



REPUBLIC OF KENYA



Intercountries Importers & Exporters Ltd v Total Security Limited & 7 others (Environment and Land Appeal 10 of 2017) [2023] KEELC 17449 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17449 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 10 OF 2017
OA ANGOTE, J
MAY 18, 2023**

BETWEEN

INTERCOUNTRIES IMPORTERS & EXPORTERS LTD APPELLANT

AND

TOTAL SECURITY LIMITED 1ST RESPONDENT

LE MOLOK LIMITED 2ND RESPONDENT

**TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES ... 3RD
RESPONDENT**

COMMISSIONER OF LANDS 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

JUBILLEE INSURANCE COMPANY LIMITED 6TH RESPONDENT

PARK AVENUE INVESTMENTS LTD 7TH RESPONDENT

TRUST BANK LIMITED (IN LIQUIDATION) 8TH RESPONDENT

RULING

1. The Appellant/Applicant filed an application dated May 31, 2022 in which it has sought for the following orders:
 - a. That this Honourable Court be pleased to stay taxation of the 1st and 2nd Respondent's Party to Party Bill of Costs pending the hearing and determination of Court of Appeal Civil Case E216 of 2021.



- b. That this Honourable Court be pleased to stay taxation of the 3rd Respondent's Party to Party Bill of Costs dated November 8, 2021 pending the hearing and determination of Court of Appeal Civil Case E216 of 2021.
 - c. That costs of this application be awarded to the Applicant.
2. The application is supported by the affidavit of the Appellant's Financial Controller who deposed that judgement was delivered by this Court against the Appellant on February 25, 2021, awarding the 1st, 2nd and 3rd Respondent's costs and that the Appellant has exercised its right to Appeal by filing Court of Appeal Civil Case No E216 of 2021.
3. It was deposed that the Appellant has been served with the 1st and 2nd Respondent's Party and Party Bill of Costs dated July 21, 2021 and the 3rd Respondent's Party and Party Bill of Costs dated November 8, 2021 and that there ought to be a stay of taxation pending the hearing and determination by the Court of Appeal Civil Case Number E216 of 2021.
4. The Appellant averred that unless the stay of taxation proceedings is ordered, the Applicant will suffer substantial loss as they are seeking an award of costs in this court and in the Appellate Court and that unless stay of taxation is granted, execution may issue thereafter and should the appeal succeed, the Applicant will be required to file another case to recover costs. According to the Appellant, taxation is premature as costs should await the outcome of the Appeal.
5. The 1st and 2nd Respondents opposed the application vide a Replying Affidavit sworn on October 18, 2022 by a director of the 1st Respondent, who deposed that judgement in this matter was indeed delivered on February 25, 2021; that the Respondents were awarded costs and that this application having been filed at the eleventh hour is meant to delay the taxation of the 1st and 2nd Respondent's Bill of Costs.
6. It was deposed that the Applicant has not proved substantial loss; that the Applicant has admitted that it is able to recover any costs which the Court of Appeal may find due to it; that the award of costs in this matter does not render the Applicant's appeal nugatory and that the Applicant has failed to offer any security for the due performance of this court's Judgement.
7. The 3rd Respondent's Trust Secretary/Administrator deposed that following the judgement of this court on February 25, 2021, the Applicant was served with a Notice of Taxation dated February 4, 2022 together with the 3rd Respondent's party and party bill of costs dated November 8, 2021 on March 8, 2022 and that despite service being effected on time, the Applicant failed to respond on time and taxation proceedings commenced on March 30, 2022.
8. The 3rd Respondent averred that on March 30, 2022, the Court directed that both the 1st and 2nd Respondent's bill of cost and the 3rd Respondent's bill of costs be taxed on May 30, 2022; that the Applicant failed to respond to the Respondents' bills of costs despite service and that on May 30, 2022, when the matter was listed for taxation, there was no representation from the Applicant's Counsel despite being present in court when the date was given.
9. It is the 3rd Respondent's case that when the matter came up for Ruling on June 8, 2022, the Applicant's Advocates interrupted the proceedings seeking that the Ruling be stayed pending the hearing of this application; that the Appellant has not demonstrated how the taxation of the 3rd Respondent's party and party bill of costs will occasion it substantial loss and that if the taxing officer proceeds to tax the 3rd Respondent's party and party bill of costs, the ascertained sum would be the foundation upon which the court could base the amount of security to be deposited.



Submissions

10. Counsel for the Appellant submitted that the court has the general power to stay execution of decree upon sufficient cause being shown; that the sufficient cause herein is the pending appeal and that the Respondents have not asserted or proved their liquidity.
11. Counsel submitted that once the bills are taxed and the taxed sum is executed, it will stifle the appeal by rendering it academic on the portion of costs; that the application was filed timeously on June 8, 2022 and that security for costs is inapplicable to this case as the Bill of costs was arrested before taxation hence saving judicial time.
12. Counsel for the 1st and 2nd Respondents submitted that the application has failed to meet the threshold for the grant of a stay order as set out in Order 42 Rule 6 of the *Civil Procedure Rules* and the case of *Masisi Mwita vs Damaris Wanjiku Njeri (2016) eKLR*. Counsel submitted that the application has been filed extremely late, which delay is unreasonable.
13. Counsel for the 3rd Respondent submitted that it is trite that a successful litigant is entitled to enjoy the fruits of its litigations and no impediment should be placed before a decree holder seeking to reap the fruits of their judgements. Counsel relied on Order 42 Rule 6 of the Civil Procedure Rules and the case of *Samvir Trustee Limited vs Guardian Bank Limited Nairobi* as cited in *Kenya Women Microfinance Ltd vs Martha Wangari Kamau (2020) eKLR*.
14. The 3rd Respondent's Counsel submitted that the Appellant had made no attempt to demonstrate that it will suffer substantial loss if the stay of taxation is not granted. Counsel argued that the taxation proceedings are not prejudicial to the Applicant because after taxation, they can always proceed to apply for stay of execution of the taxed costs.

