



Ebrahim v County Government of Mombasa & 9 others (Environment & Land Petition 31 of 2021) [2022] KEELC 3459 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 31 OF 2021**

NA MATHEKA, J

JULY 28, 2022

BETWEEN

ABDUL HAMID EBRAHIM PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

**OFFICER IN CHARGE OF PHYSICAL PLANNING AND
ENFORCEMENT OF BUILDING CODE, COUNTY GOVERNMENT OF
MOMBASA 2ND RESPONDENT**

ASSISTANT PUBLIC TRUSTEE, MOMBASA 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

NYONDO NGAO NYAE 5TH RESPONDENT

HAMISI MOTO 6TH RESPONDENT

SAJADI KAZI KIRUMBI 7TH RESPONDENT

MUSTAFA ZWAI MZUNGU 8TH RESPONDENT

JOHN BOSCO RIMBA KAI 9TH RESPONDENT

SAIDI GOMO BADI 10TH RESPONDENT

RULING

1. This application is dated April 22, 2022 and is brought under Rules 13A and 16 *Advocates (Remuneration) Order* 42 Rule 6 *Civil Procedure Rules 2010*, Section 1A, 1B & 3A of the *Civil Procedure Act*, cap 21 and Article 159 of *the Constitution* seeking the following orders;

a. That the matter be certified urgent and service be dispensed with at the first instance.



- b. That this Honourable court be pleased to issue a stay of taxation of the 5th, 6th, 7th, 8th, 9th and 10th respondents party and Party Bill of costs dated February 10, 2022 pending hearing of this application.
 - c. That this Honourable court be pleased to issue a stay of taxation of the 5th, 6th, 7th, 8th, 9th and 10th respondents party and Party Bill of costs dated February 10, 2022 pending hearing of the applicant's intended appeal.
2. It is based on the grounds that this honourable court on January 20, 2022 delivered a ruling striking out the Petitioner/ Applicant's suit with costs to the respondent. The applicant is desirous to prosecute an appeal from the decision and has filed his Notice of Appeal. The appellant has been served with a Notice of Taxation by the 5th, 6th, 7th, 8th, 9th and 10th respondents in respect to prior costs and is apprehensive that if stay is not granted execution will issue after taxation. The appellant stands to suffer loss in settling costs herein while pursuing his intended appeal, and having to litigate on costs piecemeal
 3. The 5th to 10th respondents submitted that the applicant has not placed before the court such material and information that should lead this court to conclude that surely, he stood a risk of suffering substantial loss moneywise or other and therefore grant the stay. That the applicant was served by their Advocates with the Notice of Taxation and actual Bill of Costs on March 4, 2022 as can be seen from the applicant's supporting affidavit annexed as "Exhibit AHB-2" and they only brought the present application on April 28, 2022, over a month later and have failed to supply any reasons for this delay in filing the present application. That under section 89 of the *Civil Procedure Act*, a court will only grant a stay of execution after a bill of costs is taxed and is pending hearing and determination of a reference to a judge and will be guided by the presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the applicant. That it is therefore clear from the forgoing depositions that the applicant has acted in a precipitate manner by bringing the present application before the Taxing Master has even pronounced itself on the bill of costs and issued a decree and the applicant thereafter having an opportunity to file a reference the same, the intended appeal notwithstanding.
 4. This court has carefully considered the application and the submissions herein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the *Civil Procedure Rules* as follows:

"No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside."

Order 42, rule 6 states:

"No order for stay of execution shall be made under sub-rule (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.”
5. The appellants need to satisfy the court on the following conditions before they can be granted the stay orders:
 1. Substantial loss may result to the applicant unless the order is made.
 2. The application has been made without unreasonable delay, and
 3. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
6. In the instant case the applicant states that they are desirous to prosecute an appeal from the decision and has filed his Notice of Appeal. The appellant has been served with a Notice of Taxation by the 5th, 6th, 7th, 8th, 9th and 10th respondents in respect to prior costs and is apprehensive that if stay is not granted execution will issue after taxation. The appellant stands to suffer loss in settling costs herein while pursuing his intended appeal, and having to litigate on costs piecemeal. The appellant has not demonstrated what this substantial loss is as the bill of costs is yet to be taxed. In the case of *Deposit Protection Fund v Rosaline Njeri Macharia* (2006) eKLR, the court while dealing with an application of stay of taxation proceedings stated as follows:
 - i. Going back to the 2nd defendant’s arguments, I note them as saying that if the court did not grant an order for stay of the proceedings, the applicant would not suffer substantial loss, on account of the taxation of the defendants’ Bills of Costs. When faced with those submissions, the applicant did not tell the court how the taxation of the defendants’ Bill of Costs would cause them substantial loss. To my mind, the taxation of a Bill of Costs cannot occasion any loss to the person against whom it is taxed. Therefore, the issue of taxation causing 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. The applicant did not, in my considered view, make out a case for stay of proceedings, and in particular a stay of the taxation of the defendants’ Bills of Costs. Furthermore, if the learned taxing officer were to proceed to tax the defendants’ Bills of Costs, the sums would be ascertained, and that would be the foundation upon which this court could base the size of the security which the applicant would need to raise, if the court did order that there be a stay of execution.”
7. I find that the bill of costs is not prejudicial to the applicant as the sum has not been ascertained. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE

