



Simekha & 3 others (Suing on their own Behalf and on Behalf of Members of the Local Congregation of Mariakani Christian Centre Church of God in East Africa Kenya) v Makokha & 9 others (Environment & Land Case 404 of 2018) [2023] KEELC 20264 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20264 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 404 OF 2018
OA ANGOTE, J
SEPTEMBER 21, 2023

BETWEEN

JOSEPH M. E. SIMEKHA 1ST PLAINTIFF
JOY RAELE ANDAMBI 2ND PLAINTIFF
WILBERFORCE MAKATE 3RD PLAINTIFF
TOM ISAAKA MONG'ARE 4TH PLAINTIFF
SUING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF THE
LOCAL CONGREGATION OF MARIAKANI CHRISTIAN CENTRE CHURCH
OF GOD IN EAST AFRICA KENYA

AND

BYRUM A. MAKOKHA 1ST DEFENDANT
REVEREND JAMES OBUNDE 2ND DEFENDANT
WYCLIFFE OMUSEBE 3RD DEFENDANT
RAPHAEL MUYELA 4TH DEFENDANT
MONICA OPANGA 5TH DEFENDANT
BENSON MAOSA 6TH DEFENDANT
WILLIAM SHIMANYULA 7TH DEFENDANT
THE REGISTERED TRUSTEES OF CHURCH OF GOD IN EAST AFRICA
(KENYA) 8TH DEFENDANT
DESIGN ARCHITECTS AND INTERIOR DECORATORS 9TH DEFENDANT
AIRTEL NETWORKS KENYA LIMITED 10TH DEFENDANT



RULING

1. The plaintiffs/applicants have filed a chamber summons application dated February 8, 2021 in which they have sought for the following orders:
 - a. The ruling of the taxing master dated December 9, 2020 be set aside.
 - b. Execution of the ruling of the taxing master is stayed pending appeal of the said ruling.
2. The application is supported by the affidavit sworn by Donald Odhiambo Rabala who deposed that the plaintiffs are aggrieved by the ruling of the taxing master and intend to appeal it at the Court of Appeal and that should the orders sought fail to be granted immediately, the ruling risks being enforced as against the plaintiffs, and execution carried out to their detriment, which would render the appeal nugatory.
3. It was deposed on behalf of the plaintiffs that the plaintiffs face the risk of suffering substantial loss and damage should the orders sought fail to be granted and that it is in the interest of justice that the ruling is set aside and its execution stayed pending its determination at the Court of Appeal.
4. Counsel for the 1st to 9th defendants opposed the application through a replying affidavit dated October 22, 2021 and sworn by George Kiruba Mbiyu, who deposed that the matters raised in the application are *res judicata*, the same having been raised and determined during the taxation of the defendants' bill of costs dated April 30, 2020.
5. It was deposed on behalf of the defendants that this court is *functus officio*; that the plaintiffs ought to have appealed against the decision of the taxing master; that no appeal or reference was filed by the applicants against the ruling of the taxing master; that while the ruling of the taxing master was made on December 9, 2020, this application was made on February 8, 2021 and was served upon the defendants on October 18, 2021 and that the application is an abuse of the court process and should be dismissed with costs.
6. The 10th defendant also opposed the application *vide* the grounds of opposition dated October 22, 2021.

Submissions

7. Counsel for the plaintiffs submitted that the application seeks to stay execution of the taxing master's ruling delivered on December 9, 2020, for the purpose of preserving the subject matter and preventing the appeal from being rendered nugatory.
8. It was submitted by counsel that if the defendants proceed and execute the taxed bill of costs, then the plaintiffs are bound to suffer substantial loss as there is a pending appeal at the Court of Appeal which is actively proceeding; that the appeal was filed before the taxation proceedings and that in the Nairobi civil appeal No 215 of 2020 on the subject matter, a consent order was registered in favour of the plaintiffs herein.
9. Counsel for the defendants submitted that the relevant provision for stay of execution pending hearing and determination of an appeal is set out in order 42 rule 6 (2) of the *Civil Procedure Rules*. While Counsel conceded that the application has been made without unreasonable delay, they submitted that the plaintiffs have failed to present any evidence of the substantial loss which they claim to face.



10. The defendants' counsel further submitted that the plaintiffs have failed to demonstrate that the appeal is arguable with high chances of success and that if stay is not granted, the appeal will be rendered nugatory. It was submitted by counsel that the plaintiffs did not file the notice of appeal against the ruling on taxation within the stipulated time and consequently, there is only an intention to appeal and not an appeal against taxation. It was submitted that the appeal CACA No 215 of 2020 is against striking out of the main suit.
11. Moreover, counsel submitted, the plaintiffs have made no proposal on the issue of security; that the requirement for security is to ensure that courts do not aid litigants in delaying court proceedings or execution of decrees through filing of frivolous appeals and that the court usually makes an order for suitable security for due performance of the decree as parties wait for the outcome of the appeal.
12. Both counsel relied on numerous authorities which I have considered.

