



REPUBLIC OF KENYA



**Mwangi & 20 others v Barclays Bank of Kenya Limited & another (Constitutional Petition 25 of 2016) [2023] KEELRC 2922 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2922 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CONSTITUTIONAL PETITION 25 OF 2016  
MA ONYANGO, J  
NOVEMBER 16, 2023**

**BETWEEN**

**GLADYS MUTHONI MWANGI & 20 OTHERS ..... PETITIONER**

**AND**

**BARCLAYS BANK OF KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**BARCLAYS AFRICA GROUP LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Application dated November 15, 2022 and filed in court on November 18, 2022 has been brought by the respondents. It seeks orders that:
  - i. Spent
  - ii. Pending the inter partes hearing and determination of this Notice of Motion application, this Honourable court be pleased to issue an order staying the execution and/or enforcement of the ruling and orders of this honourable Court delivered virtually by this court on November 3, 2022, together with any other consequential orders arising therefrom,
  - iii. Pending the inter partes hearing and determination of this Notice of Motion application, this Honourable court be pleased to issue an order staying any further proceedings of fresh taxation of the Petitioners' Bill of costs dated April 12, 2021
  - iv. This honourable court be pleased to grant leave to the Respondents to appeal to the Court of Appeal against the Ruling and Orders of this honourable court delivered virtually by this court on November 3, 2022
  - v. Upon grant of leave to appeal further to prayer 4 above, this Honourable court be pleased to issue an order staying the execution and/or enforcement of the Ruling and Orders of this honourable court delivered virtually by this court on November 3, 2022 together with any



other consequential orders arising therefrom pending the hearing and determination of the respondent's intended appeal in the Court of Appeal

- vi. This honourable court be pleased to issue any orders to meet the ends of justice
- vii. The costs of this Notice of Motion application to be provided for
2. The application has been brought under sections 3 and 12 of the [Employment and Labour Relations Court Act](#) No 20 of 2011, rules 17(1), (3) and (8) of the [Employment and Labour Relations Court Procedure Rules \(2016\)](#), rule 11(3) of the [Advocates Remuneration Order, 1962](#) (sic)
3. The application is supported by the affidavit of Milkah Muthoni Gachanja, legal counsel for the applicant sworn on November 15, 2022.
4. The grounds upon which the application is made are contained on the face of the application. Briefly, they are that on October 29, 2021, the taxing officer hon Noelle Kyany'a delivered a Ruling on the petitioners' Party to Party Bill of Costs dated April 12, 2021 by which the taxing officer awarded the petitioners the sum of Kshs 484,100 as party to party costs. Aggrieved by the Ruling on taxation, the petitioners filed Chamber Summons Application dated November 11, 2022 to challenge the entire decision. The respondents filed a Replying Affidavit in response and opposition to the Reference Application and the parties thereafter filed and exchanged their respective submissions. The Ruling on the Reference Application was delivered by this court on November 3, 2022 wherein the court allowed the application with costs in favour of the petitioners, set aside the ruling on taxation and directed that the Bill of Costs be remitted to be taxed by a different taxing master. The respondents are aggrieved by the reference Ruling and have filed a Notice of Appeal dated November 4, 2021 on the same evidencing their intention to appeal against the whole of the Reference Ruling.
5. In reply to the application, the petitioners filed a Replying Affidavit sworn on November 23, 2022 by the 5<sup>th</sup> petitioner Rachael Gitau. The deponent avers that the Notice of Appeal dated November 4, 2022 as filed by the respondents is incurably defective contrary to rule 11(3) of the [Advocates Remuneration Rules, 2009](#). She further states that the respondents do not deserve the discretion of this court because the judgment in the main Petition was delivered 6 years ago; that the respondents have filed a Notice of Appeal without leave of court contrary to rule 11(3) of the [Advocates Remuneration Order](#); that the respondents have not sought that the irregular Notice of Appeal be deemed as properly filed; that tremendous prejudice will be suffered by the petitioners since it has been 6 years since the judgment was delivered and that the application is premature since taxation has to commence to establish the costs owed to the Petitioners. The deponent further states that if stay of proceedings is granted the same will be highly prejudicial to the petitioners and that the respondents have not demonstrated the principles for granting stay of proceedings.
6. The application was disposed of by way of Written Submission. I have considered the application and the reply as well as the submissions and authorities cited.
7. The conditions under which an order for stay of execution may be granted are spelt out in order 42 rule 6(2) of the [Civil Procedure Rules](#) which states:

“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.”

8. The first stop in an application of this nature is to inquire whether there is an appeal in place before the court. I have perused the record and found a Notice of Appeal dated November 4, 2022. I am satisfied that there is an appeal in place within the contemplation of order 42 of the *Civil Procedure Rules*.
9. The respondents have raised an issue with the validity of the notice of appeal, in view of the fact that an appeal herein lies only with leave of the court which was not obtained before notice of appeal was lodged. The question of validity of a notice of appeal is not within the jurisdiction of this court to determine but for the Court of Appeal. As was stated by the Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* CA No Nai 238 of 2005, the court was confronted with an objection similar to that raised by the respondent regarding the validity of the notice of appeal, the court expressed itself as follows:

“The applicant filed its notice of appeal against the said decision on May 26, 2005; the court accordingly has jurisdiction to hear and determine the motion for stay. Mr Ohaga, learned counsel for the respondents ...tried to argue before us that the Notice of Appeal filed by the applicant is invalid and that, therefore the court cannot grant the order of stay prayed for. We, however take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the court has repeatedly pointed out rule 5(2) (b) does not provide that “...where a valid notice of appeal...” the rule simply provides that: “In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74...” rule 74 itself does not talk about a valid Notice of Appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under rule 5(2) (b) is being considered.”

10. The next issue is whether the application was filed timeously. The ruling which is the subject of the instant application was delivered on November 3, 2022. The notice of appeal was filed on November 4, 2022 just a day after the ruling was delivered. There was therefore no delay.
11. The third issue is whether the applicant would suffer substantial loss. The applicants have argued that unless this application is allowed as prayed, the Bill of Costs shall be taxed afresh before a different taxing officer thereby denying the respondents the opportunity to be heard on merit in their appeal against the Reference Ruling.



12. In *Nairobi City Council v Tom Ojienda & Associates* (Civil Appeal (Application) E080 of 2022) [2022] KECA 1326 (KLR) (2 December 2022) (Ruling), the Court of Appeal held as follows in a similar application:

“It is our view that this is one of those cases where the maintenance of the status quo is in the interest of both parties. If a stay is not granted and the re-taxation is done on the subject matter of Kshs 5,444,697,804/= as directed by the learned judge, the pending appeal will be rendered an academic exercise if this court was to disagree with the holding of the high court. On the other hand, if the applicant is unsuccessful in the intended appeal, the re-taxation will be done afresh taking into account the holdings of the high court. In the circumstances of this case, a stay of proceedings is necessary pending the hearing and determination of the intended appeal.”

13. With regard to the prayer for leave by the respondents to appeal to the Court of Appeal, I do not see why the same should not be granted. The applicant has settled the decree herein including costs as assessed by the taxing master. What is in issue is additional costs that may arise should the taxation be done afresh by a different taxing master as ordered in the ruling that is contested by the applicant. I therefore see no prejudice to be suffered by either party should the application herein be granted.
14. In the end I allow the application dated November 15, 2022, only in terms of prayer (iv) and (v). Costs of this application shall be borne by the Applicant.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**M. ONYANGO**

**JUDGE**

