



**Laly Furnishing House Limited v Kenya National Highways Authority & 2 others
(Environment & Land Case 925 of 2015) [2025] KEELC 429 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 429 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 925 OF 2015
OA ANGOTE, J
FEBRUARY 6, 2025**

BETWEEN

LALY FURNISHING HOUSE LIMITED PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST DEFENDANT

CHINA ROAD AND BRIDGE CORPORATION 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

RULING

1. The Plaintiff/Applicant has filed a Notice of Motion application dated 3rd November 2023 and brought under Sections 1A, 1B, 3A and 63(e) of the Civil Procedures Act, Order 42 Rule 6(1) and (2) and Order 51 Rules 1 and 4 of the Civil Procedure Rules. The Plaintiff has sought for the following orders:
 - a. That this Honourable Court be pleased to order a stay of further proceedings of Assessment/Taxation of the 1st and 2nd Defendants' / Respondents' Party and Party Bill of Costs both dated 4th May 2023 scheduled for Assessment/Taxation on 8th November 2023 pending hearing and determination of the Appeal in the Court of Appeal Civil Appeal No. E754 of 2023
 - b. That this Honourable Court be pleased to order a stay of execution of the Judgement and Decree of Honourable O.A. Angote J delivered on 27th April 2023 pending hearing and determination of this application.
 - c. That this Honourable Court be pleased to order a stay of execution of the Judgement and Decree of Honourable O.A. Angote J delivered on 27th April 2023 pending hearing and determination of the Appeal in the Court of Appeal Civil Appeal No. E754 of 2023.
 - d. That the costs of this Application be provided for.



2. The application is based on the grounds set out in a Supporting Affidavit sworn by Sukhdev Singh Laly, the Plaintiff's Director, who deposed that on 27th April 2023, the Honourable O.A. Angote delivered a Judgment and made a finding that the Plaintiff did not prove that it acquired the suit property legally and dismissed the Plaintiff's suit with costs.
3. It was his deposition that aggrieved by the said Judgment, the Plaintiff/ Applicant filed a Notice of Appeal on 11th May 2023 and requested for the certified copies of the proceedings, judgment and the decree; that on 14th September 2023, the Plaintiff/ Applicant filed and served the Record of Appeal in the Court of Appeal in Civil Appeal No. E754 of 2024 against the whole decision and that the Plaintiff has an arguable case with a high probability of success.
4. The Plaintiff's director deposed that on 7th August 2023, he was served with the 1st and 2nd Defendants'/ Respondents' Party and Party Bill of Costs dated 4th May 2023 for a colossal sum of Kshs. 19,037, 602.40 each, making a sum of Kshs. 38, 075,204.80 together with the taxation notice.
5. He contends that the Plaintiff will suffer irreparable loss if a stay of proceedings of the assessment/ taxation is not granted, considering that the Plaintiff intends to appeal against the whole decision of this court, including but not limited to costs; that it is only just and fair that the orders sought in this application are granted to avoid the Plaintiff being irredeemably prejudiced, and to preserve the substratum of the pending Appeal in the Court of Appeal Civil Appeal No. E754 of 2023 and to prevent the pending appeal from being rendered nugatory.
6. The Plaintiff asserts that this application has been brought without any or undue delay, and that the Defendants will not suffer any prejudice if the application is allowed.
7. The 1st and 2nd Defendants opposed through a Replying Affidavit sworn on 30th January 2024 by Otieno Patrick, an Advocate.
8. Mr. Otieno Patrick deposed that the Plaintiff filed a claim against the Defendants vide its Amended Plaint dated 23rd August 2019 culminating into the delivery of a Judgment on 27th April 2023, where this court dismissed the Plaintiff's suit with costs and that dissatisfied with the said Judgment, the Plaintiff filed a Notice of Appeal dated 11th May 2023.
9. He deposed that the Defendants, pursuant to the provisions of Schedule 6 of the Advocates (Remuneration) (Amendment) Order 2014, drew Party and Party Bills of Costs dated 4th May 2023 on behalf of the 1st and 2nd Defendants each totaling to Kshs. 19,037,602.40.
10. Counsel deposed that it is now trite law and settled principle that stay of proceedings and/or execution is a discretionary power of this Court that is exercised judicially by weighing the pros and cons of either granting or dismissing the orders sought.
11. He argued that the Plaintiff has not proved that it shall suffer irreparable harm and damage, if this Honourable Court were to fail to grant the orders sought; that this application is just but a delaying tactic aimed at preventing the 1st and 2nd Defendants from enjoying the fruits of the Judgment delivered in their favor and that the instant application lacks a legal basis since the judgment takes a negative format and until the 1st and 2nd Defendant's Bills of Costs are taxed and Certificates of Taxation issued, the 1st and 2nd Defendants are precluded, prevented or barred from initiating any execution proceedings as against the Plaintiff to recover the costs of the main suit.
12. According to Counsel, the taxation proceedings they have filed on behalf of the 1st and 2nd Defendants as against the Plaintiff do not affect the intended appeal in any way since the same are to be taxed by



