



Obiero (Suing on behalf of Self and Members of Lake Basin Development Authority Provident/ Pension Scheme) v Lake Basin Development Authority Board of Trustees & 7 others; Lake Basin Development Authority & another (Interested Parties) (Constitutional Petition 26 of 2019) [2022] KEHC 12757 (KLR) (26 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION 26 OF 2019**

FA OCHIENG, J

AUGUST 26, 2022

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
ARTICLE 22 (2) (B) (3),
41 (B), ARTICLE 27, ARTICLE 28, 36, 39 AND 47 (2) AND
CONTRAVENTION OF THE RIGHT EQUALITY AND FREEDOM
FROM DISCRIMINATION AND
FAIR ADMINISTRATIVE ACTION**

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT NO. 4
OF 2015 SECTION 4, 5(1) (2) (3) (4), 7 (2) (A)€ (H) (K) (M)
(N) LAWS OF KENYA**

AND

**IN THE MATTER OF RETIREMENT BENEFITS AUTHORITY
ACT OF 1997**

AND

**IN THE MATTER OF LEGAL NOTICE NO. 193 OF 2018 –
THE RETIREMENT BENEFITS (GOOD GOVERNANCE
PRACTICES) GUIDELINES, 2018)**

BETWEEN

CLIFFORD OTIENO OBIERO PETITIONER



**SUING ON BEHALF OF SELF AND MEMBERS OF LAKE BASIN
DEVELOPMENT AUTHORITY PROVIDENT/ PENSION SCHEME**

AND

**LAKE BASIN DEVELOPMENT AUTHORITY BOARD OF
TRUSTEES 1ST RESPONDENT**
PHILIP ORIARO OLOO 2ND RESPONDENT
HENRY NYAGAKA MAKORI 3RD RESPONDENT
SAISI TAHIRI 4TH RESPONDENT
DAVID NJOGU MUTUOTA 5TH RESPONDENT
JOHN MEYO 6TH RESPONDENT
ZEPHANIA OTIENO 7TH RESPONDENT
OCTAGON INSURANCE BROKERS LIMITED 8TH RESPONDENT

AND

LAKE BASIN DEVELOPMENT AUTHORITY INTERESTED PARTY
RETIREMENT BENEFITS AUTHORITY INTERESTED PARTY

RULING

The application dated 4th June 2021 was filed by the Petitioner, seeking a stay of the Orders made on 24th March 2021, as well as a stay of any proceedings until the Petitioner’s intended appeal was heard and determined.

1. In his supporting affidavit, the Petitioner indicated that on 24th March 2021, when the Orders were made, he was sick and was therefore unable to attend nor link into any court session.
2. He also said that he had agreed with the Respondents’ advocate, that the ruling should be delivered through email. He was therefore surprised when he later learnt that the Respondents’ advocate had informed the Court that he (the Petitioner) was at his rural home.
3. The Petitioner told the Court that he had been served with the “taxation proceedings”, whilst he was in hospital.
4. Due to the fact that he was unwell, the Petitioner was late in lodging a Notice of Appeal. However, he had thereafter filed an application at the Court of Appeal, seeking an extension of time to file the Notice of Appeal.
5. In his considered view, his intended appeal had a high probability of success, because the trial Court had ignored the principles and rules which govern the award or the denial of costs in Constitutional Petitions.
6. In answer to the application, the 1st to 7th Respondents have urged the Court to dismiss the same as the Petitioner had failed to file a reference from the Ruling on Taxation.



