



REPUBLIC OF KENYA



**Maana v Mbomere & 5 others (Environment and Land Appeal  
E008 of 2022) [2022] KEELC 12792 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12792 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND APPEAL E008 OF 2022  
AA OMOLLO, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**CHARLES PATRICK MAANA ..... APPLICANT**

**AND**

**OUMA ADOKA MBOMERE ..... 1<sup>ST</sup> RESPONDENT**

**DAUDI DADO NYABOLA ..... 2<sup>ND</sup> RESPONDENT**

**MATHEWS TONADO OKECH ..... 3<sup>RD</sup> RESPONDENT**

**ANTHONY OKOBWA DADO ..... 4<sup>TH</sup> RESPONDENT**

**HERBERT TINTIN DADOH ..... 5<sup>TH</sup> RESPONDENT**

**JUSTUS NAMENYA DADO ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant brought an application dated June 10, 2022 under order 42 rule 6, order 45 and order 51 of the [Civil Procedure Rules](#), section 1A & 3A of the [Civil Procedure Act](#), 2010 and any other enabling provisions of the law seeking for the following orders;
  - a) Spent.
  - b) That there be stay of execution of judgment and decree made in Busia MCL&E No 34 of 2020 pending the hearing and determination of this application.
  - c) That there be a stay of execution of judgment and decree made in Busia MCL&E No 34 of 2020 pending the hearing and determination of this appeal.
  - d) Costs of this application be in the cause.



2. The application is supported by the annexed affidavit of Charles Patrick Maana and on the following grounds inter alia;
  - i. That judgment was delivered on April 1, 2022 in favour of the respondents whereby the appellant's case was dismissed with costs to the respondents.
  - ii. That the applicant has appealed against the said judgment.
  - iii. That the appeal has high chances of success.
  - iv. That the respondents are likely to execute the decree and the applicant stands to suffer substantial loss.
  - v. That the respondents' financial ability is unknown and is unlikely to refund the costs awarded in the event the appeal succeeds.
  - vi. That the appellant is ready and willing to abide by any reasonable conditions that this honourable court may impose.
  - vii. That the orders sought will safeguard the interest of the applicant as well as the respondents.
  - viii. That this honourable court has the power to grant the orders sought in the interest of justice.
3. The 1<sup>st</sup> respondent filed their grounds of opposition dated June 21, 2022 opposing the application. He stated that there was nothing to be stayed since the suit by the applicant was dismissed and hence a decree cannot be stayed and in any event, an order for settlement of costs cannot be stayed since there is no appeal and/or reference filed against taxed costs. He stated that there is full satisfaction of the decree by this court by administrators of the estate of Daudi Dado Nyabola in full and hence the reversal of decree will be prejudicial to others parties. He prayed that the application be dismissed with costs.
4. The 3<sup>rd</sup> respondent filed his grounds of opposition dated June 28, 2022 and stated that the application seeks to stay costs of the advocates however the same costs are not deposited in court. He stated that the applicant is on a fishing expedition as the instant application is subjudice another application in Busia MC ELC No 34 of 2020 (OS) hence this application offends the mandatory provisions of section 6 of the *Civil Procedure Act* 2010.
5. The parties agreed to dispense with the hearing of the application by way of written submissions. The appellant filed his submissions on July 21, 2022 and submitted that the judgment of the court delivered on April 1, 2022 only awarded costs to the 3<sup>rd</sup> respondent and thus the 1<sup>st</sup> respondent claiming costs from him is misleading and should not be condoned by this honourable court. He said that counsel for the 1<sup>st</sup> respondent was an inactive advocate by the time judgment was delivered in Busia MCL&E No 34 of 2022 (OS) as per the records of the Law Society of Kenya and as per section 31 of the *Advocates Act* should be penalized by having his submissions struck out and the proceedings declared null and void. He quoted the decision of the Court of Appeal in *National Bank of Kenya Ltd v Wilson Ndolo Ayah* (2009) eKLR, where it was held that documents prepared by unqualified persons are null and void.
6. The appellant invited the court to find that the 1<sup>st</sup> respondent is not entitled to costs. On whether he should be issued with stay of execution of decree orders, he submitted that he has satisfied the conditions as outlined in order 42 rule 6 of the *Civil Procedure Rules*. He said that his appeal has a high chance of success and the respondent may not be able to pay back the applicant for damages suffered. He is willing to offer security for the decree pending the hearing and determination of the appeal and said that no prejudice will be occasioned to the respondents if the orders are granted. He relied on the high court decision in *Bhachu Engineers Limited vs Samwel Otiemo Orwa* (2018) eKLR where the



trial court cited the decision of Aburili J in the case of *Selestica Limited v Gold Rock Development Ltd* (2015) that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Stay of execution pending appeal is governed by order 42 rule 6 of the Civil Procedure Rules. The power to grant an application for stay of execution pending appeal is a discretionary one on sufficient cause being shown, where the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the court may impose.