the Taxing Master in the Environment and Land Court while the intended appeal has been lodged at the Court of Appeal at Nairobi.

13. He contends that the Plaintiff has not proven in any way that if stay of proceedings and/or execution are not granted, then its intended Appeal will be rendered nugatory and that in the event the 1st and 2nd Defendants were to initiate any execution proceedings against the Plaintiff, the Plaintiff would be at liberty to file an application for stay of execution pending hearing and determination of its appeal at either this court or at the Court of Appeal.
14. Mr. Otieno Patrick deponed that the application is premature, ill-conceived, ill-intended, bad in law, incompetent, frivolous, vexatious, mischievous and an abuse of court process and ought to be dismissed with costs. Alternatively, he deponed that in the event that the application is merited, then the Plaintiff must comply with Order 42 Rule 6 of the Civil Procedure Rules by providing security.
15. In a Further Affidavit dated 28th March 2024, Sukhdev Singh Laly deponed that if the taxation exercise is not stayed pending the outcome of the Appeal, the Applicant will suffer irreparable loss since one of the prayers the Applicant prayed for in the dismissed suit and the pending Appeal is an award of costs to itself. He claimed that unless stay of taxation is granted, the intended Appeal will be rendered nugatory as far as the issue of costs is concerned.
16. Mr. Sukhdev Singh Laly denied that the application is a delaying tactic and invited the court to take judicial notice that judgment was delivered on 27th April 2023 and the Appeal was filed and served on 14th September 2023. He maintained that the Applicant has not delayed in pursuing the Appeal and the Respondents stand to suffer no prejudice if the orders sought are granted.
17. Additionally, he stated that despite the orders in the judgment being negative, the taxation exercise if allowed to proceed will culminate to execution of the taxed costs and the amount as claimed in the two Bills of Costs is Kshs. 38,075,204.80. He posits that if on the other hand the pending Appeal succeeds, the Applicant will file its bill of costs for taxation and the same will demand the taxing master to carry out another taxation exercise in the same matter which amounts to abuse of the court's process.
18. Both parties filed submissions which I have considered.

Analysis and Determination

19. The current application is premised on the fact that this court issued judgment in this matter on 27th April 2023, dismissing the Plaintiff's suit with costs. The Plaintiff, being dissatisfied with the judgment, filed a Notice of Appeal on 11th May 2023, indicating its intention to appeal to the Court of Appeal against the whole decision. The Plaintiff thereafter filed a Memorandum of Appeal on 14th September 2023 in the Court of Appeal Civil Appeal No. E754 of 2024.
20. The Plaintiff, through this application, seeks to stay the taxation proceedings in this suit ELC 925 of 2015, because the 1st and 2nd Defendants'/ Respondents' have filed Party and Party Bill of Costs dated 4th May 2023 for a colossal sum of Kshs. 19,037, 602. 40 each, making a sum of Kshs. 38, 075,204.80.
21. The Plaintiff asserts that it will suffer irreparable loss if stay of proceedings of the assessment/ taxation is not granted, considering that it intends to appeal against the whole decision of this court
22. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order



stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

23. In *William Odhiambo Ramogi & 2 Others vs the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court authoritatively laid out the principles for the grant of stay of proceedings pending the hearing and determination of an appeal as follows:

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.”

