



Kayser Investment Limited v Bamburi Special Products Limited & 2 others (Environment & Land Case 534 of 2018) [2022] KEELC 2855 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEELC 2855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 534 OF 2018
LC KOMINGOI, J
APRIL 28, 2022**

BETWEEN

KAYSER INVESTMENT LIMITED PLAINTIFF

AND

BAMBURI SPECIAL PRODUCTS LIMITED 1ST DEFENDANT

KIRIIYU MERCHANTS AUCTIONEERS 2ND DEFENDANT

GIKERA & VADGAMA ADVOCATES 3RD DEFENDANT

RULING

1. This is the Notice of Motion dated 30th August 2021 brought under section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, order 42 rule 6, order 51 rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law.
2. It seeks orders: -
 1. Spent.
 2. Spent.
 3. There be a stay of further proceedings in this matter including the taxation of the Defendant's bill of costs pending the hearing and determination of the appeal instituted against the ruling and order of this honourable court on 15th October 2020.
 4. Costs of this application be provided for.
3. The grounds are on the face of the application and are set out in paragraphs 1 to 9.
4. The application is supported by an affidavit sworn by Dorothy Mbaye, an officer of the Plaintiff/Applicant, on the 30th August 2021.



5. The application is opposed. There is a replying affidavit sworn by Waeni Ngea, Head of Legal and Compliance of the 1st Respondent, on the 19th October 2021.
6. It appears the 2nd and the 3rd Respondents did not file any responses.
7. On the 26th October 2021 the court with the consent of parties directed that the notice of motion be canvassed by way of written submissions.

The Plaintiff's/Applicant's submissions

8. They are dated 17th November 2021. They raise one issue for determination; whether or not this Honourable court should grant an order staying proceedings including taxation of the Defendant's bill of costs in this suit pending the hearing and determination of the Appeal.
9. In determining the merits of the application for stay of proceedings pending appeal the applicant has the onus of establishing the following:-
 - a. That there is a prima facie arguable appeal.
 - b. The application was filed expeditiously.
 - c. That there has been established a sufficient cause to the satisfaction of the court that is in the interest of justice to grant the orders sought.

It has put forward the cases of *Nation Media Group & Another vs William Kimutai B. Keitany* [2017] eKLR; *Moses C. Mubia Njoroge & 2 Others vs Jane W. Lesaloi & 5 Others* [2014] eKLR.

10. The Memorandum of Appeal dated 8th July 2021 raises an arguable case. The memorandum of appeal points to the errors of law and fact where the honourable court failed to recognize that the property in question being LR NO 1/299 did not belong to the judgment debtor in HCCC 431 and 432 of 2014 and should therefore not be liable for disposal or attachment in fulfilment of the decretal sum.
11. The application before the court seeking a stay of proceedings was filed expeditiously following the provision of the civil procedure rules. It has also put forward the case of Global Tours & Travels Ltd; Nairobi HC Winding Up Cause No 43 of 2000 as mentioned in the case of *Edward Muchiri Ituma vs Beatrice Wangige & 9 Others* [2019] eKLR.
12. It is in the interest of justice to stay these proceedings pending appeal as the Plaintiff herein stands to suffer the loss of property should it be wrongly attached, disposed or sold by the Defendants herein, their agents or servants.
13. Proceeding with taxation in the matter is likely to predispose the Plaintiff to further losses occasioned by payment of any decretal amounts that would be awarded to the Defendants. It has put forward the case of *Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Ltd* [2015] eKLR. It prays that this court does exercise its discretion to stay the proceedings including the taxation pending appeal.

The 1st Respondent's Submissions

14. They are dated 29th November 2020. They raise two issues for determination: -
 - (i) Whether the court should stay taxation proceedings.
 - (ii) Whether the application will suffer substantial loss if the taxation proceedings are not stayed.
15. The Applicant presents its application with delay and has failed to justify the presentation of the application ten (10) months after the issuance of the orders dismissing its suit and awarding costs.



16. The 1st Respondent is acting in accordance with procedural laws intended to bring litigation to an end by seeking the taxation of its costs against the Applicant.
17. The Memorandum of Appeal on which the Applicant grounds meant to contest the order of court dated 15th October 2020 does not disclose any merit; is presented with delay and an afterthought to delay the inclusion of these proceedings. It has put forward the cases of *Mohammed Salim t/a Choice Butchery vs Nassepuma Memon Jamal* [2013] eKLR; *MS Port Reitz Maternity vs James Karanja Kabia* CA No 63 of 1997; *RWW vs EKW* [2019] eKLR; *Absalom Dova vs Tarbo Transporters* [2013] eKLR.
18. The 1st Respondent urges the court to consider that the applicant presented this suit in 2018 and to delay its conclusion further is unnecessary and prejudicial to the 1st Respondent who satisfied the court that the suit was ill founded.
19. The Applicant has not shown this court how taxation of the bill of costs dated 21st June 2021 will adversely affect its unmerited appeal or impact the asset it has introduced into these proceedings.
20. The Applicant has stated but not demonstrated how the taxation of the bill of costs dated 21st June 2021 will adversely affect its appeal or assets. Even if the 1st Respondent was to succeed in its taxation and execute against the Applicant, the Applicant would be in a position to recover all sums as the 1st Respondent is a public listed company whose records are available and in the public domain.
It has put forward the cases of *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR; *Kenya Shell Ltd vs Kibiru & Another* CA No 97 of 1986 which cited the Court of Appeal decision in *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike*; Civil Application No 238 of 2005.
21. The Applicant's application is premature as the financial obligation it may be exposed to bear has not crystallized. It prays that this application be dismissed with costs as this application is an afterthought and intended to delay the conclusion of the taxation proceedings.
22. I have considered the notice of motion and the affidavit in support. I have also considered the affidavit in response, the written submissions and the authorities cited. The issue for determination is whether this application is merited.
23. Order 42 rule 6 of the Civil Procedure Rules provides that:-
 - “(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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

It is clear from sub rule (2) that the Applicant must meet specific conditions before orders of stay of execution are granted.

24. The principles that guides a court in exercising discretion in an application for stay of execution pending Appeal are now well settled.
- 1. That the application has been brought without undue delay.
 - 2. That unless stay is granted the applicant shall suffer substantial loss.
 - 3. That the applicant has furnished security for the due performance of the decree.
25. In the case of *Feissal Amin Janmohammed t/a Dunvia Forwarders vs Shami Trading Co Ltd*, [2014] eKLR, Kasango J stated thus:-

“It is trite law therefore that a stay of execution is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made; that the application was made without unreasonable delay and that the applicant has offered proper security”.

Similarly in the case of *Visharm Ravji Halai vs Thornton & Turpin* [1963] Ltd [1990] KLR 365, it was held that in granting stay of execution, the High Court’s discretion is fettered by three conditions:-

“Firstly, the applicant must establish sufficient cause, secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay”.

26. The orders dismissing the suit herein were granted on 15th October 2020. This application was filed on 30th August 2021. This is ten (10) months from the delivery of the ruling. I find that this application has been brought after unreasonable delay. There is no explanation for the delay.
27. I agree with the 1st Respondent’s submission that the Applicant has not demonstrated how the taxation of the bill of costs dated 21st June 2021 will affect its appeal. The 1st Respondent is a public listed



company whose records are available and in the public domain. The Applicant would be in a position to recover all sums from it should it succeed in its (Applicant's) Appeal.

28. In the case of *Antoine Ndiaye vs African Virtual University* [2015] eKLR, Gikonyo J cited the holding in *Andrew Kuria Njuguna vs Rose Kuria* (Nairobi) Civil Case No 224 of 2001 (unreported), where it was held as follows:-

“Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering loss moneywise or other, and therefore grant the stay”.

29. I find that the Applicant herein has failed to demonstrate what substantial loss it is likely to suffer if these orders are not granted.
30. I find that the Application herein does not meet the requirements set out under order 42 rule 6(2) of the Civil Procedure Rules.
31. I find no merit in this application and the same is dismissed with costs to the 1st Defendant/ Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF APRIL 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Ataka for the Plaintiff

No appearance for the Respondents

Steve - Court Assistant

