

RULING

1. The applicant, Edward Mwangi Macharia (Edward), has moved this Court in person for orders of stay of further proceedings and stay of execution for recovery of Ksh. 232,690 arising from the Ruling of the Deputy Registrar of the High Court delivered on 19th November, 2015 in regard to the Taxation of Bill of Costs in Miscellaneous Civil Application No. 20 of 2013.
2. In support of his motion, Edward has sworn an affidavit in which he states that the Deputy Registrar delivered a ruling on 18th June, 2015 in which he dismissed an application dated 10th July, 2014. In that application, Edward had sought to have the Bill of costs dated 4th July, 2013 filed for taxation by Maina and Maina Advocates (the respondent herein), dismissed or struck out. On 19th November, 2015 the Deputy Registrar delivered another ruling in which he taxed the Bill of costs and, subsequently, a certificate of taxation for the bill of costs was issued on 18th July, 2016 for Kshs 232,690.
3. In the meantime, Edward filed notices of appeal in regard to the rulings of 18th June, 2015 and 19th November, 2015 on 1st July, 2015 and 2nd November, 2015 respectively, and later the notice of motion dated 17th February, 2016 that is subject of this ruling. Edward urges the Court that he stands the risk of having his properties auctioned for recovery of the taxed amount; that he filed his notices of appeal



on time, but that the High Court delayed issuing the typed proceedings; that he will be prejudiced in his intended appeal if execution of the bill of costs proceeds as per the certificate of taxation; and that the orders sought will not prejudice the respondent if granted.

4. Edward filed written submissions in support of his motion in which he reiterated what he had stated in his affidavit. He argued that the respondent will not suffer any prejudice as he will participate in the appeal, and that there has been no inordinate delay in filing this application for reasons that he had filed an appeal against the High Court decision and served the same upon the respondent, and that the respondent's move to tax the bill of cost was calculated to injure him. He prays that this application be allowed.
5. The respondent filed written submissions by which the Court was urged to dismiss the motion on the ground that the applicant had not met the conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules as no security has been furnished, and that the applicant's motion was an abuse of the Court Process as the appeal upon which it was anchored was incompetent and not arguable at all.
6. We have considered the motion before us and the contending arguments. Edward's motion is said to be brought under Rules 5(2) (b), 42 and 47 of the *Court of Appeal Rules* and the inherent jurisdiction of the Court. Rule 42 provides for the format for the motion, whilst Rule 47 provides for urgent applications. Edwards's motion is therefore substantively brought under Rule 5(2) (b) of the Court of Appeal Rules, which provides for stay of execution. Under that Rule, such a motion must be anchored on an appeal which is initiated by filing a notice of appeal to this Court. Edward has exhibited notices of appeal against the two rulings of the Deputy Registrar of the High Court in a taxation matter.
7. Under Rule 11 of the *Advocates (Remuneration) Order*, the procedure for appealing against a ruling of a Deputy Registrar as a taxing officer in a taxation matter is stated as follows:

“(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under

subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

8. A reading of Rule 11 of the *Advocates (Remuneration) Order*, shows that the first port of call open to Edward if dissatisfied with the order of the Deputy Registrar, was to file a reference to a Judge in chambers against the decision of the Deputy Registrar and, thereafter, he could only file an appeal to this Court against the decision of the Judge with leave from the Judge. In this case, the intended appeals are incompetent because the right procedure has not been followed and nor are they in the right forum.



This is because the appeal is against the decision of the Deputy Registrar and not against the decision of a Judge as Edward has not filed a reference to a Judge in chambers. Secondly, no leave has been given by a Judge for such an appeal to be filed before this Court.

9. Moreover, even assuming that the intended appeal was properly before us, Edward seeks to stay execution of the certificate of taxation for Bill of Costs which is for Kshs. 232,690, the intended appeal could not be rendered nugatory by the mere execution of the certificate of taxation, as Edward has not demonstrated that the respondent, which is a firm of advocates, will not be able to repay this money.

For these reasons we find no merit in the applicant's motion and the same is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

