



Gatehi v Njuguna t/a Frank Mwangi and Company (Civil Application E094 of 2024) [2024] KECA 1833 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KECA 1833 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E094 OF 2024
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
DECEMBER 18, 2024**

BETWEEN

JOHN NJAU GATEHI APPLICANT

AND

**D FRANCIS MWANGI NJUGUNA T/A FRANK MWANGI AND
COMPANY RESPONDENT**

(Being an application for stay of execution of the ruling, order and decree of the High Court of Kenya, at Nakuru (S. Mbochi, J.) dated 6th August, 2024 in Miscellaneous Civil Application No. E026 of 2021)

RULING

1. A concise summary of the dispute before the High Court is necessary so as to contextualize the arguments urged by the parties for or against the applicant's application dated 3rd October 2024, the subject of this ruling. The applicant is one of the administrators of the estate of the late Miriam Wangare Njau-deceased in Nakuru Succession Cause No. 469 of 2009.

Sometimes in 2015, the applicant instructed the firm of Ikua Mwangi & Company Advocates to take over the conduct of the said matter from Njugi G. & Company Advocates. The said firm filed a notice of change of Advocates dated 29th February 2015. The applicant maintained that he paid the said firm Kshs.500,000/= in full and final settlement of the agreed legal fees and annexed receipts to affidavit to support the said assertion. He claimed that the partnership of Ikua Mwangi & Company Advocates was dissolved, but the respondent took his file and filed a Notice of Change of Advocates. However, this did not vary the terms of the fees agreement.
2. It was the applicant's case that the respondent ceased acting for him during the Covid period. However, he filed an advocate/client bill of costs against him dated 12th February, 2021 being Miscellaneous Civil Application No. E026 of 2021 claiming Kshs.113,336,379/= which was taxed at Kshs. 16,857,050



by Hon. Makau, Deputy Registrar. Aggrieved by the taxation decision, on 18th October 2023, the applicant filed a reference being Miscellaneous Civil Application No. E026 of 2021 challenging the taxation. Conversely, by an application dated 14th November 2023, the respondent applied for an order that the certificate of taxation dated 27th October, 2023 be adopted as a decree of the Court.

3. Mohochi, J. determined the two applications by a ruling delivered on 6th August 2024, he faulted the Taxing Master for failing to deduct the sum Kshs.500,000/= being the instruction fees paid by the applicant to the respondent. The learned Judge reduced the taxed amount to the Kshs. 16,387,050. It is this ruling that the applicant by his application dated 3rd October, 2024 seeks to stay pending hearing and determination of his appeal to this Court against. The application is brought under Articles 25 (c) as read with Article 50 (1) & 159 of *the Constitution* and Rules 1 (2), 5 (2) (b) and 49 of the Court of Appeal Rules, 2022. The grounds in support of the application are that the value of the estate is yet to be determined, therefore it is unclear how the said sum was arrived at and he was condemned to pay in person. The applicant also relied on his draft memorandum of appeal which essentially questions the amount assessed the principles applied in allowing the taxed amount. He averred that unless the stay is granted, his appeal would be rendered nugatory since he stands to suffer irreparable loss if execution proceeds.
4. In his replying affidavit sworn on 5th December, 2024 in opposition to the application, the respondent averred that the application is brought in bad faith and it is an abuse of the court process because the applicant fully participated in the taxation proceedings. He also averred that the taxing master considered the nature of the dispute and rightly allowed Kshs. 16,857,050/=:, which was reduced to Kshs.16,387,050/= by Muhochi, J. He maintained that the said sum is fair as confirmed by a valuation report and the Certificate of Confirmation of Grant which shows that the estate is very vast. The respondent maintained that the applicant has not demonstrate that his appeal is arguable and that he is guilty of perjury and does not merit this Court's discretion.
5. Regarding the nugatory aspect, the respondent maintained that he runs a reputable law firm and he is capable of refunding the decretal sum if the appeal is successful.
6. In her submissions in support of the application, the applicant's counsel Ms. Njeri Kariuki recapped the contents of the applicant's affidavit in support of the application and argued that the learned judge erred in law and in fact by failing to appreciate the fact that the valuation of the estate was not established by way of a valuation report to support the colossal sum assessed by the court, and in any event, the respondent does not deserve such a huge amount for merely drawing and filing a notice of change of advocates.
7. In support of the argument that the appeal would be rendered nugatory unless stay of execution is issued, counsel maintained that the services were offered to the applicant for the benefit of the estate and therefore, if stay is not granted, the Kshs.16,387,050/= will be recovered from the applicant personally.
8. In opposing the application, the respondent's counsel Mr. Njoroge contended that the applicant's appeal is frivolous and maintained that the appellant has failed to demonstrate the existence of a written agreement providing that the agreed fees for entire succession cause was Kshs.500,000/=:.
9. On the nugatory aspect, Mr. Njoroge maintained that the applicant has not demonstrated that he will suffer loss if the order sought is refused or that the appeal would be rendered nugatory. Mr. Njoroge also submitted that if stay is granted, the respondent will be prejudiced because he deserves to be paid for the legal services rendered.
10. Our invitation to intervene on behalf of the applicant has been invoked under Rule 5 (2) (b) of the Court of Appeal Rules which provides that this Court may in any civil proceedings, where a notice of



