



**County Government of Kisumu & another v Kisumu Yacht Club Registered Trustees  
(Environment and Land Appeal 47 of 2019) [2022] KEELC 3246 (KLR) (5 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3246 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 47 OF 2019**

**A OMBWAYO, J  
AUGUST 5, 2022**

**BETWEEN**

**COUNTY GOVERNMENT OF KISUMU ..... 1<sup>ST</sup> APPLICANT**

**CITY MANAGER, COUNTY GOVERNMENT OF KISUMU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KISUMU YACHT CLUB REGISTERED TRUSTEES ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of the Learned Trial Magistrate Honourable W. K. Onkunya (SRM) in Kisumu CM ELC Case No 85 of 2019 delivered on 6th November 2019))*

**RULING**

1. County Government of Kisumu and City Manager Kisumu has come to court with an application dated 17/2/2022. The application seeks orders that pending the hearing and determination of the appeal there be a stay of execution of the judgment and orders issued on 19<sup>th</sup> November, 2021 by the Honourable Justice A. Ombwayo. The Honourable Court be pleased to issue any other order for purposes of maintaining the *status quo*. Costs of this application be in the cause.
2. The application is based on grounds that can be discerned in the supporting affidavit of Edris Omondi the County Attorney who states that the respondents have shown their intention to execute the decree of the court and have filed their bill of costs. That if stay is not granted the appeal shall be rendered nugatory. The applicant states that they have a arguable appeal against the respondents.
3. In the replying affidavit of Harsh Patel Commidore, he states that the Honourable Court should not bar a successful litigant from taxing its Bill of Costs arising from a concluded matter as costs follow the event notwithstanding that the applicants have not sought extension of time to lodge Appeal and their application has been carefully camouflaged as an application for leave to appeal, for stay of execution of the Judgment and for stay of taxation proceedings.



4. That in an application for stay an applicant is required to satisfy the conditions set out under Order 42 Rule 6 (a) and (b) of the [Civil Procedure Rules](#) before he can be granted orders of stay whereas on the other hand taxation of bills of costs is part of execution proceedings without which a decree for execution may not be drawn.
5. That at no point have applicants alleged that should they pay the costs of the Appeal herein as would be taxed then the money would not be refunded in case the intended appeal to the Court of Appeal would eventually succeed.
6. That the applicants have not described what hardship or loss they would suffer if it were to be forced to settle costs before the intended appeal is heard and has therefore not proved the substantial loss it stands to suffer if the application for stay is denied whereas it has recourse to file a reference to the High Court once the taxation is determined by the deputy Registrar of this honourable Court.
7. That the applicants in failing to prove substantial loss that they stand to suffer, and in further failing to furnish security for costs for due performance of the decree, the application is untenable therefore as a successful litigant the respondents are entitled to the fruits of the judgment since they can always pay the same costs if the appeal to Court of appeal succeeds as the club herein is a reputable business for the past 40 years and indeed no allegation has been made that it incapable of making such refund.
8. The Respondent's/Applicants' application has been premised on a misapprehension of the law by citing Order 22 Rule 22 of the [Civil Procedure Rules](#) as the basis for seeking stay whereas the said law is not applicable in this case since no decree has been sent by another Court to this Honourable court for execution as such the application is incompetent and misconceived and ought to be dismissed with costs.
9. That since the Notice of Appeal signifying their intention to pursue an appeal was not lodged within statutory timelines provided pursuant to the provisions of Rules 74 and 75 of the [Court of Appeal Rules, 2020](#) there is technically no valid appeal on which a stay of execution order can be anchored.
10. That whereas this Honourable Court lacks jurisdiction to pronounce itself on the validity of the Respondents/Applicants' Notice of Appeal which jurisdiction is the sole preserver of the full bench of the Court of Appeal pursuant to Rule 53 of the [Court of Appeal Rules, 2020](#) the position in law at the moment is that the Respondents have not filed an appeal nor applied for enlargement of time to enable it to seek alternative reliefs that may be available as of right or discretion of the Court.
11. That even assuming that the Notice of Appeal was presumed by this Honourable Court to be valid, which is not the case as failure to obtain leave to appeal where such leave is required is a fundamental omission which goes to the root of the competence of an appeal, the mere filing of an appeal does not ipso facto connote that a stay of execution order should issue as such issuance will be at the unfettered discretion of the Court which must be satisfied that the 2<sup>nd</sup> Respondent has established sufficient cause for such an order, has furnished security and has established that it will suffer loss if the orders sought are not granted.
12. That the applicants are guilty of laches having filed the present application only after the respondents had already taken steps to file their Party to Party Bill of Costs whose taxation is now being challenged contrary to the doctrines of equity that abhors indolence.
13. That the application lacks merit for not disclosing any justifiable cause to stop or stay taxation of the Party and Party Bill of Costs.



14. I have considered the application on record and submissions on record and in determining this application I rely on Order 42 rule 6 of the Civil Procedure rules that provides:-

“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.”

15. In this case, the application was filed on 17/2/2022. Whereas the Judgment was delivered on November 19, 2021. There is a delay of almost 88 days which is inordinate. No explanation has been given on the delay. Moreover, the applicant has not demonstrated any substantial loss if stay is not granted as the process of taxation does not in any way prejudice the applicant.
16. It has not been demonstrated that the respondent will not be able to pay or refund the costs if the applicant succeeds on appeal. On security the Government is exempted from giving security in such matters. In a nutshell, I do find the application not merited due to delay and that the costs once taxed and paid to the respondent by the applicant can be refunded hence the application is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 5<sup>th</sup> DAY OF AUGUST, 2022**

**ANTONY OMBWAYO**

**JUDGE**

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.

