



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

**Civil Case 15 of 2000**

**ROYAL MEDIA SERVICES .....PLAINTIFF/APPLICANT**

**VERSUS**

**TELKOM KENYA LIMITED & 13 OTHERS .....DEFENDANTS/RESPONDENTS**

**RULING**

Two applications of a similar nature were before me being the Notice of Motion of the 11.7.2005 and Notice of Motion of 31.8.2005. Dr. Kamau Kuria for the Applicant elected to proceed only with the first application.

The Applicant seeks the following orders:-

- “1. that this Honourable Court be pleased to stay the order for dismissal of this suit made on 24<sup>th</sup> November, 2004 until the plaintiff’s intended appeal is lodged, heard and determined.***
- 2. That this Honourable Court be pleased to stay the taxation of the bill of costs herein dated 31<sup>st</sup> January, 2005 until the plaintiff’s intended appeal is lodged, heard and determined.***
- 3. That the costs of this application be in the cause.”***

Dr. Kamau Kuria relied substantially on the provisions of O 41 Rule 4 of the Civil Procedure Rules and Sections 77(9) and 84 of the Constitution.

The first application sought in effect prayers for an order, which is negative in form. By her Ruling of the 24.9.2004 Lady Justice Mugo dismissed the Plaintiff’s suit for want of prosecution.

Is it possible to stay such an order? In my view it is not as there is nothing to stay. The Applicant has appealed against the dismissal of the suit and in due course this will be dealt with by the Court of Appeal. In the meanwhile the order dismissing the suit will remain intact.

A somewhat similar application was made in the Court of Appeal, albeit under the provision of Rule 5 (2) (b) of the Court of Appeal Rules in the case of Exclusive ***Estates Limited V Kenya Posts and Telecommunication Corporation & another C.A. No. NAI 162 of 2004 ( VR 34/2004)*** in which the learned Court of Appeal at page 6 stated:-

**“The stay of execution envisaged by Rule 5(2) (b) of the Rules of this Court is the execution of a decree or order capable of execution in any of the methods stipulated by section 38 of the Civil**

**Procedure Act. A “decree holder” as defined in section 2 of the Civil Procedure Act:**

***“means any person in whose favour a decree has been passed or an order capable of execution has been made and includes the assignee of such decree or order”.***

**The order which dismissed the suit was a negative order which is not capable of execution. If the order sought is not granted, the appeal will not be rendered nugatory because if the appeal succeeds the dismissal order will be set aside and the suit will be restored on the register.”**

I decline, therefore, to grant this order.

With regard to the second prayer sought Dr. Kamau Kuria was frank in admitting that the Applicant was concerned at the large sums being claimed by some of the Respondents in their Bills of Costs.

It was his submission that the costs if taxed and executed could lead to the Applicant suffering what would amount to a violation of his constitutional rights as stated in Section 77(9) of the Constitution which states:-

*“(9) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time”*

He relied on the case of *Ndyanabo v AG (2001) E.A. page 485* where it was held inter alia that:-

*“A person’s right of access to justice was one of the most important in a democratic society and, in Tanzania, that right could only be limited by legislation that was not only clear but which was also not violative of the Constitution. The fundamental right of access to justice was what linked together the three pillars of the Constitution, that is, the rule of law, fundamental rights and an independent, impartial and accessible judiciary.”*

He also relied on the case of *Erinford Properties Ltd v Cheshire County Council (1974) 2 All ER page 448*.

The application was opposed by Dr. Kiplagat whose arguments were also adopted by Mr. Mwenesi.

Dr. Kiplagat submitted that under Order 41 Rule 4 2(a) the application for stay must be made without unreasonable delay. In this case this application was made some eight months or so after the ruling of Lady Justice Mugo from which an appeal had been preferred. He relied on the case of *Ngure v Magugu CC. No. 457 of 2003* where Mr. Justice Waweru considered a delay of four months in the absence of an explanation as being fatal to an application for stay of execution. He rejected an explanation from the bar that the delay was occasioned by the delay in taxing the costs.

He submitted Section 77(9) of the Constitution applied to everyone and relied on the case of *Kenya Bus Service Ltd. and others v AG and another, Mis. CC. No.413 of 2005* and the ruling of Justice Nyamu and a passage where he stated:-

*“Fundamental rights cannot be enjoyed in isolation and by a selected few while they trample on others or tread upon their rights. The enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest. Rights and freedoms can only thrive alongside those of others and the society at large because the alternative would be anarchy. The function of the court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions on the other hand is to do a balancing act. In this balancing act are principles values, objectives to be attained, a sense of proportionality and public interest and public policy considerations just to mention a few. All these must be put on the scales with the fundamental rights on the left and the limitations*

*on the right.”*

I accept that the delay in making this application is unreasonable. The reason given that it was necessitated by the presentation of the Bill of Costs for taxation is not a sufficient reason.

Indeed what is before me is an application not to stay execution of any order of this court emanating from the Ruling of Lady Justice Mugo, of which there is none capable of execution, but to stay the taxing officer from taxing the Bills of costs and the parties enforcing the consequent sums due on taxation.

In my view this application is misconceived as the remedy of the Applicant is to appeal against the sums taxed if it is dissatisfied with their quantum under Rule 11 of the Advocates Remuneration Order 1993 and then, if it so wishes, to seek a stay pending the determination of that reference.

With regard to the Applicant's fundamental rights I interpret section 77(9) to mean that no one shall be denied access to the courts and a fair hearing within a reasonable time. It does not mean that any particular person is more privileged than another in obtaining the order they require. In this case the Applicant will be entitled to a fair hearing before the taxing officer and any other court thereafter should it arise and as such I do not see that the Applicant has any right to complain at this stage that he is not being given a fair hearing. I would associate myself with the comments of Mr. Justice Nyamu that justice must be even handed.

In the result for the reasons given I dismiss this application with costs to the Respondents.

Dated and delivered at Nairobi this 7<sup>th</sup> day of November, 2005

P. J. RANSLEY

JUDGE