



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Petition Cause 1 of 2003

NTOITHA M'MITHARU PETITIONER

AND

RICHARD MAOKA MAORE 1ST RESPONDENT

BISHOP JOSEPH KYAVOA – RETURNING OFFICER

NTONYIRI CONSTITUENCY 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA .. 3RD RESPONDENT

RULING

The applicant has filed a reference under Rule 11 (2) of the Advocates Remuneration Order to challenge the decision of the taxing officer in taxing the 1st respondent's bill of costs on two items at a total of Kshs. 3.3m. While the hearing and determination of that reference is pending, the applicant who was the petitioner in this Election Petition has brought the present application seeking orders of stay of execution.

The application is premised on the grounds that the taxed costs are excessive and the applicant will be prejudiced if he paid the same before the reference is heard. The applicant has further averred that he stands to suffer substantial loss if the taxed costs were to be paid to the 1st respondent and the reference succeeded as the 1st respondent's means and assets are not known.

In his grounds of opposition, the 1st respondent has deposed that the taxing officer's decision was made in accordance with the law and further that the instant application amounts to an abuse of the court process as the applicant was granted thirty (30) days' stay but failed to satisfy the decree.

I have considered these arguments and the two authorities cited by counsel for the 1st respondent. I need to observe straight away that on 16th September 2008 when this application was argued before me *ex parte* the temporary order I made was not properly extracted. On that day, I specifically ordered that there would be:-

“a temporary stay as prayed pending the hearing and determination of this application inter partes on 7th October 2008.”

At no time did I order that there would be a stay pending the hearing and determination of the reference as reflected in the extracted order. It is important for the Deputy Registrar to ensure that the extracted order is in the same terms as the order granted by the court before signing the same.

Having made that observation, I also wish to note that the application is expressed to be brought under order 41 rule 4 of the Civil Procedure Rules, in which case the applicant must demonstrate that unless the relief sought is granted he will suffer substantial loss; that he has brought the application for stay without unreasonable delay and that he is ready and willing to comply with any conditions as to security as may be ordered by the court.

The applicant has averred that he does not know of the 1st respondent's means or assets and is therefore apprehensive that should the sum of Kshs. 3.3m be paid to him and subsequently the reference succeeds, the 1st respondent may not be capable of refunding the same.

The applicant having raised doubt as to the 1st respondent's means to make restitution, the evidential burden shifts to the 1st respondent to rebut the allegation. Having failed to do so the applicant's apprehension remains unchallenged.

The ruling on taxation was delivered on 11th August 2008. A temporary stay for thirty (30) days was granted. The instant application was filed on 15th September 2008. I find no delay that can be described as unreasonable.

The applicant has, finally, expressed his readiness to abide by any condition as to security as may be ordered.

It is ordered, in the circumstances, that there shall be a stay of execution pending the hearing and determination of the reference herein subject to the applicant depositing the sum of Kshs. 1.5m in an interest earning account with a reputable bank in the joint names of his counsel and the 1st respondent's counsel within thirty (30) days of this order failing which execution shall proceed without further orders.

Costs to be costs in the reference.

Dated and delivered at Meru this 22nd day of January 2009.

W. OUKO

JUDGE