



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tapoyo v Andiema (Environment and Land Appeal 11 of 2022)  
[2022] KEELC 4865 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4865 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND APPEAL 11 OF 2022  
FO NYAGAKA, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**JAMES MUSA TAPOYO ..... APPELLANT**

**AND**

**FREDRICK PKEMOI ANDIEMA ..... RESPONDENT**

**RULING**

1. On 21/06/2022, the Appellant filed an Application dated the same date. The Application, having been filed under urgency, was placed before this Honorable Court the same date and perused at the ex parte stage. Upon its perusal, this Court formed the opinion that the parties needed to address it on a preliminary point. Thus, it directed, inter alia, that:  
  
“(4)The parties herein to appear for the hearing of a preliminary point of law on the Application dated 21/06/2022 on 04/07/2022 as to whether this court has jurisdiction to hear this Application in terms of Order 42, Rule 6 of the Civil Procedure Rules.”
2. On the said 04/07/2022, Ms. Mweneke, learned Counsel for the Appellant, submitted that the Application was properly before the Court, which to her was vested with jurisdiction to handle it. This is because, firstly, an Appeal had been preferred by the Appellant. Secondly, the Appeal was merited with chances of success. It was contended that the Appeal was filed against the trial Court’s decision to uphold the Respondent’s Preliminary Objection. She continued that Order 42 of the *Civil Procedure Rules* provided for stay of execution where an appeal had been preferred. She thus urged this court to proceed with the Application.
3. Mr. Lowasikou, learned Counsel for the Respondent submitted that the Application was proper as an Appeal had been filed. He stated that he was not averse to the Application.



4. As stated above, before the Application could be disposed of, I directed parties to impress me with oral submissions as to whether the Application is proper before this court. The issue before me at the preliminary stage therefore was not on the merits of the Application but whether the entire Application was properly before me.
5. It is not gainsaid that an Application for stay of execution is governed by the provisions set out in Order 42, Rule 6 of the Civil Procedure Rules. However, the present case asks this court not to stay execution but assessment of costs. The Application before me was brought by the Appellant before first seeking the determination of the same issue before the Court from which the Appeal was preferred. It was not disputed that the Appellant filed the Appeal herein and immediately moved this Court with the Application in issue, within it. Thus, question is whether or not the Application is a matter ripe for hearing and determination before this court.
6. In my view the Appellant failed to take an important step before moving this Court through the said Application. Order 42 Rule 6 of the Civil Procedure Rules requires the party desiring to apply for stay of execution or proceedings in relation to a matter where an appeal has been preferred to first approach the Court from which the Appeal is preferred before moving to the higher court for similar orders or a variation of an order he/she feels aggrieved with.
7. Justice Keiwua Jac, in the Court of Appeal case of *M G Sharma -vs- Uburu Highway Development Limited* [2001] eKLR once held:

“I think that approach was quite irregular.... the application to stay that case, ought in the first place to have been placed before the Deputy Registrar of the superior court and the prayer for stay urged and if granted it was only then, the balance of the application to have the case struck out, should have been referred to the learned judge. In the absence of such an order from the Deputy Registrar, steps taken to have the file placed before the learned judge, were in my judgment ineffective to divest the Deputy Registrar of jurisdiction to have the bill of costs taxed or to confer jurisdiction to the learned judge because what had been done appears to me to have been a nullity.”
8. Again, the High Court in *Donholm Rabisi Stores -vs- East African Portland Limited* [2005] eKLR held:

“Taxation of costs, whether those costs be between party and party or between Advocate and Client is a special jurisdiction reserved to the taxing officer by the Advocate (Remuneration) Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates (remuneration) Order. The present application is not such reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself. The taxing officer does nothing beyond taxation of the bill of costs. The consequences of such taxation, for instance recovery of the taxed costs, will be a matter for the court, and the court can at that stage be asked to stay recovery of those costs pending whatever event, say, an appeal against the order granting the costs, or a reference under Rule 11 of the Advocates (Remuneration) Order.”
9. I agree with the holdings in the above cases. The court cannot at this juncture make any orders on a matter that has not been ‘tested’ in the lower Court. It is imperative that an Applicant wishing to appeal first moves the trial court for orders of stay of execution or proceedings before having recourse to a superior court for similar orders. Without that step being taken, such move would be premature and



not according to the higher court with jurisdiction. As such, this court lacks the jurisdiction to entertain the Application that was filed prematurely. It would have been proper for the Applicant herein to invoke the jurisdiction of the taxing master. Consequently, I find that the Application before me is amorphous. It fails and is hereby struck out with no orders as to costs.

10. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2022.**

**DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE**

