



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC APPEAL NO. 48 OF 2016**

**GACHANJA MUHORO & SONS LIMITED**

**T/A EASY MART SUPERMARKET.....APPELLANT**

**=VERSUS=**

**MARTIN NGANGA KAMAU &**

**JANE WANJIKU NGANGA.....1<sup>ST</sup> RESPONDENT**

**DAVID WANDERI T/A TAIFA AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

The appellant filed this appeal on 11<sup>th</sup> May, 2016 challenging the decision of the Business Premises Rent Tribunal (“the tribunal”) that was made on 29<sup>th</sup> April, 2016 in which the tribunal held that it had no jurisdiction and struck out the appellant’s reference with costs and allowed the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein to take possession of the suit properties namely Plot Nos. 239, 240 and 241 on L.R No. 6845/149, Utawala, Embakasi (“the suit properties”). Contemporaneously with this appeal, the appellant filed a civil suit before this court namely, ELCC No. 497 of 2016 (“the ELC suit”) against the respondents herein seeking among other reliefs; a declaration that the appellant was not in rent arrears as at 31<sup>st</sup> July, 2015, damages for unlawful distress, loss of business and reputation and, special damages in the sum of Kshs. 65,722,115.08.

The appellant’s application for stay of the tribunal’s order was dismissed by this court on 24<sup>th</sup> June, 2016. The appeal herein was subsequently dismissed with costs by Obaga J. on 27<sup>th</sup> June, 2019 for want of prosecution. The order dismissing the appeal herein has neither been stayed nor varied. The respondents’ costs were taxed by the taxing officer in the sum of Kshs. 273,600/= on 5<sup>th</sup> December, 2019 and a certificate of taxation was issued for the said amount on 18<sup>th</sup> December, 2019. No reference has been filed in respect of that taxation.

The ELC suit is still pending hearing before this court. What is now before me is the appellant’s Notice of Motion application dated 20<sup>th</sup> September, 2019 in which the appellant has sought a stay of further proceedings in this appeal pending the hearing and determination of the ELC suit which is part heard before this court. The application was brought on the ground that the respondents herein had filed their bill of costs prematurely. The appellant averred that the dispute between the parties was still pending determination in the ELC suit which was related to this appeal and that the appellant withdrew this appeal to allow the determination of the dispute between the parties in the ELC suit which was still pending. The appellant contended that it was in the interest of justice that the orders sought be granted.

The application was opposed by the respondents through a replying affidavit sworn by the 1<sup>st</sup> respondent on 21<sup>st</sup> September, 2020. The respondents termed the application an abuse of the process of the court. The respondents averred that this appeal was filed to challenge the decision of the tribunal made on 26<sup>th</sup> April, 2016 and that the ELC suit was filed on the same date as the appeal herein. The respondents averred that the appeal herein and the ELC suit were separate and distinct and each sought specific and distinct remedies from the court. The respondents denied that this appeal was withdrawn by appellant as claimed in the supporting affidavit. The respondents averred that the appeal was dismissed for want of prosecution after the appellant lost interest in the same upon the dismissal of its stay application. The respondents averred that after the dismissal of the appeal with costs, the respondents were entitled to file their bill of costs for taxation as there was nothing left to be done in the appeal. The respondents averred that since this appeal and the ELC suit are different, the court cannot make orders in this appeal touching on the ELC suit that is not before the court. The respondents contended that the appellant’s application was challenging the dismissal order through the back door. The respondents averred that there was no valid reason for granting the orders sought. The respondents averred that they were people of means and were capable of refunding the taxed costs to the appellant should such need arise.

The application was heard orally on 14<sup>th</sup> October, 2020. In their submissions, the advocates for the parties reiterated the contents of the affidavit in support of and in opposition to the application. The appellant’s advocate submitted that the appellant was dissatisfied with the

taxation and intended to file a reference against the same. The appellant's advocate submitted that since the appellant had deposited the entire taxed costs in court, the stay sought should be granted.

The respondents' advocate submitted that the appellant had refused to participate in the taxation and that if the appellant intended to file a reference, the same ought to have been filed within 14 days. The respondents submitted that the appellant had not filed a reference ten (10) months down the line. The respondents submitted that there was no allegation that the respondents would be unable to refund the taxed costs in the event that they are called upon to do so. The respondents submitted that they were entitled to enjoy the fruits of their judgment and urged the court to order the release of the money deposited in court as security to the respondents.

I have considered the application by the appellant and the response thereto by the respondents. I have also considered the submissions of counsels. I find no merit in the application before the court. The stay sought by the appellant is sought pending the hearing of the ELC suit. I am in agreement with the respondents upon perusing the pleadings filed in the ELC suit that that suit and the appeal herein has no connection as far as the cause of action and the reliefs sought are concerned. I believe that it was not necessary to file the appeal and the ELC suit on the same day if they were intended for the same purpose. It is not disputed that this appeal was dismissed with costs to the respondents. It is also not in dispute that the dismissal order has not been stayed. It is also not in dispute that the respondents' costs were taxed at Kshs. 273,600/= on 5<sup>th</sup> December, 2019 and that no reference has been filed against the taxation. I have seen in the court file a typed ruling by the Deputy Registrar dated 5<sup>th</sup> December, 2019. If the appellant wanted to file a reference it should have done so by now. In the absence an appeal against the order dismissing the appeal herein or a reference against the taxation, there is no basis upon which the court can stay the recovery of the costs that were awarded to the respondents herein which is what has been sought by the appellant in the present application but guised as a stay of proceedings pending the hearing of the ELC suit.

The upshot of the foregoing is that the appellant's Notice of Motion dated 20<sup>th</sup> September, 2019 is not for granting. The application is dismissed with costs to the respondents. The sum of Kshs. 273,600/= deposited in court by the appellant pursuant to the order made herein on 11<sup>th</sup> December, 2019 shall be released to the respondents through their advocates on record forthwith subject to confirmation by the Judiciary Accounts Department that the deposit was made.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2021**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mungai for the Appellant

Mr. Mwangi for the Respondents

Ms. C. Nyokabi-Court Assistant