



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 471 of 2004

ELKANA MUKUNDI GATIMU.....1ST PLAINTIFF/APPLICANT

KENYUA NGUNJIRI2ND PLAINTIFF/APPLICANT

VERSUS

JOHN B. MUYA.....1ST DEFENDANT/RESPONDENT

MRS. R. W. KUNYIHA.....2ND DEFENDANT/RESPONDENT

SATIMA REGISTRARS.....3RD DEFENDANT/RESPONDENT

REGISTRAR OF COMPANIES.....4TH DEFENDANT/RESPONDENT

R U L I N G

I have before me an application by the 1st plaintiff and the 2nd plaintiff whereby an order is sought for stay of execution of the order of taxation dated 7.10.2005 pending the hearing and determination of an intended reference from the said order of taxation. The application is expressed to be brought under the provisions of paragraph 11 of the Advocates Remuneration Order, Orders XLI Rule 4(1) and L Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.

The application is made on the following primary grounds:-

- (1) That the applicants being dissatisfied with the decision of the taxing officer intend to file a reference against the same.**
- (2) That the intended reference has high chances of success and the same will be rendered nugatory if the respondents proceed with execution.**
- (3) That the applicants stand to suffer irreparable loss and damage if the execution proceeds before the hearing of the said reference.**

The application is supported by an affidavit sworn by the 1st plaintiff. The 2nd defendant has sworn a supplementary affidavit. The application is opposed and there is a replying affidavit sworn by the 1st

defendant who has sworn the affidavit on his own behalf and on the authority of the 2nd defendant.

The application was canvassed before me on 4.10.2006 by Mr. Njiru Learned Counsel for the plaintiffs/applicants and Mr. Mogeni Learned counsel for the defendants/respondents. Having listened to the submissions made to me by the counsels appearing the primary issue in this application is whether or not there is jurisdiction on the part of the court to stay execution of an order on taxation of a bill of costs and if there is such jurisdiction whether or not the court's discretion should be exercised in favour of the plaintiffs/applicants and on what terms. Counsel for the defendants cited the decision of the Court of Appeal in **Francis Kabaa –vs – Nancy Wambui and Another C.A. No.298 of 1996 (UR)** where the Learned Judges of the Court of Appeal were of the view that stay of execution may not be available in respect of costs. For the same proposition reliance was placed upon the case of **Housing Finance Company of Kenya –vs – Embakasi Youth Development Project: HCCC No.1068 of 2001 (UR)**.

I have always entertained the view that the jurisdiction to order a stay of execution with respect to costs is one of discretion and has its foundation in the Court's inherent powers. This is in view of the fact that there are occasions when the costs involved are astronomical normally referred to as manifestly excessive. In my view the court should still retain the jurisdiction to stay execution in the interest of justice irrespective of whether or not the execution is being levied to recover costs. However, as the Court of Appeal appears to hold a different view, the plaintiffs' application appears doomed to fail on the basis that there is no jurisdiction to entertain an application for stay of execution of an order of taxation duly made pursuant to the provisions of the Advocates Remuneration Order.

The plaintiffs have also invoked Order XLI Rule 4(1) of the Civil Procedure Rules. In my view whereas the court may be guided by the conditions set in that order, and take an analogy therefrom, the said provisions have no application at all to an application for stay of execution pending the hearing and determination of an intended reference. In any event even if the application were to be determined under the said order, the plaintiffs have not satisfied the conditions set in that order to wit: the demonstration of substantial loss, the furnishing of security for the due performance of the decree and the showing of sufficient cause.

In the end, the plaintiffs' application dated 12.4.2006 is dismissed with costs to the respondents. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2006.

F. AZANGALALA

JUDGE

3.11.2006

Read in the presence of:-