



Musyoki Mogaka & Company Advocates v Kiwipay (K) Limited (Commercial Appeal E350 of 2023) [2025] KEHC 459 (KLR) (Commercial and Tax) (28 January 2025) (Ruling)

Neutral citation: [2025] KEHC 459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E350 OF 2023
JWW MONG'ARE, J
JANUARY 28, 2025**

BETWEEN

MUSYOKI MOGAKA & COMPANY ADVOCATES APPELLANT

AND

KIWIPAY (K) LIMITED RESPONDENT

RULING

Introduction and Background:-

1. On 11th August 2023, the court's Deputy Registrar delivered a ruling ("the Ruling") in which she certified the sum of Kshs. 100,000.00/= as due to the Appellant ("the Advocates") from the Client, which sum was in respect of a Bill of Costs filed by the Advocates in respect of a suit; HCCOMM Petition No. E010 of 2022. The Advocates are aggrieved with the Ruling and have evinced their intention to appeal against the same but first, they have filed the Notice of Motion dated 21st December 2023 made under Sections 1A, 1B 3 & 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya, section 6 of the High Court (practice and procedure) Rules, Order 42(6)(1), (2), (6) of the *Civil Procedure Rules* and Article 50(1) & 159 (2)(d) of the *Constitution* seeking the following orders:
 1. Spent
 2. That the Honourable Court does consider and grant leave to the Appellant to file the Appeal herein out of time.
 3. Spent
 4. That the Applicant be allowed to hold as lien for its unpaid legal fees the Respondent's Money in the sum of USD. 1,934,900 in the custody of Ecobank Limited in Accounts No. 6682003059 and 6682003378 pending the determination of the Applicant's appeal.



5. Spent
 6. That the Honourable Court does order for the virtual proceedings in HCCOMM PET E010 of 2023 dated 27th September 2022 be made available for consideration.
 7. That this Honourable Court do grant any other and further order as may be just and expedient and for the interest of justice.
 8. That cost of this application be provided for.
2. The application is supported by the grounds on its face and the affidavit of Elkana Mogaka, an advocate and former employee in the firm of the Advocates, sworn on 21st December 2023. It is opposed by the Client through the Preliminary Objection dated 13th February 2024 (erroneously dated 13th February 2023). The application was disposed by way of written and oral submissions by the parties' respective counsel.
 3. The Advocates state that the Ruling certified a sum of Kshs. 100,000.00/= as due to them despite their existing a retainer agreement and board resolution between the parties to pay a sum of USD 1,934,900, representing less than a decimal tenth of the disputed sum. That as a result, the Advocates are being denied the fruits of their labour despite there being proper representation, including responses and filings within the e-filing portal that were properly argued before the Court. The Advocates state that they have an arguable appeal that raises serious triable issues thus the need to allow the determination of the appeal on merit and that any execution of the Ruling of the trial will render their appeal nugatory.
 4. The Advocates contend that the Deputy Registrar failed to take into account the pleadings that were argued before the Court on the day and date and failed to take into account the responses considered by the Judge in court proceedings that were conducted virtually. Further, that the Deputy Registrar failed to take into account all the necessary ingredients in the matter in making the Ruling and as such, the matter is ripe for appeal and the Advocates request a second look be given to the Ruling before the matter is considered disposed.
 5. In response, the Client states that the appeal and motion are misconceived and fatally defective for being offensive to the strict provisions of Paragraph 11 of the Advocates Remuneration Order ("the Order") and that this Court lacks the jurisdiction to hear and determine this appeal as it has been brought in violation of the statutory structures in place to regulate objection proceedings against the Bill of Costs and subsequent Certificate issued by the Deputy Registrar. As such, the Client states that the appeal and motion are therefore incompetent for invoking this Court's jurisdiction before exhausting the redress mechanisms anchored in statute. For these reasons, the Client prays that the appeal and motion be dismissed with costs to the Client.

Analysis and Determination:-

6. I have carefully gone through the application, the Objection and submission of the parties. I must agree with the Client that the Advocates' application is all over the place. It seeks to "appeal" the Ruling of the Deputy Registrar when as per Paragraph 11 of the Order, the only avenue available to them for challenging the decision of a taxing master is through objection and reference proceedings whereas an appeal is the preserve of the Court of Appeal. In any event, assuming that their appeal is an objection, their application seeks to enlarge time for filing the same but the Advocates have not given any reasons as to why the objection/appeal is late. They have delved straight into the merits or otherwise of the objection without first dealing with the hurdle of time. Even assuming that an appeal lies with the court (which it does not), the same would still require reasons for filing the appeal out of time as provided for by section 79G of the [Civil Procedure Act](#). Thus, whichever way you look at it, the present application



is defective and fatally so as the court's jurisdiction is ousted by the incompetent application and stale proceedings as was held by the court in Ogolla v Onyango Otunga & Company Advocates (Civil Appeal E101 of 2023) [2023] KEHC 27214 (KLR).

Conclusion and Disposition:-

7. In the foregoing, I find that the application dated 21st December 2023 is fatally defective and the same is hereby struck out with costs to the Respondents. Any interim orders issued herein are forthwith vacated. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JANUARY 2025.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Ngoizi holding brief for Mr. Elkana Mogaka for the Applicant.
2. Mr. Kiprotich for the Respondent.
3. Mr. Mwangi for Ecobank – Proposed Interested Party.
4. Amos - Court Assistant