7. They pointed out that on 29th June 2021, when the learned taxing officer delivered her ruling, the Petitioner was present in court.
8. From the record, I note that the Petitioner was absent from the court when the ruling was delivered by the taxing officer on 29th June 2021.
9. The Respondents submitted that the application was fatally defective because it was not accompanied with a Notice of Appeal, or a draft appeal.
10. In the absence of an appeal, the Respondents submitted that there was no basis upon which the Petitioner could anchor his contention about an appeal which had high chances of appeal.
11. Whereas the Petitioner may have his reasons for holding the view that his intended appeal has high chances of success, the Court is unable to ascertain whether or not such a view was merited.
12. In any event, I hold the considered opinion that the trial court was not the proper forum for determining whether or not an intended appeal, arising from its decision had high chances of success.
13. Speaking for myself, I acknowledge that I am not infallible; but whenever I deliver a decision, I do so in the belief that it was well-founded. It would be a travesty of justice for a court to deliver a decision which it had reason to believe, would probably be upset on an appeal.
14. At the time the Petitioner filed the application in question, the party and party Bill of Costs had not yet been taxed.
15. It is therefore understandable why the Petitioner did not, at that stage, seek an Order for stay of execution. He only sought a stay of proceedings.
16. However, as no interlocutory stay was granted, the process of taxation went ahead, and the costs were taxed in the sum of Kshs 149,175/=.
17. If the Court were to stay any further proceedings now, that would imply that the process of execution would be stayed.
18. It is an interesting scenario as the Respondents called upon the Court to reject the application for stay of execution, whereas there was no express application for stay of execution.
19. Pursuant to Order 42 Rule 6 of the *Civil Procedure Rules*, an Order for stay of execution or proceedings may be granted for sufficient cause. However, the rule expressly stipulates that;

“No order of stay shall be made unless
the court is satisfied that substantial
loss may result to the applicant unless
the order is made and the application
has been made without unreasonable
delay and 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.”

20. The whole purpose of granting an order of stay is to ensure that an appeal is not rendered nugatory.
21. If the Applicant would stand to suffer substantial loss, in the event that stay was not granted, the Court may grant appropriate orders, in order to conserve the subject matter of the appeal.
22. The onus is on the Applicant to demonstrate that his appeal would be rendered nugatory if the Court rejected the application for stay.
23. In this case the Petitioner had not yet filed a Notice of Appeal. He has filed an application for the extension of time for the filing of the Notice of Appeal.
24. Until and unless the Court of Appeal granted an extension of time, there is yet no appeal on record. Therefore, it cannot be argued that the appeal would be rendered nugatory.
25. Nonetheless, the Petitioner has called to his aid the provisions of Section 1A and 1B of the *Civil Procedure Act*. He submitted that the Court ought to weigh the likely consequences of granting the stay or of declining to order stay, with a view to ensuring that its decision does not lead to an undesirable or absurd outcome.
26. I am in agreement with the Petitioner, that the Court has an obligation to balance the interest of the Applicant, who is seeking to preserve the status quo until the appeal was determined; and the interest of the Respondent who is seeking to enjoy the fruits of his judgment.
27. In carrying out that task, the Court has to carefully give consideration to the evidence tendered by the Applicant, to ascertain if the Applicant had proved that he would suffer substantial loss if stay was not granted.
28. I am alive to the fact that the Court of Appeal may or may not grant to the Petitioner, an extension of time for filing the Notice of Appeal.
29. If the Petitioner was granted an extension of time after execution had been carried out, the extension of time would be meaningless.
30. But, of itself, the extension of time, if it were to be given, is not the yardstick for determining whether or not the Petitioner’s intended appeal had high chances of success.
31. On the other hand, the Court is not able to categorically state that the intended appeal was without any merits.
32. In these circumstances, I hold the considered view that justice demands that the Petitioner be accorded the opportunity to pursue his intended appeal, before the Respondents can execute the Orders arising from the taxation of the party and party costs.
33. But the Respondents are entitled to security for the due performance of such decree as may ultimately be binding upon the Petitioner.
34. Accordingly, I do order that there shall be a stay of further proceedings, until the intended appeal was determined. For the avoidance of any doubt, the determination of the intended appeal could come as early as the moment when the Court of Appeal rejects the Petitioner’s application for extension of time.
35. This Order for stay of execution is conditional upon the Petitioner providing security in respect to the taxed costs. In that regard, the Court grants to the Applicant the period of forty-five (45) Days from



today, to deposit the taxed costs in a joint interest-earning account which shall be held by the Petitioner and the Respondents.

36. The costs of the application shall abide the fate of the intended appeal. If the appeal was successful, the costs of this application shall stand awarded to him. However, if the appeal was unsuccessful, the costs of the application shall stand awarded to the 1st to 7th Respondents.

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 26TH DAY OF AUGUST 2022

FRED A. OCHIENG

JUDGE