24. An order of stay of proceedings, which is distinct from an order of stay of execution, is one that should be granted in exceptional circumstances. The Halsbury’s Laws of England, 4th Edition, Vol. 37 at p. 330 states as follows with respect to applications to stay proceedings:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to



continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.”

25. The Plaintiff has annexed copies of the Notice of Appeal and the Memorandum of Appeal. The Plaintiff in this suit has sought to stay taxation proceedings pending appeal. It asserts that if the Defendants are allowed to tax their Bills of Costs before the Appeal is heard and determined, the issues of costs in the appeal will be rendered nugatory.

26. In *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*, Ringera J stated:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously (emphasis added).”

27. This court is not convinced that the taxation proceedings will visit any prejudice upon the Plaintiff/Applicant. After all, taxation is a legal process whose import is to ascertain the sums due to the decree holder. This was aptly stated in the case of *Deposit Protection Fund vs Rosaline Njeri Macharia [2006] eKLR* as follows:

“The only effect of taxing a Bill of Costs is the ascertainment of the quantum of costs payable by one person to another. Thereafter, the party whose costs had been ascertained could take out execution proceedings... Furthermore, if the learned taxing officer were to proceed to tax the defendants’ Bills of Costs, the sums would be ascertained, and that would be the foundation upon which this court could base the size of the security which the applicant would need to raise, if the court did order that there be a stay of execution.”

28. In the same vein, the court in *Dickson Sinkeet Mapi vs Naisenyu Pargarna Mutunkei [2021] eKLR* pronounced that taxation proceedings are independent as this is the mandate of the Taxing Officer and that the party and party bill of costs is not subject of the Appeal.

29. Consequently, the process of taxation should therefore be allowed to proceed, as the Plaintiff has failed to show the substantial loss it will suffer if the ascertainment of the payable amount by the Taxing Officer goes on.

30. The Plaintiff has also sought this court stay the judgment and decree of this court issued on 27th August 2023. The Plaintiff has relied on the case of *Wako Adan & Another vs Phyllis Wanjiru Mwangi [2020] eKLR*, where the court held that the three prerequisite conditions for an applicant to succeed in being granted an order for stay of execution are:

a. That substantial loss may result unless the order is made.



- b. That the application has been made without unreasonable delay.
 - c. Such security as the court orders for the due performance of the decree has been given by the applicant.”
31. The court further held that these three conditions cannot be severed and must be met simultaneously. In *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR), the court held that the process of execution by itself, does not amount to substantial loss. The court stated as follows:
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.
- The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma vs Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:
- “...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
- With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.”
32. It is trite that the purpose of an order of stay of execution is to preserve the subject matter of a suit, so that an appellant’s rights are not frustrated, and their appeal is not rendered nugatory.
33. The judgment issued by this court on 27th August 2023 dismissed the suit with costs. Save for the order of costs, the judgment and decree is a negative order, which by its nature, cannot be stayed. The orders do not instruct any party to take any action or to refrain from doing anything.
34. The court of Appeal in *Kanwal Sarjit Singh Dhiman vs Keshavji Jivraj Shah* [2008] KECA 346 (KLR) stated as follows with respect to stay a negative order:
- “The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”



35. Being a negative order, there is therefore nothing capable of being stayed. The negative nature of the judgment and decree of the court is admitted by Sukhdev Singh Laly in his Further Affidavit. It is then apparent that the Plaintiff's intention is to prevent the process of taxation and its eventual execution.
36. Noting that the process of taxation had only commenced, the Plaintiff is not in any imminent danger of execution. This court must then agree with the Defendants that this application is premature.
37. For those reasons, the Plaintiff's application dated November 3, 2023 is dismissed. As costs follow the event, the Plaintiff shall bear the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF FEBRUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kimathi for Plaintiff

Ms Odhiambo holding brief for Ms Olando for 1st and 2nd Defendants

Ms Kalairie holding brief for Osoro for 3rd Defendant

Court Assistant: Tracy

