



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 625 OF 2009**

**MWANGI STEPHEN MURIITHI.....PETITIONER/APPLICANT**

**VERSUS**

**HON. DANIEL TOROITICH ARAP MOI, EGH.....RESPONDENT**

**RULING**

1. The Petitioner (Applicant) filed the Petition herein in 2009. The Petitioner then claimed, amongst other reliefs, orders for compensation for the deprivation of the Petitioner's right to property under Section 75 of the repealed Constitution.
2. Having heard the Petition, the court (Gacheche J) on 6 April 2011 agreed with the Petitioner in many aspects and awarded the Petitioner damages. The decretal amount was later stated to be in the excess of Kshs. 3,000,000,000/=. The Respondent quickly moved to the Court of Appeal and on 9 May 2014 the Court of Appeal overturned the judgment of the High Court. The Court of Appeal also ordered the Petitioner to meet the cost of both the High Court proceedings and the Court of Appeal proceedings.
3. Dissatisfied, the Petitioner cast his last dice and appealed to the Supreme Court Subsequently. The appeal before the very final court in our jurisdiction is yet to be heard. The parties were in unison that the hearing is now slated for 28 January 2016.
4. In the meantime, the Respondent on 15<sup>th</sup> September 2015 begun the process of recovering the costs awarded by the Court of Appeal. The Respondent filed a Party and Party Bill of costs. The total amount charged is slightly above Kshs. 227,000,000/=. The Bill of Cost is yet to be taxed and is pending taxation before the Deputy Registrar. The Petitioner seeks to have the proceedings impending before the Deputy Registrar stayed pending hearing and determination of the Appeal before the Supreme Court.
5. The Petitioner, through Mr. Paul Mwangi, argued that the circumstances of this case dictate that I exercise my discretion and stay the proceedings. On the other hand, counsel for the Respondent Mr. J. Ochieng Oduol together with Miss. Noreen Kidunduhu urged the point that the court has no jurisdiction as the matter is still solely in the hands of Deputy Registrar. For this proposition in law, counsel referred the court to the Court of Appeal decision in **Otieno Ragot & Company -v- Kenya Airports Authority [2015]eKLR** .
6. Counsel for the Respondent added that even if the court has jurisdiction the court has nothing before it with which it can exercise discretion in favour of Petitioner. As the Petitioner has not even offered any security and neither has Petitioner shown that he will suffer substantial loss.
7. There is no doubt that the taxing master exercises a special and primary jurisdiction with regard to taxation of awarded but untaxed costs. Similarly, there is also no doubt that when the High Court is seized with Constitutional Petitions and/or Judicial Review applications such proceedings are also *sui generis* and the court then is seized with special jurisdiction. That would include all

- matters and proceedings emanating from such special jurisdiction: see , for example, **Sanghani Investments Ltd -v- Nairobi Remand & allocation Prison [2007] 1 EA 354** . The court's jurisdiction will emanate from the Constitution and or statute.
8. There is however the age old principle that law has occasionally to bend to justice. Consequently even where the court's jurisdiction is not specially conferred by statute the court always has the inherent or residual jurisdiction to ensure that there is no injustice. I have no doubt in my mind that such residual jurisdiction is not taken away simply because it is the duty of a taxing master to attend to and assess Bills of Costs.
  9. My reading of the Otieno Ragot & Company Advocates' case as well did not appear to reveal so. Foremost, the court of Appeal was not dealing with a situation similar to the current one. There was no issue of stay pending appeal. The court was however clear that the High Court should never “ *usurp the functions of a taxing master in the first instance, to itself tax the bill[of costs] or determine the value of the subject matter in the name of setting parameters for the taxing master*”. The court went ahead to hold that matters which are for determination by the taxing master should not be handled by the High Court. The court of appeal then gave select examples of matters which could be properly for determination by the taxing master by referring to the High Court decision in **In re Winding Up of Leisure Lodges Ltd ,Winding Up Cause No 28 of 1996**. The matters included the quantum of costs to be awarded, the validity of a bill as a whole or any items in the bill. I hold the view that in the instant case, the court is not being asked to and neither would the court usurp the powers of the taxing master in considering an application for stay pending an appeal.
  10. I am also not convinced that an application for stay of proceedings pending an appeal should be a matter exclusively before the taxing master. Indeed, in ordinary civil matters that jurisdiction is with the court appealed from and not the deputy registrar: See Order 42 of the Civil Procedure Rules.
  11. In my view and judgment, the court's inherent jurisdiction to ensure justice is done where the circumstances are appropriate does not fade away and disappear simply because a taxing master is seized with a matter. In my view too, this court may not have an express jurisdiction but it has an inherent jurisdiction to interfere or intercede where appropriate as the power to stay proceedings is only to be exercised to ensure that there is no injustice: see **Adrian Zukerman Zukerman on Civil Procedure, Principles of Practice**.
  12. I return the verdict that this court has the necessary jurisdiction to entertain and determine the current application in the circumstances of this case given that the proceedings sought to be stayed are domiciled in this court and not the Court of Appeal.
  13. The question then is: do the circumstances warrant the orders sought? My answer is brief.
  14. The Petitioner has simply asked that there may be a stay of proceedings as the dispute between parties is yet to be fully determined as an appeal is pending before Supreme Court.
  15. Where the court is being asked to exercise its discretionary powers it would be important for a party to illustrate any hardship it may suffer if the discretion is not exercised in his favour. That has not been illustrated at all by the Petitioner. To simply state that an appeal is pending would not suffice. In other words, an appeal *simpliciter* does not grant a party any right of stay of proceedings or execution. More has to be shown.
  16. In the instant case that no sufficient basis has been established for any stay of proceedings. It has not been shown that the Petitioner stands to suffer irreparably if his appeal before the Supreme Court ultimately turns in his favour. No risk of injustice was shown by the Petitioner and I am satisfied that, currently, there is none. I find no reason to stay the impending taxation proceedings.
  17. I find, too, that the Notice of Motion dated 29<sup>th</sup> October 2015 is wanting in terms of merit and ought to be dismissed.
  18. It is dismissed but with no order for costs.

**Dated, signed and delivered at Nairobi this 27<sup>th</sup> day January, 2016.**

**J.L.ONGUTO**

**JUDGE**

