Insurance Regulatory Authority v Waweru Gatonye & Company Advocates (Civil Application E440 of 2021) [2022] KECA 916 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KECA 916 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E440 OF 2021

DK MUSINGA, W KARANJA & S OLE KANTAI, JJA

JULY 22, 2022

BETWEEN

INSURANCE REGULATORY AUTHORITY ..... APPLICANT

AND

WAWERU GATONYE & COMPANY ADVOCATES ..... RESPONDENT

(An application seeking stay of execution of the Judgment and Orders of the High Court of Kenya at Nairobi (Majanja, J.) delivered on 13th August 2021 in High Court Misc. Application No. E207 of 2019 as consolidated with High Court Misc. Application No. E1061 of 2020)

RULING

1. The applicant's Notice of Motion dated 8th December 2021 seeks stay of execution of the judgment and orders delivered by Majanja, J. on 13th August 2021 in High Court Misc. Application No. E207 of 2019 as consolidated with High Court Misc. Application No. E1061 of 2020. In the same application, the applicant further seeks stay of execution of the Garnishee Order Nisi issued exparte by Majanja, J. on 29th November 2021 against the Garnishee, National Bank of Kenya, that the applicant's monies deposited and being held in deposit account number xxxxxxxxxxxx be attached to answer a decree for the sum of Kshs.315,272,706.00 inclusive of interest as at 25th November 2021 awarded to the respondent.

2. The dispute between the applicant and the respondent arose from an advocate/client relationship. The respondent had been instructed by the applicant to represent it in *John Kipkemboi Kilel v. Insurance Regulatory Authority & 2 Others*, Nairobi HCCC No. 491 of 2013, where the plaintiff in that matter was claiming from the applicant Kshs.12,075,289,826.00. The respondent filed a statement of defence and attended court severally for pre-trial conferences but due to lack of instructions and cooperation the respondent filed an application to be allowed to cease acting for the applicant, which application was duly allowed.

3. The advocate/client relationship having come to an end, the respondent filed a bill of costs dated 3rd June 2019 seeking to tax its bill, which it had stated as Kshs.395,258,644.00. The taxing officer (Deputy Registrar) in a ruling dated 12th May 2020, taxed the bill at Kshs.262,990,246.00. A certificate of costs for the taxed sum was subsequently issued on 25th June 2020.

4. Being dissatisfied with the ruling of the taxing officer, the applicant filed a Reference before the High Court, to wit, High Court Misc. Application No. E207 of 2019 seeking to set aside and review the decision of the taxing officer of allowing Kshs.151,053,122.82 as instruction fees. The applicant argued that this amount was manifestly high and punitive and amounted to unjust enrichment on the part of the respondent. During the pendency of that application, the respondent filed a separate application, to wit, High Court Misc. Application No. E1061 of 2020 praying that the certificate of costs issued on 25th June 2020 be adopted as a judgment of the court. The two applications were consolidated and heard, and on 13th August 2021, Majanja, J. dismissed the application for orders to set aside and review the decision of the taxing officer. Consequently, the decision of the taxing officer was upheld by the learned judge and judgment was entered in favour of the respondent in the sum of Kshs.262,990,246.40 together with interest, which was said to accrue from 25th June 2020. It is this decision that the applicant seeks to challenge by way of an appeal to this Court.

5. The instant application is supported by the grounds appearing on the face thereof and in the supporting affidavit and further supporting affidavit both sworn by Godfrey Kiptum, the Commissioner of Insurance and Chief Executive Officer of the applicant. The intended grounds of appeal, which are contained in the draft Memorandum of Appeal are, inter alia, that the learned judge erred in law and by failing to consider the principles of taxation set out in the decision of this Court in *Joreth Ltd v. Kigano & Associates*, Nairobi Civil Appeal No. 66 of 1999 'as the amount awarded to the respondent who withdrew from acting before the case was even heard does not support the just, equitable, proportionate and affordable resolution of civil disputes; by making a finding that the Taxing Master applied the proper charging schedule and ascertained the value of the subject matter from the plaint'. The applicant contends that the intended appeal is arguable.

