



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC (OS) NO. 4 OF 2014

PIUS MUSIMBA MUASYA & 15 OTHERS.....APPLICANTS

VERSUS

ONESMUS NDOLO NGETA & 3 OTHERS.....RESPONDENTS

RULING

What is before Court for determination is the Applicants' Notice of Motion application dated the 21st September, 2020 where they seek the following orders:

1. That pending the hearing and determination of this application the court do stay taxation of the bill of costs herein and any other proceeding herein.
2. That pending hearing and determination of Plaintiff/Applicants' appeal being Nairobi Court of Appeal Civil Appeal Number 94 / 2015 the court do stay taxation of the bill of cost herein and any other proceeding herein.

The application is premised on the grounds on the face of it and the supporting affidavit of one of the Applicants' PIUS MUSIMBA MUASYA where he deposes that they were dissatisfied with the judgement of the court and filed Civil Appeal No. 94 of 2015 in the Court of Appeal which raises triable issues. He confirms that through their advocates, they have been served with bill of costs together with taxation notice by the Respondents which is scheduled for 23rd September, 2020. He explains that one of the prayers he is seeking is an award of costs to himself and contends that unless the stay of taxation is granted, the intended appeal will be rendered nugatory as far as the issue of costs is concerned. He reiterates that he shall suffer irreparable loss and damage unless stay of taxation is issued as execution may issue thereafter and should the appeal succeed, he will be required to file another case to recover costs. Further, taxation is premature as costs should await outcome of the appeal. He avers that he had made the application without undue delay and the Respondents shall not suffer any prejudice if the orders sought are granted.

The application was opposed by the Respondents who filed a replying affidavit sworn by the 1st Respondent ONESMUS NDOLO NGETA where he deposes that the said application is frivolous, vexatious, unmeritorious, overtaken by events and an abuse of the court process. He insists the application is an afterthought and seeks to deprive the Respondents of the fruits of their judgement. He confirms that judgement was delivered in April, 2018 and it is after two years when the application for stay against the Decree and Judgment was filed. Further, that the application is brought in bad faith. He avers that the Applicants have annexed to their supporting affidavit, an unfiled document purporting to have filed an appeal but this evidence is misleading. He reiterates that the Respondents will be highly prejudiced as the costs of this suit continue to accrue. Further, the Applicants can be compensated by way of damages.

The Application was canvassed by way of written submissions but the Applicants failed to file theirs, despite the Court granting them leave to do so.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 21st September, 2020 including the respective affidavits and Respondents' submissions, the only issue for determination is whether there should be a stay of taxation of the bill of costs pending the outcome of Nairobi Court of Appeal Civil Appeal Number 94/2015.

The Respondents in their submissions reiterated their averments as contained in their supporting affidavit and insist Civil Appeal No. 94 of 2015 does not exist but there is Civil Application No. 94 of 2019 as evident in annexure 'PMK 1' attached to the application in which the Applicants sought stay of execution but the same was denied. Further, the same has never been granted by the Court of Appeal. They aver that the Applicants have not come to court with clean hands. They contend that the process of ascertaining the quantum of costs is taxation

and constitutes a claim being made by the Respondents. They state that the Applicants' application is premature. To support their arguments, they relied on the following decision: **Doris Awino Abira V M I Wafula & Co. Advocates (2021) eKLR.**

The Applicants have sought for stay of the taxation of bill of costs proceedings pending the determination of Nairobi Court of Appeal Civil Appeal Number 94/2015, which has been opposed by the Respondents. I note the Applicants have filed the instant application two years after the delivery of the judgement. They claim to have filed an appeal and have not appraised court of its position. Further, the Respondents in their submissions, averred that the Court had declined to grant a stay of execution which fact was not controverted by the Applicants. Be that as it may, I will first proceed to highlight various legal provisions governing stay pending appeal.

Order 42 Rule 6(2) of the Civil Procedure Rules provides that: ' **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.**'

In the current scenario, the Applicants claim the taxation of the Respondents' bill of costs should not proceed as it will prejudice them. The Deponent except for indicating that he has sought for costs in the Court of Appeal, has however not indicated what prejudice they stand to suffer if the taxation of the Bill of Costs proceeds and neither have they offered any security for costs.

In the case of **Deposit Protection Fund V Rosaline Njeri Macharia [2006] eKLR**, the Court while dealing with an application of stay of taxation proceedings, observed as follows: ' **Going back to the 2nd defendant's arguments, I note them as saying that if the court did not grant an order for stay of the proceedings, the applicant would not suffer substantial loss, on account of the taxation of the defendants' Bills of Costs. When faced with those submissions, the applicant did not tell the court how the taxation of the defendants' Bill of Costs would cause them substantial loss. To my mind, the taxation of a Bill of Costs cannot occasion any loss to the person against whom it is taxed. Therefore, the issue of taxation causing substantial loss does not even arise. 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. The applicant did not, in my considered view, make out a case for stay of proceedings, and in particular a stay of the taxation of the defendants' Bills of Costs. 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.**' Emphasis Mine

From the facts as presented, it is my considered view that the taxation of the Bill of Costs is not prejudicial to the Applicants as it is thereafter, that they can proceed to apply for stay of execution if the Respondents seek to execute the Decree. Further, the Court of Appeal has not granted a stay of execution of the Judgement in which the Respondents were awarded costs. It is trite that it is only through taxation that the costs can be ascertained. To my mind, I am of the view that taxation proceedings are independent as this is the mandate of the Taxing Officer and in this instance, the Bill of Costs is not subject of Appeal.

It is against the foregoing while relying on the legal provisions cited above and associating myself with the decision quoted, I find that the Applicants have failed to meet the **threshold set for granting stay of taxation of the Bill of Costs pending the outcome of the aforementioned case in the Court of Appeal and will decline to grant the said orders as sought.**

In the circumstances, I find the Notice of Motion dated 21st September, 2020 unmerited and will disallow it with costs to the Respondents.

DATED, SIGNED AND DELIVERED IN VIRTUALLY AT MACHAKOS THIS 31ST DAY OF JANUARY, 2022.

CHRISTINE OCHIENG

JUDGE