



REPUBLIC OF KENYA

IN THE ELC COURT OF KENYA

AT NYAHURURU

JUDICIAL REVIEW No 4 OF 2017

(FORMERLY JR 23 OF 2016)

IN THE MATTER OF AN APPLICATION BY KIBAIGA KIRANGU KIMIRI

AND

IN THE MATTER OF COUNTY LAND ADJUDICATION & SETTLEMENT OFFICER LAIKIPIA COUNTY

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY LAND ADJUDICATION & SETTLEMENT

OFFICER-LAIKIPIA COUNTY.....1st INTERESTED PARTY/RESPONDENT

JOSEPH CHRIS RITICH CHEMASAS.....2nd INTERESTED PARTY/APPLICANT

EX-PARTE

KIBAIGA KIRANGU KIMIRI.....SUBJECT/RESPONDENT

RULING

1. The Applicant herein, vide his Notice of Motion dated the 11th November 2019 sought the following orders;
 - i. **Spent.**
 - ii. **Spent**
 - iii. Stay of any taxation proceedings pending the hearing and determination of the interested Party/Applicant's Appeal in Nakuru HCCA No. 195 of 2019.
 - iv. That this Court be pleased to issue any other orders as it may deem just, appropriate and expedient in the interest of justice.
 - v. That the cost of this Application be provided.
2. The said Application was supported by the grounds on its face and on the sworn affidavit of Joseph Chris Rotich Chemasas, the Applicant herein, and dated the 11th November 2019.
3. By consent, parties agreed to have the said application disposed of by way of written submissions wherein the Applicant filed their written submissions on the 20th November 2019 to the effect that he was seeking the stay of taxation proceedings pending the hearing and determination of an Appeal filed at the Nakuru High Court, being HCCA No. 195 of 2019, for reasons that if the taxation proceedings were

allowed to proceed, than the Appeal would be rendered nugatory since the matter shall have been dispensed with by the taxing master.

4. The Applicant relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and Order 43 Rule 1(1) to submit that an Appeal need not be reduced to a mere academic exercise hence the duty of the Court was to protect the sanctity of the Court procedure. That further the duty of the Court was to exercise latitude in its interpretation of rules so as to facilitate determination of Appeals on merit and also to facilitate access to justice so that the deserving litigants were not shut out. The Applicant relied on the decided case of **Masisi Mwiti vs Damaris Wanjiku Njeri [2016] eKLR** to buttress their submissions.

5. The Applicant further submitted that the principles of granting the order of stay had been stated by Courts time and again as follows.

i. That the Applicant must demonstrate that the intended Appeal would be rendered nugatory if stay is not granted.

ii. That the Applicant shall suffer irreparable loss and damage if stay is not granted.

6. On the first principle as to whether the intended Appeal would be rendered nugatory if stay was not granted, the Applicant submitted that the Courts had time and again stated that what amounted to an arguable Appeal would be an Appeal that raised at least one bonafide issue that deserved consideration of the Court. They relied on the decided case of **National Bank of Kenya Limited & Another vs. Geoffrey Wahome Muotia [2016] eKLR**.

7. That an arguable Appeal was not one which must necessarily succeed but one which ought to be argued fully before the Court; one which was not frivolous. That the Appeal pending before the Court of Appeal was arguable on the grounds raised therein. That the costs that had been awarded had also been challenged. That if the orders of stay were not granted, the proceedings in the high Court would proceed leading to execution of the taxed bill of costs and the Applicant would be compelled to make good the Decree thereby rendering the Appeal nugatory should it succeed.

8. On the second principle as to whether the Applicant shall suffer irreparable loss and damage, it was his submission that once the Bill of Costs was taxed, the Applicant would be condemned to pay the entire amount which amount would have been reversed by the Court of Appeal and he would have no recourse on the same. That the Respondent did not have an income and therefore should the Appeal succeed the Applicant would not be able to recover his costs from the Respondent.

9. The Applicant relied on the decided case of **Lake Tanners Limited & 2 Others vs Oriental Commercial Bank Limited [2010] eKLR** to submit that since it was the Courts discretion whether to grant or refuse an application for stay of execution, the Court ought to consider the special circumstances of the case and its unique requirements.

10. That in the case of **Mukuma vs. Abuoga [1988] KLR 645**, it had been recognized inter alia that the issue of substantial loss was the cornerstone of jurisdiction and that what was to be prevented was a substantial loss because such loss would render an Appeal nugatory. That the costs awarded in this case was in dispute and the Court ought to consider the same in order to preserve the Appeal case. The Applicant also recognized that the power to grant the said order was the discretion of the Court considering the issues raised in the special circumstance of the case.