Analysis And Determination

13. This court has carefully considered the pleadings and submissions by the parties. Although the plaintiffs have prayed for the setting aside of the decision of the taxing master, no ground for the prayer was set out in the application or the supporting affidavit. Indeed, the plaintiffs' advocate did not submit on this issue at all.
14. The sole issue that arises for determination therefore is whether the plaintiffs/applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of the ruling of the taxing master dated December 9, 2020 pending appeal.
15. Order 42 rule 6 of the *Civil Procedure Rules* prescribes the law with respect to stay of execution pending appeal. It provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless-
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) 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.”
16. This court has discretion to grant an order of stay of execution pending appeal. This discretion is however fettered by the conditions set out in order 42 rule 6 above. The court must be satisfied that substantial loss may result if the order is not made; that the application was made without unreasonable



delay; and lastly, provision of such security as the court may order. This position has been upheld by the Court of Appeal in *Visbram Ravji Halai v Thornton & Turpin* civil application No Nairobi 15 of 1990 [1990] KLR 365.

17. It is trite that the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute, and to ensure that an appeal is not rendered nugatory. This was held in *RWW v EKW* [2019] eKLR as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs... Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”

18. The plaintiffs herein have submitted that they have satisfied the conditions set out under order 42 rule 6 of the *Civil Procedure Rules*. First, as to whether this application was filed without unreasonable delay, the impugned decision was made on December 9, 2020, while this application was filed on February 8, 2021. It is not disputed that this application was therefore made without unreasonable delay.

19. The second condition is with respect to substantial loss. The definition of substantial loss was set out in *James Wangalwa & Another v Agnes Cheseto* [2012] eKLR as follows:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process.

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.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.”

20. Courts have pronounced that a party must not just state that it stands to suffer substantial loss. Rather, such a party must demonstrate how such loss is likely to occur, should stay of execution not be granted.



This was stated in *Daniel Chebutul Rotich & 2 Others v Emirates Airlines* civil case 368 of 2001, as quoted in *Kenya Commercial Bank Limited v Sun City Properties Limited & 5 others* [2012] eKLR as follows:

“It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur...“Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum.”

21. In this case, the plaintiffs/applicants have pleaded that if the defendants proceed and execute the taxed bill of costs, then the plaintiffs are bound to suffer substantial loss, as there is a pending appeal at the Court of Appeal which is actively proceeding.
22. The appeal the plaintiffs are referring to is Nairobi Civil Appeal No 2015 of 2020, which is against the ruling of this court dated January 30, 2020. In the impugned ruling, this court dismissed the plaintiffs’ suit on the ground that the plaintiffs failed to give notice of the suit to other church members in accordance with the provisions of order 1 rule 8 of the *Civil Procedure Rules*.
23. On this basis, it is evident that the plaintiffs have not filed any appeal or a reference against the decision of the taxing master dated December 9, 2020 pursuant to the provisions of rule 11 of the *Advocates (Remuneration) Order, 2009*, which provides as follows:

- “(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

24. That being the case, and in the absence of a reference challenging the decision of the taxing master in this court, the application for stay of execution of the taxing master’s ruling is a non-starter, null and void.



25. In any event, it is clear that the decision of the taxing master culminates in a money decree. The Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR authoritatively asserted that where there is a money decree, it is not likely that an appeal would be rendered nugatory:

“It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent’s circumstances, but the information that was forthcoming did not confirm the applicant’s misgivings.

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

26. In addition, this court also bears the responsibility of balancing the interests of a successful litigant with those of an unsuccessful litigant. In *Kenya Commercial Bank Limited v Sun City Properties Limited & 5 others* [2012] eKLR, the court stated that:

“In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.”

27. The upshot of the foregoing is that the plaintiffs have failed to demonstrate and establish that they risk substantial loss should this application be disallowed. Moreso, in the absence of an appeal against the ruling of the taxing master.

28. As to the third condition of security for costs, the applicants have shown no willingness to deposit the taxed amount either in court or in a joint account as security. The rationale for security under order 42 of the *Civil Procedure Rules* is to guarantee the due performance of the decree which may ultimately be binding on the plaintiffs’.

29. In conclusion, the plaintiffs’ have failed to satisfy the conditions provided under order 42 rule 6(2) of the *Civil Procedure Rules*, including evidence to show that indeed an appeal as against the decision of the taxing master is pending either in this court or the Court of Appeal.

30. For those reasons, the application dated February 8, 2021 is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF SEPTEMBER, 2023.

O. A. ANGOTE
JUDGE

