

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 3445 of 1995

DAVID KAMANJO KABIRUPLAINTIFF

VERSUS

SAMUEL MBUGUA KIARIE & 6 OTHERS DEFENDANT

RULING

The Plaintiff's application before the Court dated 5th August 2011 is seeking orders that there be a stay of execution pending the hearing and determination of the Appeal filed herein. The application is brought under sections 3 and 3A of the Civil Procedure Act (Cap 21), Order 22 Rule 22 and Order 42 Rule 6 of the Civil Procedure Rules of 2010, and all other enabling provisions of the law.

The grounds for the application are that the Defendants have filed a bill of costs for Kenya Shillings 632,890/= pending taxation, which once taxed may be executed during the pendency of the appeal. Further that the Defendants are not in a position to repay the money should costs be awarded in their favour. The Plaintiff also states that taxation is part of proceedings and since an appeal on the same is pending in Court of Appeal Case No. 23 of 2006, and the said appeal has high chances of success, it is fair and just that the taxation be stayed.

The Plaintiff disclosed that he had made an application to stay taxation dated 28th May 2007 which was dismissed by Khamoni J. on 19th March 2010, and that he had also applied for review of the said ruling on 14th April 2010, which application was also dismissed by the said Honourable Judge on 14th July 2010. The Plaintiff submitted that whereas in the said applications he had applied for stay of taxation, in the present application he is seeking stay of execution pending appeal as he is not sure the Respondent will be in a position to repay the money in case the appeal succeeds. The Plaintiff attached as evidence a copy of the Memorandum of Appeal, a copy of the Defendant's bill of costs dated 29th August 2005 and filed on 16th December 2005, a copy of the ruling by Khamoni J. made on 19th March 2010 and a copy of the proceedings at the hearing of the application to review the said ruling.

The Defendants oppose the application on two main grounds. The first ground is that the present application is unmerited in that it has not met the threshold envisaged under Order 42 Rule 6 of the Civil Procedure Rules 2010. Secondly, that the present application is an abuse of the Court process since it touches on matters that are already *res judicata*, as the Plaintiff's application dated 28th May 2007 which sought similar orders was dismissed by this Court, and the Plaintiff is thereby asking the Court to sit as an appellate court on its own orders.

After consideration of the pleadings filed, evidence tendered and the submissions made by counsel at the hearing of the application on 30th November 2011, I find that I must agree with Defendant's Counsel's submissions. The Plaintiff's counsel was at pains to distinguish the present application from the application dated 28th May 2007 which was dismissed by this Court, and submitted that the previous application sought to stay the process of taxation, while the present application is seeking to stay the results of the taxation. While it is the case that it is the results of such taxation that can properly be the subject of an application of stay of execution, this application is premature as there are no results of such

taxation to be executed, since the bill of costs has not been taxed. Any orders of stay given by this court in the present application can therefore only have the effect of stopping the taxation proceedings, which is an issue already substantially heard and determined by this Court in previous applications by the Plaintiff.

For the same reason I find that Order 22 Rule 22 of the Civil Procedure Rules is inapplicable in this application as there is no decree for execution before the Court, and also that the threshold in Order 42 Rule 6(2) for the stay of execution pending appeal 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.”

Moreover the Plaintiff has not brought any evidence to show the Defendants’ inability to pay the costs in the event of the appeal filed herein succeeding.

The Plaintiff’s application dated 5th August 2011 is accordingly hereby dismissed for the reasons given in the foregoing. The Plaintiff shall bear the costs of the said application.

Dated, signed and delivered in open court at Nairobi this 18th day of January, 2012.

P. NYAMWEYA

JUDGE