



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 59 OF 2013

ZIPPORAH CHELAGAT

RAEL CHEPNGETICH

LILIAN CHEPTANUI KEMEI PLAINTIFFS

VERSUS

TITO KIPLIMO CHEKWONY

SILAS KIPTANUI DEFENDANTS

R U L I N G

1. The applicants brought a notice of motion dated 4.2.2015 in which they seek stay of execution of this court's decree given on 22.5.2014 and that this court be pleased to set a side / and or review the costs as taxed herein. The applicants contend that they have preferred an appeal to the Court of Appeal and that if stay is not granted, the appeal which they have preferred at the Court of Appeal will be rendered nugatory. They contend that the appeal has high chances of success.
2. The applicants further contends that the bill of costs was taxed ex-parte as the same was not served upon the applicants. They therefore argue that they were condemned unheard and that already they have been served with notice to show cause and that if stay is not granted they are likely to be arrested.
3. The application is opposed by the defendants/ respondents through a replying affidavit sworn on 22.2.2015. The respondents contend that the applicants application is an abuse of the process of court and that the same has been brought too late in the day. They contend that the bill of costs was duly served upon the applicants' and that they have only come to court to file this application after they were served with notice to show cause.
4. I have gone through the applicants' application as well as the submissions by their advocate. I have also considered the submissions by the advocate for the respondents as well as the replying affidavit by the respondents. The issues which emerged for determination are firstly whether the application for review of the taxed costs is properly before this court and secondly whether stay of execution can be granted in the circumstances of this case.
5. I will start with the issue of stay of execution. The applicants have moved this court under order 42 Rule 6 of the Civil Procedure Rules. There are certain conditions which must be met before stay of execution can be ordered. First the court must be satisfied that substantial loss may result to the applicant unless the order is made. Secondly the application must be made without in unreasonable

delay. Thirdly there has to be security for the due performance of such decree as may ultimately be binding on the applicant.

6. The Judgment being appealed against was delivered on 22.5.2014. The appeal was filed on 25.7.2014. The application for stay was made on 9.2.2015. This is a period of over 8 months. I find that this period is unreasonable in the circumstances.

7. I now turn to consider whether there will be any substantial loss suffered if stay is not granted. The applicants had sued the respondents seeking orders of eviction and injunction against the respondents. The applicants' suit was dismissed with costs to the defendants on 22.5.2014. The respondents are not executing any decree arising from that judgment. What the respondents are only executing are costs of the dismissed suit. I do not see how execution for costs can render the appeal herein nugatory. There is no substantial loss which the applicants will suffer if stay is not granted.

8. The issue of security is only considered if it is found that there will be substantial loss suffered. The last issue for consideration is whether the application for review of the taxed costs is properly before me. The applicants are complaining that they were not served with hearing notice for the bill of costs and that instruction fees was not properly awarded as there was no valuation report filed to show the value of the property. It is important to note that the taxation herein was done by the Deputy Registrar of this court. If the applicants wanted the taxation to be set aside or reviewed, they should have made that application before the Deputy Registrar. This court can only deal with matters which are brought before it by way of reference from the decision of the Deputy Registrar. This court cannot entertain an application seeking to set aside a taxed bill on the ground that there was no service of the bill upon the applicants.

9. I do not find any merit in the applicants' application. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated , Signed and Delivered at Kitale on this 26th day of May 2015.

E. OBAGA

JUDGE

In the presence of Mr. Bororio for defendant / respondents and Mr. Ndarwa for Mr. Mokuwa for Plaintiff / Applicant.

E. OBAGA

JUDGE

26.5.2015