6. On nugatory aspect, the applicant argued that a Garnishee order absolute was issued by the High Court on 15th December 2021, but a conditional stay was issued by the High Court, subject to payment of Kshs.15,000,000.00 to the respondent. It further argued that should the funds held in its account number xxxxxxxxxxxx at National Bank be released to settle the decretal amount, there would be no guarantee of a refund in the event the appeal succeeds. Additionally, that the settlement of the decree would disrupt the entire budget of the applicant and most of its operations would come to halt, occasioning great injustice to the people of Kenya whom the applicant serves.

7. The applicant through its written submissions reiterated the grounds appearing in its application, the supporting affidavit and the further supporting affidavit and we need not rehash them. However, on the nugatory aspect of the application, the applicant cited the Supreme Court case of *Gatirau Peter Munya v. Dickson Mwendwa Kithinji & 2 Others* [2014] eKLR where public interest was held to be an additional ground for consideration in an application for stay of execution.

8. The application was opposed by way of replying affidavit sworn on behalf of the respondent by Charles Waweru Gatonye, Senior Counsel, on 21st December 2021. The respondent stated that the intended appeal is not arguable and the appeal, if successful, will not be rendered nugatory. The respondent also sought to challenge the jurisdiction of this Court to hear and determine the application on the grounds that the notice of appeal which forms the foundation for the application was neither lodged nor endorsed by the Deputy Registrar of the High Court as required under rules 10 and 75 of the Rules of this Court. He urged the Court to strike out the notice of appeal.

9. On nugatory aspect, the respondent stated that what it seeks to enforce is a money decree; and that the applicant had not alleged that the respondent is impecunious and as such will not be able to refund the decretal sum in the event the intended appeal is successful. He stated that the respondent is a solid law firm and would be able to refund the decretal sum in the event that the appeal is successful.

10. On the allegation that the operations of the applicant would come to a halt should it satisfy the decree of the High Court, the respondent stated that the applicant did not provide any form of evidence in support of that argument.

11. We have considered the application, the respective submissions which both parties entirely relied on as well as the applicable law. It is now well established that in an application of this nature an applicant must satisfy this Court that the appeal or intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.

12. The respondent has challenged the jurisdiction of this Court to hear and determine the application based on what the respondent refers to as a defective notice of appeal. If the respondent intended to challenge the validity and or legality of the notice of appeal dated 26th August 2021, it ought to have filed an application to strike out the notice under rule 84 of the Rules of this Court, and that should have been done within thirty days from the date of service of the notice of appeal. We need not say more on this issue. We shall therefore determine the application on its merit.

13. The applicant has submitted that the learned judge failed to consider the principles of taxation set out in the decision of this Court in *Joreth Ltd v. Kigano & Associates*, (supra), and in the process awarded a huge sum to the respondent, who ceased acting even before the matter was heard.

14. The respondent countered that argument by stating, inter alia, that the taxing officer applied the correct principles in taxing the bill of costs; that instruction fees in a liquidated claim is based on the amount claimed and is payable once an advocate is instructed and a statement of defence filed; that the learned judge found that the taxing officer had exercised her discretion judiciously and therefore the intended appeal is not arguable.

15. In the impugned ruling, the learned judge at paragraphs 4 and 5 stated as follows:

> "4. It is common ground that the Advocates represented the Authority in John Kilel v Insurance Regulatory Authority and 2 Others HCCC 491 of 2013 ("the Suit"). The Deputy Registrar considered the parties' depositions and rival submissions on the Bill of Costs which was for a total of Kshs.395,258,644.00/= and by the ruling dated 12th May 2020, stated in part as follows on the instruction fees: 'From the Plaint the value of the subject matter is Kshs.12,075,289,826/-. The defence was filed and hence the instruction fees is to be paid. The instruction fee is calculated as follows: -
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> 1st Million Kshs.77,000/-
>
> Next 19 million @ 1.5% Kshs.285,000/- Balance 12,055,289,826 @1.25% Kshs.150,691,122.82
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> Total instruction fees is awarded at Kshs.151,053,122.82"
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> 5. It is this decision on instruction fees by the Deputy Registrar that is being challenged by the Authority and forms the substance of its reference."