11. While relying on their list of authorities as filed herein, in response to the Applicant's submission and in opposition there to, the subject/Respondent herein filed his submissions on 27th January 2020 submitting that the Applicant's application was res judicata for reasons that on the 21st February 2019 the interested party had filed a Notice of Motion of the said date in which at prayer (c) he had sought for the following relief:

'That this honorable Court be pleased to stay execution of the Decree in respect of the judgment entered hearing on the 17th of January 2019 and any other order that need be issued pursuant thereto pending the hearing and determination of the Applicant's Appeal'.

12. That the said application had been opposed by the subject through his replying affidavit sworn on the 13th of March 2019 wherein a ruling had been delivered on the 11th June 2019 and the prayer for stay had not been granted.

13. That the taxation proceedings that the interested party sought to stay had emanated from the judgment entered on 17th of January 2019 which was a subject of stay in the Notice of Motion dated 21st February 2019. That in the said judgment, the subject had been awarded the costs of the suit which was to be borne by the interested party which was the taxation of costs the interested party had sought to be stayed in the present application.

14. That pursuant to the provisions of Section 7 of the Civil Procedure Act, the Court is barred from trying the prayer for stay of taxation proceedings as the issue had been directly and substantially in issue in the Notice of Motion dated 21st February 2019 which application had been heard and fully decided by the Court. That the Applicant herein had neither sought for leave to Appeal stay or review of the orders of 11th June 2019 and therefore by the present application, the Applicant was asking the Court to sit on its own Appeal. The Court should therefore down its tools and strike out the application with costs.

15. Their further submission was that in case the Court found that the application herein was not res judicata, then their submission was that the same be found to have no merit for reason that it had been filed pursuant to the provisions of Order 42 Rule 6 (1) (2) and 7 of the Civil Procedure Rules which provision dealt with stay of execution of decrees pending the hearing and determination of an Appeal. The Applicant's application was therefore premature as the subject's bill of costs dated the 21st February 2019 had yet to be taxed and a certificate of costs to be issued. That the subject/ Respondent had not sought to execute a certificate of costs arising from taxation and

therefore the prayer for stay of execution was misconceived.

16. The Subject/Respondent further submitted that the interested party had not satisfied the conditions for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules because he had neither demonstrated the substantial loss that would result to him nor that the application had been made without unreasonable delay. That the Decree that would result from taxation proceedings was a money decree which would call upon the interested party to pay to the subject the cost of the suit to be assessed by the Court.

17. That it had not been deponed anywhere that the subject was impecunious and not in a position to refund the cost if the same would be assessed and paid to him pending the hearing and determination of the Appeal. The subject on his part had deponed that he was a man of means and in a position to refund whatever amounts that shall be paid to him pending the hearing and determination of the Appeal. That under the provisions of Section 107 of the Evidence Act, it was incumbent of the interested party to prove that the Respondent did not have the means to refund the said money.

18. That the Applicant herein was indolent and guilty of laches and was not deserving of the stay orders, his application having been filed on the 11th October 2019, which was 5 months after the date of delivery of the ruling which dismissed his Notice of Motion dated 21st February 2019, and the said application having been filed three days to the date fixed for taxation of the Bill of Costs.

19. That the Applicant had not demonstrated that he had an arguable Appeal since the Appeal had been overtaken by events after the decree, which was issued on 17th January 2019, had already been executed substantially and a title deed issued to the Respondent as evidenced in their annexure marked as KKK1.

20. That since the Applicant had only sought for stay of taxation proceedings, his Appeal would not be affected or rendered nugatory if the said proceedings were allowed to go on as all the taxing master was expected to do was to assess the costs payable to the Respondent.

21. That parties were bound by their pleadings and the Applicant had not sought for stay of execution of the certificate of costs which arose from the taxation proceedings. That the amount to be paid was unknown and the Bill of Costs was likely to be dismissed in its entirety leaving nothing to execute.

22. It was further their submission that the Applicant had not provided security as was required pursuant to the provisions of Order 42 Rule 6 (2) (b) which provision was couched in mandatory terms. That the application lacked merit and the same ought to be dismissed with costs to the subject/Respondent. They also sought for orders issued on the 14th October 2019 to be vacated.

Analyses and determination.

23. The subject Respondent herein has raised a preliminary objection on a matter of law to the effect that the present application was res judicata the *Notice of Motion vide Certificate of Urgency dated the 21st February 2019*.

24. A Preliminary Objection according to the decided case by the Court of Appeal in **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

25. In this proceedings, it is the Subject/Respondent’s case inter alia that this Application be dismissed with costs as the same was res judicata by virtue of the *Notice of Motion dated the 21st February 2019* in the same suit.

26. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”

27. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

28. The matter in issue is identical in both suits;

- i. The parties in the suit are the same;
- ii. Sameness of the title/claim;
- iii. Concurrence of jurisdiction; and
- iv. Finality of the previous decision.