To grant or refuse an application for stay of execution pending appeal is discretionary in that the court when granting stay has to balance the interests of the appellant with those of the respondent.”

7. The 1<sup>st</sup> respondent filed his submissions on July 27, 2022 and submitted that it is trite law as spelt out in section 27 of the *Civil Procedure Act* that costs follow the event. That they are entitled to costs as the applicant’s suit was dismissed with costs. He submitted that the order for costs has not been set aside nor reference filed against the assessed cost. He urged the court to find that costs taxed cannot be stayed without offering of security and or settlement of the same.
8. I have read the application together with the rival affidavits and submissions and the issue that is up for determination is whether the applicant should be granted stay of execution of decree as prayed. Order 42 rule 6 of the *Civil Procedure Rules* provides for the guiding principles in granting stay of execution and it provides as follows;
  - 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.
9. The applicant has stated that the respondents financial ability is unknown and are unlikely to refund the costs awarded in the event the appeal succeeds and he stands to suffer substantial loss. The 1<sup>st</sup> respondent, on the other hand, has said that the applicant is a vexatious litigant and a man of straw known for having his properties attached and sold. This court is being called to decide whether the application for stay is merited and whether the appellant will suffer substantial loss unless the stay order is granted. The application is seeking stay of execution of the judgement and decree of the trial court. The judgement appealed against was a negative order so essentially the applicant is seeking stay of the taxed costs.
10. There is no dispute that Respondents have taxed their costs in Busia MCL&E No 34 of 2020 and they have been issued with a certificate of costs. In his submissions, the applicant is urging this court to determine whether the 1<sup>st</sup> respondent is entitled to the costs of the suit. A reading of the memorandum



of appeal filed and on record, there is no ground asking this court to determine whether or not the 1<sup>st</sup> respondent is entitled to reap from the order of costs awarded in the impugned judgement. Further, the present application as filed does not include an order for reference against the taxed costs. Parties are bound by their pleadings and it would be misplaced for this court to determine a matter that has been introduced through the submissions.

11. The remaining question for this court to determine is whether or not the stay of execution of the costs pending hearing and determination of the appeal should be granted. The applicant annexed a copy of a letter dated May 30, 2022 from the 1<sup>st</sup> respondent's advocate threatening execution unless they received proposals on how the costs would be settled. The applicant argues that he will substantial loss because the 1<sup>st</sup> respondent's straw financial means. The 1<sup>st</sup> respondent responded to the application through his advocate who did not address this court on the issue of their financial ability in the event the applicant's appeal succeed. This court is alive to the principle guiding court on issuing stay of execution on costs, highlighted for instance, in the case of the Court of Appeal in the case of *Kenya Shell Ltd v Kibiru & another* (1986) KLR 410, held that:

“Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay”.

12. The 3<sup>rd</sup> respondent raised the issue of this application being *subjudice* as provided by section 6 of the *Civil Procedure Act*. The doctrine of sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it. The 3<sup>rd</sup> respondent did not attach a copy of the said similar application which has been filed in Busia MCL&E No. 34 of 2020 and this court cannot therefore make a comparison and determine if the two applications are similar. Secondly, there was no request made for stay of proceedings in this court so the argument for subjudice is overtaken by events.

13. Consequently, considering that granting a stay of execution order is a discretion of this court, and taking into perspective the rights of the applicant to argue his appeal and the hardship he may face in having the costs refunded in the event the appeal succeeds, i shall grant a conditional stay of execution. Consequently, the application is allowed on the following. The interests of the respondents in this application are mitigated by the conditions set here below;

- a. The appellant is granted stay of execution of the taxed costs pending the hearing and determination of this appeal on condition that the appellant shall deposit a sum of
  - i. Kshs 750,000/= in the joint interest earning account to be opened in the names of his advocate and the advocate of the 1<sup>st</sup> respondent within 60 days of the date this ruling.
  - ii. Kshs 750,000/= in the joint interest earning account to be opened in the names of his advocate and the advocate of the 3<sup>rd</sup> Respondent within 60 days of the date this ruling
- b) In default of compliance with (a) above, the stay of execution automatically lapses.
- c) The costs of this application shall abide the winner in the appeal.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 28<sup>TH</sup> DAY OF SEPT., 2022.**

**A. OMOLLO**

**JUDGE**

