



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 122 OF 2011

JAMES KUTSUSHI ATINDO 1ST PLAINTIFF
MUSA CHICHOLE MAHERO 2ND PLAINTIFF
DAVID ASHALI JUMA 3RD PLAINTIFF
ISAIAH MUSUNGU NAMBIKHWI 4TH PLAINTIFF
COLUMBUS MAKOKHA SHIUNDU 5TH PLAINTIFF
FREDRICK MUMIA WANGARA 6TH PLAINTIFF
ZADOCK WAYWERA OKAMULO 7TH PLAINTIFF
PRISCAH M. WAMUKOYANI 8TH PLAINTIFF
MARTIN KADIMA MULAMA 9TH PLAINTIFF

V E R S U S

PATRICK OKUKU 1ST DEFENDANT
KENNEDY ECHESSA 2ND DEFENDANT
GABRIEL ATOKO 3RD DEFENDANT
GEORGE AMBUCHE 4TH DEFENDANT
BASIL KHALUMI MISANGO 5TH DEFENDANT
FRANCIS WASHIKA 6TH DEFENDANT
ALPHONCE BWIRE 7TH DEFENDANT
KENYA SUGAR BOARD 8TH DEFENDANT
MUMIAS OUTGROWERS COMPAN9 (1998) LTD 9TH DEFENDANT

RULING

The application dated 21.1.2013 seeks orders of stay of proceedings, taxation and execution of the ruling delivered on 4.11.2011 pending the hearing and determination of the applicant's appeal No. 24 of 2012 before the Court of Appeal at Kisumu. Mr. Maura, counsel for the applicant submitted that there is an appeal pending before the Court of Appeal at Kisumu and if the taxation is allowed to proceed then the appeal will be rendered nugatory. The appeal involves the issue of costs and there is an application before the Chief Magistrate's Court to have the costs taxed. A memorandum of appeal has already been filed before the Court of Appeal as leave to appeal out of time was granted by Justice Nambuye.

Mr. Ngugi, counsel for the 8th respondent opposed the application and relied on the replying affidavit sworn on 14.2.2013. Counsel contends that there is a bill of costs that is due for taxation. The name of the 8th defendant was struck out by the court with costs. The court does not have jurisdiction to entertain the application. The application does not fall within the principles of stay of execution and there is nothing to stay as the costs have not been ascertained. No sufficient cause has been shown to grant the application. The application was filed late as the ruling was delivered on 4.11.2011. No substantial loss will be suffered by the applicants and no security has been offered.

The essence of this application is to stop the taxing master from assessing the costs awarded to the 8th respondent by the court. The taxing process is yet to be done. The applicant contends that the plaintiffs have appealed against the ruling of the court and the appeal will be rendered nugatory should the costs be taxed. I have seen the memorandum of appeal and the same deals with the issue of the striking out of the 8th defendant from the suit as well as the costs awarded to the defendant. The process of taxing costs is aimed at determining how much in terms of costs should be paid to the party awarded the costs. Even if the costs are assessed the same may not be paid if the court is of the view that the appeal is likely to succeed or the party to pay the costs is in a position to settle the debt at any given time. In some situations the court can order the assessed costs be deposited in court or in a joint account of counsels for the parties. The mere fact that costs have been assessed cannot prejudice the appeal filed by the applicants. I do not see any prejudice that will befall the applicants in this matter. Once the costs are assessed the applicants can file an application for stay of execution. The application is premature as no costs have been assessed. The costs were awarded by the court and the Court of Appeal can vary the ruling of the High Court even before the costs are paid.

It has taken a long time to deliver this ruling due to the Election Petitions and the applicants have had ample time to prosecute their appeal. The appeal cannot be rendered nugatory just because the costs have been assessed. I do find that as of now there is nothing to stay. The 8th respondent is merely in the process of having the costs awarded to him assessed. The application is not merited and the same is hereby dismissed with costs.

Delivered, dated and signed at Kakamega this 17th day of October 2014

SAID J. CHITEMBWE

J U D G E a