29. Without going into details, it is clear that the parties to the suit, the title and/ or claim were similar in the previous suit as in the present suit whereby there was also concurrence of jurisdiction. However the decision thereto in the previous application was not a finality to the suit.

30. The Application of 21st February 2019 upon which this Court delivered its ruling on the 11th day of June 2019, had sought for stay of execution of the decree in a judgment delivered on the 17th January 2019, pending the hearing and determination of the Appeal to which the Applicant also sought leave for extension of time for filing of the said Appeal. The said application was allowed and the Applicant filed an Appeal in the Nakuru HCCA being No 195 of 2019. The Applicant now seeks to stay the taxation proceedings in this matter pending the hearing of the said Appeal

31. With due respect to Counsel for the Subject/Respondent herein, it cannot be said that the orders sought in the present proceedings are similar in the previous proceedings or that the preliminary objection herein raised seeks to finally determine the rights and obligations of the parties to a case. The Preliminary objection herein must fail.

32. Looking at the merit of the Application herein, the Applicant seeks to stay taxation proceedings pending the hearing and determination of the Appeal in Nakuru HCCA No 195 of 2019.

33. In **Kassam Khimji Ltd vs Meridian Properties Ltd [2004] eKLR** the Court held as follows;

“In my considered opinion, a decree cannot stricto sensu, arise out of the taxation. That which arises out of a process of taxation is a Certificate of Taxation. However, the Court does recognize that execution can issue in respect of a Certification of Taxation. Therefore, if the Applicant were to satisfy the requirements for the grant of an order for stay of execution, the Court would grant it.

34. **In the present case**, no material has been put before the Court in the form of a certificate of Taxation to warrant the exercise of its discretion to grant a stay of execution for a reasonable time, to enable the Applicant make another substantive application for stay of execution, and in any case, the resultant of the taxation would be costs which is repayable by refund.

35. Under paragraph 11 of The Advocates (Remuneration) Order, the procedure for objecting to a decision of the taxing officer is through a recourse to the High Court by way of a reference to a Judge by Chamber Summons. The decision of the Judge on such objection is Appealable, with the leave of the Judge to the Court of Appeal. Under Paragraph 12 of the Order, the parties to the taxation may by consent refer any matter in dispute arising out of the taxation of a bill of costs for the opinion of the High Court. Therefore in addition to providing the taxing master with the parameters and tools for carrying out taxation of costs, the Advocates (Remuneration) Order contains a comprehensive process for any party aggrieved by a decision of the taxing officer to object to it before a Judge and, as we have seen, further recourse to the Court of Appeal with the leave of the Judge.

36. Ringera, J (as he then was) in **the matter of Winding Up of Leisure Lodges Limited, Winding Up Cause No. 28 of 1996** expressed his the opinion, which was accepted by the JJA that a party aggrieved by a decision of a taxing officer ‘*whether it be on the quantum awarded on the bill as a whole or any items thereof or on the validity of the bill as a whole or any items thereof has recourse to the High Court by way of reference under Paragraph 11 of the Advocates (Remuneration) Order and that that Order is a complete code.*’

37. The Court of Appeal in the case **Otieno Ragot & Company Advocates v Kenya Airports Authority [2015] eKLR** made a reference to its finding in the case of **Sharma vs. Uhuru Highway Development Ltd [2001] 2 EA 531** where it had held that:

“an advocate after rendering services to his client forwarded a fee note to his client. It was not paid. The advocate commenced a miscellaneous civil suit in the High Court submitting his itemized advocate/client bill of costs for taxation. The taxation was then scheduled before the taxing officer. Before the taxation was done, the client applied to the High Court for stay of the taxation and for the striking out of the Miscellaneous Cause. When the matter reached this Court, it was held that the proceedings before the High Court were a nullity as the matter had already been fixed for taxation before the Deputy Registrar and there were no grounds conferring jurisdiction on the Judge to hear the matter and no steps had been taken to divest the Deputy Registrar of his jurisdiction. This Court was clear that in those circumstance the High Court did not have jurisdiction to entertain the application for stay.’

38. In the case of **Bernard Gichobi Njira v Kanini Njira Kathendu & Another [2016] eKLR** the Court of Appeal when faced with a similar application held as follows:

Nothing is irreversible here including payment of any costs as these are repayable by refund. Indeed, no allegation has been made that the Respondents are incapable of making such refund. The application in any event was premature as no bill of costs had been submitted before the High Court for taxation and execution was a distant possibility.

39. I have nothing useful to add to the said finding of the Court of Appeal which is binding to this Court. In the circumstance, I hereby dismiss and the Applicant’s application dated the 11th October 2019 with costs to the Subject/Respondent.

Dated and delivered at Nyahururu this 6th day of May 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE