



**Samwel Seroney t/a Kimsite Park Hotel and Restraurant v Kipkemboi & 3 others (Environment and Land Judicial Review Case 2 of 2021) [2023] KEELC 16155 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16155 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2021  
MN MWANYALE, J  
MARCH 13, 2023**

**BETWEEN**

**SAMWEL SERONEY T/A KIMSITE PARK HOTEL AND  
RESTRAURANT ..... APPLICANT**

**AND**

**DOUGLAS KIPKEMBOI ..... 1<sup>ST</sup> DEFENDANT  
PRISCAH JEPTOO ..... 2<sup>ND</sup> DEFENDANT  
CHAIRMAN BUSINESS RENT TRIBUNAL ..... 3<sup>RD</sup> DEFENDANT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Applicant herein, vide Notice of Motion dated November 9, 2022 sought the following orders;
  - a. Spent
  - b. THAT, the Honourable Court be pleased to stay the taxation of the Defendants Bill of Costs pending the hearing and determination of Eldoret High Court Civil Appeal No 81 Of 2022.
  - c. THAT, costs be in the cause.
2. The said Notice of Motion application was supported by the grounds on the face of it and on affidavit deponed by Samwel Seroney, the Applicant herein, dated November 9, 2022. The Applicant averred that on July 14, 2021, he instituted an application to appeal out of time against issues arising from dismissal of Judicial Review application which is the subject of the present Bill of Costs. He states further that the instant suit and the appeal touches on the same subject matter and between the same parties. Therefore the taxation of bill of costs herein ought to be stayed pending hearing and determination of the appeal.



3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the application vide Replying Affidavit sworn by Douglas Kipkemboi on December 1, 2022. He averred that the Applicant had not attached the bill of costs to their application hence had not demonstrated what ought to be stayed. Further that the Applicant was a habitual litigant who had filed several cases over the same issues and similar parties. That the Applicant ought to be stopped and litigation has to come to an end. The 1<sup>st</sup> Respondent urged, this Honourable Court to dismiss the instant application in the circumstance.
4. In response to the Replying Affidavit, a further affidavit was sworn by the Applicant and filed on January 10, 2023. The Applicant deponed that item No 1 on the bill of costs was pegged on the sum of Kshs 4,800,000/= which figure is now subject of Appeal in Eldoret High Court Civil Appeal No 81 of 2022.
5. On December 7, 2022, parties were directed to file written submissions in respect of the instant application. Both complied.

#### **Analysis And Determination:-**

6. Upon consideration of the application dated November 9, 2022, respective affidavits and submissions by parties, the sole issue for determination is whether there ought to be a stay of taxation of Respondents bill of costs pending the outcome of Eldoret Civil Appeal No 81 Of 2022.
7. The jurisdiction of this Court whether to grant stay of proceedings is derived from Order 42 Rule 6 of the Civil Procedure Rules which provides that:

' 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 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 the 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 orders set aside.'

'6 (2) No order for stay of execution shall be made under sub rule (i) unless-

- a. The Court is satisfied that substantial loss may result to the Applicant unless the order is made and 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.'
8. The Court therefore has to rely on the settled principles cited herein above when considering an application such as the one before me. This decision whether or not to grant stay of proceedings is a discretionary one as was observed by Ringera J in the case of Re Global Tours & Travel Ltd -vs- Five Continents Travel Limited (2015) eKLR. He held that;

' 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 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 case, 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.'

9. The Court in the case of *Deposit Protection Fund –vs- Rosaline Njeri Macharia (2006) eKLR* while dealing with an application for stay of taxation proceedings observed that;

'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. Further, if the taxing officer were to proceed to tax Defendant's Bill of Costs, the sums would be ascertained, and that would be the foundation upon which this Court would 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.'

10. With the above in mind, the Court must first determine the prima facie merits of the appeal. Upon perusal of Memorandum of Appeal annexed and marked SKS 2, the Court has established that the Appeal related purely to the decision of the Business Premises Rent Tribunal Case No 51 of 2017. The grounds therein do not make any reference to the Judicial Review Judgment by Lady Justice Odeny delivered on June 23, 2021 as alleged by the Applicant. In essence, there is no pending appeal against the decision of the Honourable Judge in this suit. Neither is there an order for stay of execution of the said judgment.

11. Moreover, the Court has observed that the main contention of the Applicant is on item (i) on the Respondents Bill of Costs. In my view, this contention, can only be heard and resolved by the taxing master, the Deputy Registrar, and not this Court. The Court may only address such issues after a reference has been filed by parties disputing the decision of the taxing master. This not being a reference, I will refrain myself from dealing with this issue any further.

12. That said, it is the Court's view that there exists no nexus between Eldoret High Court Civil Appeal No 81 of 2022 and the present bill of costs. Therefore taxation of the said bill of costs will not prejudice the Applicant.

13. In the end, I find no merit in the instant application and dismiss it with costs to the Respondents.

14. Orders accordingly.

**DATED AND DELIVERED AT KAPSABET THIS 13<sup>TH</sup> DAY OF MARCH, 2023.**

**HON. M. N. MWANYALE,**

**JUDGE**

**In the presence of;**

1. Mr. Murgor for the Applicant
2. Mr. Rugut for the Respondent.