Submissions Analysis and Determination

15. This court has considered the application, pleadings and submissions of the parties. The issue for determination is whether this court should stay the taxation proceedings pending the appeal.
16. The factual matrix herein is that this court entered judgement for the 1st, 2nd and 3rd Respondents on February 25, 2021, awarding the 1st, 2nd and 3rd Respondents costs. Aggrieved by the Judgement, the Appellant filed Court of Appeal Civil Case E216 of 2021.
17. The 1st, 2nd and 3rd Respondents on their part have filed party to party bill of costs. The Appellant has consequently filed this application seeking a stay of taxation of these proceedings pending determination of the appeal before the Court of Appeal.
18. The Appellant has averred that unless the stay of taxation proceedings is ordered, it will suffer substantial loss because they are seeking an award of costs in this court and in the Appellate Court. Further, that unless stay of taxation is issued, execution may issue and should the appeal succeed, the Applicant will be required to file another case to recover costs.
19. Order 42 Rule 6(2) of the Civil Procedure Rules sets out the principles that a court should consider while deciding whether to grant stay of execution pending appeal.
20. In this matter, it was imperative for the Applicant/ Appellant to prove that the application was brought without unreasonable delay and to not only plead that it will suffer substantial loss, but also prove the same.



21. With respect to whether this application was made without unreasonable delay, the Applicant filed this application on May 31, 2022, seeking to stay the taxation of the bill of costs dated July 21, 2021 and November 8, 2021. The 3rd Respondent has averred that the Applicant was served with the respective bills of costs on February 4, 2022 and March 8, 2022.
22. While the Respondents have averred that this delay was inordinate, considering that the 3rd Respondent has admitted that service was only effected in February and March 2022, the delay in filing of this application in May 2022 was not inordinate.
23. This court shall now consider whether the Applicant stands to suffer substantial loss if this application is disallowed. This court has held that substantial loss does not mean the ordinary loss which every judgment debtor suffers, but rather something in addition to that. In *Century Oil Trading Company Ltd vs Kenya Shell Limited* as cited in [*Muri Mwaniki & Wamiti Advocates vs Wings Engineering Services Limited \[2020\] eKLR*](#), the court proffered the following definition of substantial loss:

' The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words 'substantial loss' must mean something in addition to all different from that Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.'
24. The court in [*James Wangalwa & Another vs Agnes Naliaka Cheseto \[2012\] eKLR*](#) similarly opined that the process of execution alone does not amount to substantial loss. It stated that as follows:

' The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

'The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.'
25. In *Machira t/a Machira & Co Advocates vs East African Standard [2002] eKLR*, the court further expounded that substantial loss must be specified and particulars given and that a court must be



satisfied that substantial injury will be suffered if the other party proceeds with execution. It held as follows:

' If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (eg appeal or intended appeal).'

26. While the Appellant has asserted that they stand to suffer substantial loss, they have failed to prove that they will suffer a loss different and in addition to that which a judgement debtor would necessarily suffer.
27. The Appellant did not itemize the particulars of substantial loss it stands to suffer should this application be denied. Its assertion that the process of taxation itself would occasion it substantial loss does not suffice.
28. I say so because taxation is a legal process whose import is to ascertain the sums due to the decree holder. This would thereafter be the basis of execution proceedings against which a party may seek stay orders. This was held in the case of *Deposit Protection Fund vs Rosaline Njeri Macharia [2006] eKLR* as follows:

' The only effect of taxing a Bill of Costs is the ascertainment of the quantum of costs payable by one person to another. Thereafter, the party whose costs had been ascertained could take out execution proceedings... Furthermore, if the learned taxing officer were to proceed to tax the defendants' Bills of Costs, the sums would be ascertained, and that would be the foundation upon which this court could base the size of the security which the applicant would need to raise, if the court did order that there be a stay of execution.'

29. The 3rd Respondent has also cited the case of *Dickson Sinkeet Mapi vs Naisenyu Pargarna Mutunkei [2021] eKLR*, where the court held that taxation proceedings are independent as this is the mandate of the Taxing Officer and that the party and party bill of costs is not subject of the Appeal.
30. Guided by these decisions, this court is not persuaded that the Appellant will suffer any substantial loss if the application herein is not granted. Indeed, until the bill of costs is taxed and the amount ascertained, the issue of a party suffering substantial loss cannot arise. The process of taxation should be allowed to proceed to enable the Appellant know its obligations, notwithstanding the pending appeal.
31. For those reasons, the Notice of Motion application dated May 31, 2022 is dismissed with costs to the 1st, 2nd and 3rd Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF MAY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Ikonge holding brief for Mathenge for 3rd Respondent

Ms Otieno for Wandabwa for 1st and 2nd Respondent



Ms Magotsi holding brief for Ms Kilonzo for Appellant

Court Assistant - Tracy