appeal has been lodged in accordance with Rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5 (2) (b) are well settled. In *Chris Munga N. Bichage vs. Richard Nyagaka Tongi, Independent Electoral & Boundaries Commission & Robert K. Ngeny* [2013] KECA 141 (KLR), this Court stated:

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

11. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court on appeal. In *Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR, this Court described an arguable appeal as one which must not necessarily succeed, but one which ought to be argued fully before the court and one which is not frivolous. It also stated that the court must not make definitive or final findings of either fact or law at that stage because doing so may embarrass the ultimate hearing of the main appeal.
12. In satisfaction of the first prerequisite, the applicant has raised 7 grounds in his draft memorandum of appeal. One of the grounds is that the learned Judge erred in law and in fact by failing to appreciate the fact that the valuation of the estate has not been established. The other grounds question the amount awarded terming it as colossal and whether the applicable principles were applied. In our view these are arguable grounds. For example, there is no valuation report on record to support the claimed value of the estate. In response to this ground, the respondent maintained that the subject estate is vast and thus the taxed amount is fair and reasonable in the circumstances and “as confirmed by the valuation report and certificate of confirmation of grant.” However, the respondent did not attach the valuation report in his affidavit in reply to the application. It should be remembered that even one ground can suffice to demonstrate that an appeal is arguable. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
13. Turning to the second prerequisite, that is, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, we bear in mind that this being a money decree, onus is on the respondent to show that he is a man of means. This Court in the case of *Kenya Hotel Properties Limited vs. Willesden Properties Limited Civil Application Nai. No. 322 of 2006* (UR 178/06) stated:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court was however emphatic that in considering such matters as hardship a 3rd principle of law was not being established at all.” (Emphasis ours).



14. Although the respondent has stated that he runs a reputable law firm business and is capable of refunding the decretal amount if the appeal is successful, we note there was no attempt to support this claim either by provided bank statements or deposits or audited accounts to demonstrate the ability to pay Kshs.16,387,050/= in the event the appeal succeeds. Conversely, the respondent described the estate as vast and worth over one billion Kenya Shillings.
15. In conclusion, we are satisfied that the applicant has satisfied both pre-requisites and that the scales of justice tilt in favour of allowing the application. Accordingly, we allow the applicant's application dated 3rd October, 2024 and order that there shall be stay of execution of the ruling and orders issued by Mohochi, J. in Miscellaneous Civil Application No. E026 of 2021 on 6th August, 2024 pending the hearing and determination of the applicant's appeal against the said ruling. The costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAKURU THIS 18TH DAY OF DECEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb.

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.

