Case Number:	Civil Application 292 of 2009
Date Delivered:	11 Dec 2009
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Daniel Kennedy Sultani Aganyanya, Philip Nyamu Waki, Joseph Gregory Nyamu
Citation:	Karuturi Networks Limited & another v Daly & Figgis Advocates [2009] eKLR
Advocates:	-
Case Summary:	Civil Procedure and Practice - applcation for stay of proceedings pending appeal - factorrs to be considered by the court before allowing such application - Rule 5 (2) (2) and 42 Court of Appeal Rules
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	H.C.M.C. 278 of 2008
Case Outcome:	Application allowed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLICATION 292 OF 2009

KARUTURI NETWORKS LIMITED.....1ST APPLICANT

FLOWER XPRESS FTZE ……2ND APPLICANT

AND

DALY & FIGGIS ADVOCATES.....RESPONDENT

(An application for stay of proceedings pending the lodging, hearing and determination of an intended appeal from the decision of the High Court at Nairobi by (Kimaru, J) dated 24th July, 2009

in

H.C.M.C.No.278 of 2008)

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RULING OF THE COURT

This is an application for stay of proceedings pending the lodging hearing and determination of an intended appeal from the decision of the superior court in Nairobi (***Kimaru, J***) dated 24th July 2009 in ***High Court Misc Cause No 278 of 2008***. It is brought under ***Rules 5(2((b)*** and ***42*** of the Court of Appeal Rules.

The applicants' brief version of facts is that on or about 4th May 2007 the second applicant instructed the respondents, a firm of lawyers to act on its behalf in the acquisition of shares in a number of local companies, and as a result the respondent set out the terms of its engagement which included the charging of its fees on a time expended basis. The respondent then proceeded to carry out the instructions and by an e-mail dated 16th October 2007 the respondent attached a fee note dated 15th October 2007. The respondent had by another e-mail sent to the applicant on 15th October 2007 set out the time spent and the fee it proposed to charge for the work done in the sum of US 91,000 plus VAT and disbursements. The second applicant and the respondent fell into a disagreement on some issues, but not on the charging of fees on time expeded basis, which in turn resulted in the respondent drawing and filing in court a bill of costs dated 1st April 2008 in the sum of US$ 800,700.

On the other hand the respondents version is that on 4th May 2007 they were contacted by the applicants' representative with a view to conducting a legal diligence; finalizing a sale agreement and conducting all other legal work with regard to the purchase of ***Sher Agencies Limited***, a company which they were informed conducted horticultural business in Naivasha Kenya and in response to the applicant's request as above, provided a breakdown of their standard billing on the basis that work conducted in respect of the due diligence process for Sher Agencies Limitedwould be conducted on a time expended basis and that such work along with all other legal work would be subject to the standard terms and conditions and that the applicant accepted the respondent's standard terms and conditions and insisted that the legal work commences immediately. When the work commenced it because apparent to the respondent that the proposed sale agreement in respect of Sher Agencies Limited as drafted by the vendors was completely inadequate and provided severely limited protection to the applicants and as a result required significant redrafting so as to ensure the protection of the applicants.

The common ground is that the work was completed. However the linchpin of the dispute is whether, there is an agreement between the parties in respect of the respondents' fees. The applicants' contention is that there is an advocate/client agreement in terms of ***section 45(6)*** of the Advocates Act and therefore there was no jurisdiction for the taxing master to proceed with the intended taxation following some determination by the superior court and in any event the fee dispute, in view of the existence of an agreement between the parties should have been the subject matter of a suit filed pursuant to ***section 48*** of the Advocate's Act and therefore neither the taxing master nor the superior court had jurisdiction to proceed in the manner they did. For the respondent it has been contended that there was no agreement on fees hence the filing of a bill of costs in a miscellaneous suit in the superior court.

A historical outline of the proceedings which gave rise to the matter before us is that after the bill of costs dated 1st April 2008 was filed and served the applicant filed an application by way of a chamber summons on 7th April 2008 seeking to strike out the advocate – client-bill and seeking an order to have the respondent's list of documents annexed

to the bill of costs as volume 1 to 6 expunged from the records. The application was grounded on ***section 44(4), 44(6)*** of the Advocates' Act, Schedule VI or 1(2) of the Advocate's Remuneration Orders, ***section 3A*** of the Civil Procedure Act and ***Order VI Rule 13(1) (b),*** and ***(c)*** of the Civil Procedure Rules. On 18th April 2008 the applicant filed a further application by way of a Notice of Motion. The application sought an order to stay the Advocate-Client bill of costs dated 1st April 2008. The application was expressed to be grounded on ***section 3A*** of the Civil Procedure Act and on ***Order 50 Rule 1*** of the Civil Procedure Rules. On 16th April 2008 the taxing master who is also the Deputy Registrar, after hearing submissions of counsel for the parties ordered that the bill of costs and the application to strike out be listed for hearing on a priority basis before a judge. The application to strike out was placed before *Kihara, J* on 18th April 2008 and the judge eventually heard the application on 13th, 21st May, 18th June and 11th July 2008, and on 28th July 2008 the judge ruled that the application to strike out be heard and determined by the taxing master. By a ruling dated on 6th January 2009 the taxing master dismissed the application to strike out. An appeal against the taxing master's ruling was filed in the superior court on 12th January 2009. However, on 11th May 2009 the applicants filed an application for stay of the taxation which application was heard and ruling reserved until 25th July, 2009. The appeal against the ruling of the taxing master declining to strike out the bill was listed for hearing on 25th June 2004 before (*Khamoni, J),* but following the raising of a preliminary objection against the application the hearing was adjourned to 24th July 2009. Meanwhile two days earlier a ruling on the application for stay was delivered on 22nd July 2009 by (*Kimaru, J*) and on 24th July 2009 the matter was again listed before (*Kimaru, J*) and on the same day (*Kimaru, J)* struck out the appeal without any hearing on the ground of his ruling of 22nd July 2009.

The applicant has filed a notice of appeal in this court against *Kimaru, J's* ruling to strike out the appeal and a draft memorandum of appeal has been exhibited in the application before this Court.

The applicant has cited 21 grounds in support of its application before us. However the applicant's counsel ***Mr Gachuhi*** laid stress on the principal grounds 1, 2,3 and 4 in the body of the application which state:-

1. ***That the applicant has an arguable appeal.***

2. ***The intended appeal is not frivolous and raises substantial matters of two (sic).***

3. ***That in the superior court there was a serious breach of the rules of natural justice because the applicants' appeal was summarily dismissed without a hearing.***

4. ***That in view of the agreement on fees between the parties there is a serious issue of jurisdiction in view of sections 45(6) of the Advocates Act which the superior court failed to consider*.**

In his submissions the learned counsel ***Mr Gachuhi*** emphasized the above grounds and further contended that it was arguable whether or not a taxing master has jurisdiction to tax a bill in a non contentious matter where there is an agreement pursuant to the provisions of ***section 45(6***) of the Advocates Act and also whether the taxing master had the jurisdiction to strike out an application under ***Order VI rule 13*** of the Civil Procedure Rules. He submitted that the issue of jurisdiction could only be determined by the superior court and it failed to do so. He cited the case of Owners of the ***Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1*** where ***Nyarangi JA*** observed that "***jurisdiction is everything***". ***Mr Gachuhi*** also put forward the argument that parties cannot confer jurisdiction to a tribunal which had no jurisdiction in the first place and this in turn meant the proceedings in the superior court could be a nullity and it would be wrong and unfair to subject an applicant to proceedings which in his view were patently a nullity. For the same reasons counsel contended that failure to grant a stay would result in great hardship to applicant if it was required to pay the sum of 56 million (Kshs)after taxation. If the taxation were to proceed the applicants contention was that such taxation would spring from flawed proceedings. For this reason the applicant would suffer great prejudice should the appeal succeed because it would have to part with a big sum of money without any assurance that the respondents would be able to pay back should the appeal succeed. He conceded that the order to strike out was not a positive order requiring anything to be done and therefore could not be stayed but he was quick to add that the applicants' interest was to have a stay of taxation, scheduled to take place on 29th of October, 2009.

On his part ***Mr Monari*** the learned counsel for the respondent submitted that the applicant had not shown that it would suffer any prejudice. In his submissions he relied on the affidavit in opposition to the application where he draws the court's attention to the fact that the transaction or the work undertaken was worth US Dollars 86 million which is equivalent to Kshs 5.5 billion. He added that the applicant had not paid the fee as per the invoices sent to it and that it had not made any repayment proposals for a period close two years now. He asserted that there was no fee agreement between the parties and no fee note had been exhibited by the applicant. He further submitted that in the absence of any agreement between the parties it is only a taxation such as the one scheduled for 29th October, 2009 which would determine the fee or the costs payable to the respondent. On the issue of jurisdiction, ***Mr Monari*** submitted that Rules 10 and 11 of the Advocates Remuneration Order gave the taxing master jurisdiction to tax the bill. Concerning the ruling dismissing the appeal the learned counsel submitted that the only order made was the dismissal of the appeal and no order of stay could be made against such order as was held in the case ***NDUNGU KINYANJUI v KIBICHOI KUGERIA SERVICES & ANOTHER (200) e KLR.*** The ratio decidendi of this case is that where the court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum, there would be nothing arising out of the decision for this Court to enforce or to restrict by injunction. He contended that the striking out of the appeal was not an arguable point as the substance of that appeal was the same as per the ruling of *Kihara Kariuki, J.* He concluded his

submission by stating that in the taxation itself the applicant would have an opportunity to dispute the items in the bill and if not satisfied invoke rules 10 and 11 of the Advocates Remuneration Order and for this reason the applicant's application is solely calculated to delay the taxation and further emphasized that the fact that the bill was for a substantial amount was not one of the grounds under ***Rules 5(2)(b)*** of this Court's Rules.

This being an application under ***Rule 5(2)(b***) of this Court's rules, the requirements which an applicant must satisfy in order to succeed under this rule are well set out in a number of well known decisions of this Court. Thus in order for the applicant to succeed it is necessary for the applicant to satisfy us, firstly that the pending appeal is an arguable one, or in other words, not frivolous, and, secondly, that if the stay of proceedings is not granted the appeal, if it succeeds when it is ultimately heard, will be rendered nugatory.

Concerning the first requirement the applicant easily succeeds in our view and without in any way delving into the merits of the intended appeal both the issue of the existence or not of a fee agreement and the issue of jurisdiction are not frivolous.

As regards the second requirement the court was not given an easy task. Firstly if the taxation is not stayed, the only aspect which we can legally stay in the light of the ratio in the case ***NDUNGU KINYANJUI v KIBICHOI KUGERIA SERVICES & ANOR supra,*** secondly, the applicant could still take part in the taxation and if still aggrieved seek a stay of the outcome of the taxation and also pursue an appeal without it being rendered nugatory. It follows, therefore, that after the taxation, this Court could yet be faced with another application for stay concerning the same matter which in turn means that this Court would be encouraging the filing of further proceedings including yet another appeal with the resultant delay and extra costs. In addition, this Court has in the past in an application under the same rule involving a law firm held that at that point in time that particular firm would have been faced with a serious hardship in paying upfront 10 million (Kshs) to a judgment creditor pending appeals - [see the case of ***ORARO & RACHIER ADVOCATES v CO-OPERATIVE BANK OF KENYA LTD CA 154 of 2000*** [unreported]. The question which cries out for an answer is whether when a law firm is the recipient of substantial funds we should not do a similar balancing act as was done in the ***Oraro case supra.*** What is good for the goose is good for the gander. In the case before us the contested fee note is 56 million (Kshs) approximately which would ultimately have to be paid to the respondent law firm in a situation where the law firm has not exhibited any evidence that they have the means to repay such a substantial amount or whatever might be adjudged to be their entitlement should the appeal ultimately succeed.

On our consideration of rival submissions on this second requirement, we have come to the conclusion that justice will be served better by weighing the conflicting claims of both parties and in particular the hardships likely to be faced by the parties. On the one hand, the respondent firm is likely to be kept away from payment of its fee notes for a long time, while on the other hand the applicant, a business entity, is likely to be called upon to pay a substantial amount in

satisfaction of a contested fee note with no accompanying guarantee of repayment by the respondent of what might be adjudged to be payable should the appeal finally succeed. This aspect might render the intended appeal nugatory. Linked to these considerations are the issues of further delay additional costs and lack of finality due to further proceedings, should we fail to grant a stay such as the prospect of yet a further appeal should the intended taxation proceed. Taking the above considerations in view, we think the balance tilts in favour of granting a stay. We entertain no doubt that formulating the two requirements under ***Rule 5(2)(b),*** in the past this Court did so in order to achieve the ends of justice. Happily the two requirements have by and large stood the test of time and will continue to be important guidelines in the future. However on 23rd July 2009, both the Civil Procedure Act Cap. 21 and the Appellate Jurisdiction Act Cap 9 were amended by the incorporation of ***sections 1A*** and ***1B*** to the Civil Procedure Acts which provisions provide for an overriding objective which the courts and this Court must take into account when they interpret the respective Acts and rules or exercise any powers under the Acts or the rules. We consider it useful to set out in extenso ***sections 3A and 3B*** of the Appellate Jurisdiction Act.

3A.(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of it powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and orders of the Court.

3B.(1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) The just determination of the proceedings;

(b)The efficient use of the available judicial and administrative resources;

(c)The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(d) The use of suitable technology.

In the case of ***CALTEX OIL (KENYA) LTD (Now renamed TOTAL MARKETING KENYA LTD) v EVANSON NJIIRI WANJIHIA CA NAI 190 of 2009 (UR 131/2009)*** this Court stated:-

"Before we set out the terms of the conditional stay it is important to state that in our view the powers of this Court have recently been enhanced by the incorporation of an overriding objective in Sections 3A and 3B of the Appellate Jurisdiction Act Cap 9 and sections 1A and 1B of the Civil Procedure Act, Cap 1 following the enactment of the State Law (Miscelleneous Amendment) Act No.6 of 2009. The overriding objective provides that the purpose of the two Acts and the rules is to facilitate the just, expeditious, proportionate and affordable resolution of disputes.

Although the overriding objective has several aims the principal aim is for the Court, to act justly in every situation either when interpreting the law or in exercising its powers. The Court has therefore been given a greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective. The provision came into operation on 23rd July 2009 and it is our view that by striking the balance as set out above we have also given effect to the overriding objective by firstly taking into account the special circumstances of the matter before us and secondly placing the two parties on equal footing as far as is practicable pending the outcome of the intended appeal. We have endevoured to do so by balancing their respective claims and hardships and designing, a stay order on terms."

It follows therefore that the jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective as set out above including its principal aims. In our view, dealing with a case justly includes *inter-alia* reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court including the granting of appropriate interim relief in deserving cases. As case managers, we realize that in this country and elsewhere the main scourges of civil justice are ***cost*** and ***delay***. Eliminating or reducing cost is now a new statutory requirement imposed on all courts including this Court, in the management of all civil matters. As elaborated above, refusing to grant a stay of the taxation would result in extra cost and delay including the filing of yet another appeal to this Court arising from the same matter. On the other hand our invocation of the overriding objective could avoid any further proceedings and reduce both cost and delay. Indeed in the circumstances, what would have fully embraced the overriding objective would have been for the court to hear the actual appeal instead of the application, but no record of appeal was in sight!

We are of the view that the applicant is successful on this ground as well.

In the result the application is allowed with costs in the appeal. It is so ordered.

DATED and delivered at Nairobi this 11th day of December 2009.

P. N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEA*L*

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

DEPUTY REGISTRAR