16. After analyzing submissions by the parties including various authorities citied, the learned judge delivered himself as hereunder:

> "20. From the application, depositions and submissions, the main issue for determination is whether the Deputy Registrar erred in awarding the instruction fees in the manner she did. The approach to be taken by this court in dealing with the Reference is not in dispute. Since the jurisdiction to tax bills of costs is vested in the Deputy Registrar, it is a settled principle that on a reference to a judge from the taxation decision, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs (see Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR).
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> 21. The parties do not dispute the fact that the Deputy Registrar applied the proper charging schedule of the Order, Schedule 6 Paragraph 1(b) which provides, inter alia, that:
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> 1
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> (b) To sue in any proceedings described in paragraph
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> (a) where a defence or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties
>
> ...
>
> (d) To defend any other proceedings; an instruction fee calculated under subparagraph 1(b)"

17. In his deposition, the learned judge held that the Deputy Registrar applied the proper charging Schedule and ascertained the value of the subject matter from the plaint. He cited this Court's decision in *Joreth Limited v Kigano & Associates* (supra) where the Court held as follows:

> "We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

18. In the above cited decision, this Court affirmed the respondent's augments that instruction fees is an independent and static item that is charged only once and is not affected or determined by the stage the suit has reached. Instruction fees in a liquidated claim is a figure that is determinable with exactitude and precision and as we have shown above, in dismissing the Reference, the learned judge cited the correct mathematical formula that was followed by the Deputy Registrar in arriving at the disputed

sum. The applicant did not allege that the tabulation was wrong or was not in accordance with the Schedule 6. The amount that was arrived at as instruction fees is indubitable.

19. Looking at the proposed grounds of appeal and juxtaposing the same with the well-reasoned ruling by the trial court, we are not persuaded that the intended appeal is arguable. We are satisfied that the taxing officer (Deputy Registrar) assessed instruction fees appropriately as affirmed by the learned judge.

20. On the nugatory aspect, the applicant did not allege that the respondent will be unable to refund the judgment sum if the intended appeal succeeds. On the other hand, the respondent averred that it is a highly reputable law firm; has invested in real property; and will be able to refund the full judgment sum should the intended appeal succeed.

21. In our view, the onus lay squarely on the applicant to prove that the respondent will be unable to repay the judgment sum if its appeal succeeds. In *Tobias O. See v. Maseno University & 3 others* [2016] eKLR, this Court in dismissing an application for stay of further proceedings pending the hearing and determination of an intended appeal stated thus:

> " The applicant did not contend that the respondents are impecunious and therefore would not be able to refund the taxed costs in the event that the intended appeal is successful. The respondents are institutions and persons of substance who had averred that they would be well able to repay the costs, if the intended appeal is successful."

22. The applicant further alleged that there is a risk of its operations being grounded unless the court grants the orders sought but did not provide any evidence to that effect. In *Kenya Hotel Properties Limited v. Willesden Investments Limited* [2007] eKLR, this Court held:

> " We do agree with Mr. Nowrojee that to convince the Court to follow the decision in Reliance Bank case (supra), the applicant needs to do more than merely saying that it would experience hardship were it to be compelled to pay the decretal amount. The applicant needs to "put on the table" its financial position and how the same would be affected."

We adopt the same reasoning in this application. The applicant's averments were not supported by any documentary material or at all.

23. In view of the foregoing, we find that the applicant has not satisfied this Court that the intended appeal is arguable and will be rendered nugatory unless we grant the orders of stay pending appeal. Consequently, we dismiss the application with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR