



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: GITHINJI, MARAGA & GATEMBU, J.J.A)**  
**CIVIL APPLICATION NO. NAI 13 OF 2014 (UR 8/2014)**

**BETWEEN**

**EASTLAND HOTEL LIMITED ..... APPLICANT**

**AND**

**WAFULA SIMIYU & CO. ADVOCATES ..... RESPONDENT**

*(An application for stay of execution and further proceedings pending the hearing and determination of the intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi, being the Ruling of (E. K. O. Ogola, J) delivered on the 21<sup>st</sup> January, 2014*

*In*

**MISC. CIVIL APPLICATION NO. 713 OF 2012)**

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**RULING OF THE COURT**

1. The applicant, Eastlands Hotel Limited, has applied to this Court under Rule 5(2)(b) of the Rules of the Court for stay of execution of the High Court decree dated 10<sup>th</sup> May 2013 and any consequential orders therefrom, and a stay of further proceedings in Misc. Application No. 713 of 2012 pending the hearing and determination of the intended appeal.

**Background**

2. The background to this application as it emerges from the record before us is that the law firm of Wafula Simiyu & Co Advocates, the respondent, represented the applicant in the High Court at Nairobi in Civil Case Number 167 of 2012. The applicant was one of six defendants in that suit. The suit was settled by consent of the parties on 21<sup>st</sup> September 2012.

3. The respondent failed to agree with its client, the applicant, regarding the legal fee payable for work done by the respondent in connection with that suit. In November 2012 the respondent filed an advocate/client Bill of Costs against the applicant in High Court Misc. Cause No. 713 of 2012 in which the respondent claimed an amount of Kshs. 36,340,093.00 as legal fees and disbursements against the

applicant. When the Bill of Costs came up for taxation, the Deputy Registrar of the High Court was satisfied it had been duly served and went ahead with taxation *ex parte*. Taking the value of the subject matter as Kshs. 1,000,000,000.00, the Deputy Registrar, in a ruling delivered on 12<sup>th</sup> April 2013 taxed and allowed costs of Kshs. 19,374,317.00 payable by the applicant to the respondent.

4. Based on that taxation the respondent obtained judgment against the applicant and a decree in favour of the respondent against the applicant for Kshs. 19,374,317.00 was issued by the High Court on 10<sup>th</sup> May 2013 in High Court Misc. Cause No. 713 of 2012.

5. In an application dated 31<sup>st</sup> July 2013 presented to the High Court under paragraph 11(2) of the Advocates (Remuneration) Order, the applicant applied to set aside the taxation and to have the Bill of Costs taxed afresh on the grounds that the Deputy Registrar misapplied principles of law in the taxation of the bill of costs; that the Deputy Registrar erred in law and in fact in determining instruction fees at Kshs.12, 802,700.00 yet the respondent firm had not been instructed by the applicants to act on their behalf; that the Deputy Registrar had not considered the nature of the instructions the advocates had executed in awarding the instructions fees; and that the Deputy Registrar had failed to consider that a sum of money had already been paid to the advocates which amount was more than reasonable compensation for work done.

6. The learned judge in his ruling delivered on 21<sup>st</sup> January 2014 determined that the applicant had instructed the respondent to represent it and the other defendants who were shareholders and directors of the applicant in that suit. The judge was satisfied that the respondent had rendered legal services to the applicant as set out in the Bill of Costs. The judge declined to interfere with the Deputy Registrar's taxation taking the view that there was no error of principle and the fees were rightly assessed.

7. Basing his decision on **Steel Construction Petroleum Engineering (EA) Limited vs. Uganda Sugar Factory (1970) EA 141** the judge took the view that the "*Court cannot interfere with a taxing master's decision unless the decision is based on an error of principle or the fee awarded is so manifestly excessive as to justify an inference that it was based on an error of principle.*"

8. The judge however referred the Bill of Costs back to the Deputy Registrar for the purpose of taking accounts between the parties in order to establish how much legal fees had already been paid to the respondent prior to the taxation.

9. Aggrieved by the decision of the High Court given on 21<sup>st</sup> January 2014, the appellant intends to appeal to this Court against that decision and was granted leave of the High Court to appeal on 30<sup>th</sup> January 2014. Against that background the applicant brings the present application to stay execution of the decree issued by the High Court 10<sup>th</sup> May 2013 in Misc. Application No. 713 of 2012 and to stay further proceedings in that suit pending the hearing and determination of the intended appeal.

### **The applicable test**

10. The grant or refusal of relief under Rule 5(2)(b) of the Rules of this Court is a matter of judicial discretion. In the case of **Equity Bank Limited vs. West Link Mbo Limited Civil Application No. NAI 78 of 2011**, Githinji JA stated:

*"It is trite law in dealing with 5(2)(b) applications the Court exercises discretion as a court of first instance. ... It is clear that rule 5(2)(b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."*

11. The principles on which that discretion is to be exercised have been stated in many cases. In **Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd** Civil Application No. NAI. 157 of 2006 this court stated:

***“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”***

The question for our consideration is whether the application before us meets the required standard.

### **Submissions by Counsel**

12. At the hearing of the application before us the parties were represented by learned counsel. Mr. C.O Kenyariri appeared for the applicant while Mr. J.W Simiyu appeared for his law firm, the respondent.

