



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**Environmental & Land Case 1861 of 2001**

**DAVIDSON KARIUKI MAINA T/A BILLS CONSULT.....PLAINTIFF**

**VERSUS**

**BOBMIL PROPERTIES LIMITED.....DEFENDANT**

**RULING**

The Plaintiff has filed an application dated 22<sup>nd</sup> August 2011, seeking orders that the payment of costs of Kshs 165,762/45 awarded to the Defendant herein on 23<sup>rd</sup> June 2011 be stayed until the hearing and determination of an intended appeal in the Court of Appeal. The intended appeal is against the judgment of the Court in this suit that was delivered on 1<sup>st</sup> October 2009. The grounds for the application are that the Plaintiff seeks to proceed with the said appeal in the Court of Appeal which has overwhelming chances of success, and the Plaintiff will suffer immensely if forced to pay the costs before the intended appeal is determined. The Plaintiff also states that if the stay is not granted the Defendants will proceed with the execution of the taxed costs which it has threatened to do, and that no prejudice will be caused to the Defendant if the payment of costs is stayed until the hearing and determination of the intended appeal.

The Plaintiff's Counsel, Mr. Gacheche, submitted that the costs being stayed are the costs of the suit, and not the professional fees, which have already been paid to the Defendant's Counsel. The Plaintiff has annexed as evidence copies of the said judgment and notice of appeal, a copy of the certificate of taxation dated 28<sup>th</sup> July 2011 and a copy of a letter from the Defendant's Counsel demanding payment of the costs dated 5<sup>th</sup> August 2011.

The Defendant's Counsel, Mr. Kevin McCourt, in a Replying Affidavit sworn on 14<sup>th</sup> November 2011, states that the bill of costs was taxed with the consent of the Plaintiff's advocate, and that the application herein was filed on 25<sup>th</sup> August 2011 but served on the Defendant on 7<sup>th</sup> November 2011, which is an indication of *mala fide* on the part of the Plaintiff. The Defendant's Counsel further stated that they had written to the Plaintiff's Counsel urging them to prosecute the appeal, and annexed as evidence a copy of the said letter dated 27<sup>th</sup> October 2011. Mr. McCourt submitted that if the court is inclined to grant a stay then a conditional stay be granted on the condition that the costs be deposited in a joint account held by the advocates for the Plaintiff and Defendant, as the Defendant had not denied that they are liable to pay the costs.

I have read and carefully considered the pleadings, evidence, and submissions by the parties to this application. The application is brought pursuant to section 3A of the Civil Procedure Act (Cap 21), Order 42 Rule 6 of the Civil Procedure Rules 2010 and Order 51 Rule 1 of the Civil Procedure Rules 2010. After perusal of these provisions and of applicable authorities, I am of the view that in respect of taxed costs there cannot be a stay of execution pending appeal, unless there is some exceptional circumstance shown by the Applicant, for instance by showing that the Respondent is not, or will not be in a position to pay the said costs upon the appeal succeeding. I am guided in this finding by two decisions of the Court of Appeal. In **Cooper v Nevill (1959) E.A 731** when considering an application for suspension of further execution of taxed costs pending an appeal to the Privy Council, the Court of Appeal held that while indeed the court does possess discretion in the matter arising out of its inherent jurisdiction, this discretion should be exercised according to general principles. The Court of Appeal in the said case found the

general principle to be that a stay will not be granted unless in very exceptional circumstances.

This was also the position adopted by the Court of Appeal in **Francis Kabaa v Nancy Wambui & Another, Civil Appeal No. 298 of 1996**. In that case the Court of Appeal held as follows with regard to stay of taxed costs:-

“The application according to the Notice of Motion is to stay the order of Amin J, in which he dismissed the applicant’s suit then before him. Before us the applicant says that what he wants is a stay of an order that he should pay costs. But this is not really what the order of Amin, J was all about. In any case, even if that were so, the Appellant, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs.”

I am of the view that no exceptional circumstance has been shown by the Plaintiff in the application before this Court to merit a stay of execution of the taxed costs of Kshs 165,762/45 awarded to the Defendant on 23rd June 2011.

The Plaintiff’s application dated 22<sup>nd</sup> August 2011 is hereby dismissed with costs to the Defendant.

**Dated, signed and delivered in open court at Nairobi this 20<sup>th</sup> day of January, 2012.**

**P. NYAMWEYA**

**JUDGE**