13. Mr. Kenyariri referred to the grounds appearing on the face of the application and the supporting affidavits sworn by Qian Zengde a director of the applicant and submitted that the intended appeal is arguable and has high chances of success; that if the appeal is successful it will be rendered nugatory if the respondent will have executed the decree dated 10<sup>th</sup> May 2013; and that the applicant is ready and willing to provide any such reasonable security that this Honourable Court may order. Counsel argued that the issues that will be canvassed on appeal as set out in the draft memorandum of appeal include the question whether the High Court was right in its appreciation of the value of subject matter of the suit on the basis of which the respondent’s Bill of Costs was taxed; specifically whether the value of the subject matter should have been taken at Kshs. 300 million representing the value of the shares in the applicant at stake or whether it should have been based on the value of the entire company which was placed at Kshs. 1 billion.

14. Counsel went on to say that if the contested amount of taxed costs is paid over to the respondent and considering an amount of Kshs. 5 million was already in a joint account in the names of both parties, it would be difficult for the respondent, a sole legal practitioner, to refund the whole amount of money in case the appeal succeeds. In support, Mr. Kenyariri referred us to numerous authorities including **Githunguri Vs Jimba Credit Corporation Limited Nairobi Civil Application No. 161 of 1988**; **Butt Vs Rent Restriction Tribunal No. 6 of 1979**; and **Kenya Kazi Security Services Ltd Vs Kenya National Private Security Nairobi Civil Appeal No. 108 of 2013**;

15. Opposing the application, Mr. Simiyu referred us to his replying affidavit sworn on 13<sup>th</sup> February 2014 and submitted that the applicant has not established a case for the exercise of the Court’s discretion in its favour; that the applicant has not established that it has an arguable appeal that will be rendered nugatory if the orders sought are refused; that the intended appeal is a second appeal which can only be based on points of law and yet the memorandum of appeal does not contain complaints on points of law; that the applicant has on two occasions unsuccessfully challenged the decree before the High Court; that the applicant has failed to demonstrate that if the amount due under the taxed bill of costs is paid then the intended appeal will be rendered nugatory or would prejudice the appeal in any way.

16. Mr. Simiyu pointed out to the Court that the respondent had filed an undertaking in the High Court binding itself to refund the taxed costs should the intended appeal succeed and that in light of that undertaking the orders sought should be refused. In that regard Mr. Simiyu referred us to this Court’s decision in the case of **Francis Kabaa V Nancy Wambui and Jane Wanjiru Civil Application No. 298 of 1996 (unreported)**, **G.R Mandavis V The Commissioner of Income Tax (1957) EAI** and **Morgan V Elford (1877) 4 Ch. D 352**.

17. Mr. Simiyu went on to argue that the respondent law firm has assets and a professional indemnity cover of Kshs. 20 million which would cover a situation such as this; that to grant the orders sought would expose the respondent to great risk as all directors in the applicant are foreigners; that there is a further risk to the respondent should the applicant be sold or placed under receivership by its creditors prior to the determination of the intended appeal. Mr. Simiyu concluded by submitting that it would be against the interest of justice to stay a monetary decree that has been confirmed by two courts below.

**Determination**

18. We have considered the application, the affidavits and the submissions by learned counsel. Among the grievances by the applicant is the complaint that the taxation of advocate/client bill of costs at Kshs. 19,374,317.00 by the Deputy Registrar as confirmed by the learned Judge of the High Court is based on a misdirection on the value of the subject matter of the suit and the scope of work done by the respondent. There is also the complaint that the lower courts failed to have regard to the fact that the dispute related to shares in the applicant as opposed to the entire company. In our view, these complaints do not appear to be frivolous. We think the intended appeal is arguable.

19.Regarding the question whether the intended appeal will be rendered nugatory if the stay is not granted, we have taken into account the amount involved, as was done by this Court in the case of **Reliance Bank Limited vs. Norlake Investments Ltd [2002] 1 EA 231**. We have also taken into account that an amount of Kshs. 5,000,000.00 is held in a joint account between the advocates for the parties. We have also had regard to the offer made by the applicant to provide security and the intimation by the respondent that should the court be inclined to allow the application, it should be on condition that the applicant pays Kshs.15, 000,000.00 into the respondent’s account.

20. Being of the view that the intended appeal is arguable and having regard to the amount involved and taking all factors into consideration, we grant prayer 2 of the applicant’s application dated 29<sup>th</sup> January 2014 and order that pending the hearing and determination of the intended appeal there will be a stay of execution of the decree dated 10<sup>th</sup> May 2013 and of any consequential orders therefrom. Further proceedings in Misc. Civil Application no. 713 of 2012 are also stayed pending the hearing and determination of the intended appeal. These orders are subject to the following conditions:

- a. The applicant shall within 45 days from the date of delivery of this Ruling deposit the sum of Kshs. 5,000,000.00 in a joint interest earning account with the respondent in a reputable bank. That amount will be so held pending the hearing and determination of the intended appeal or until further orders.
- b. The amount of Kshs.5,000,000.00 held in the joint account between the parties shall continue to be held pending the hearing and determination of the intended appeal or until further orders.
- c. The applicant shall within 60 days from the date of delivery of this Ruling lodge and serve its record of appeal with this Court.
- d. In default of compliance with any of these conditions the order for stay shall be automatically discharged and the application shall stand dismissed.

21. The costs of the application shall be in the appeal.

**Dated and delivered at Nairobi this 21st day of March, 2014.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

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

**REGISTRAR**