



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

LAND CASE NO. 506 OF 2015

MICHAEL NAYGWA OTULA.....PLAINTIFF/APPLICANT

VERSUS

MAGDALINA ALUOCH DAUDI.....1ST RESPONDENT

JOANES AMIMO OTULA.....2ND RESPONDENT

MOSES SHIKUKU SULE.....3RD RESPONDENT

CHARLES OMBATI OMWENGA.....4TH RESPONDENT

FREDRICK OCHIENG WOKORI.....5TH RESPONDENT

RULING

1. The Plaintiff filed the notice of Motion dated the 5th November, 2018 seeking for stay of proceedings pending the hearing of the appeal No. 120 of 2018, and stay of taxation scheduled on the 13th November, 2018 plus costs. The application is based on the two (2) grounds on its face that the court did not appreciate the right to access to justice, and that the court was biased. The application is supported by the affidavit sworn by the plaintiff on the 5th November, 2018 summarized as follows:-

- a. That the plaintiff's case against the defendants was heard and dismissed despite tendering all the necessary evidence.**
- b. That he filed an appeal No. 120 of 2018 and pray for stay of proceedings as the Defendants are people who cannot refund the costs if he succeeds on appeal.**
- c. That the appeal would be rendered nugatory unless the application is granted.**

2. The application is opposed by the Defendants through the four (4) grounds on the grounds of opposition dated the 13th November, 2018 summarized as follows:-

- a. That the application is misconceived, abuse of the due process of the court, incompetent, lacks merit and brought in bad taste.**
- b. The application offends Order 42 Rule 6(2) of Civil Procedure Rules.**

3. The application came up for hearing on the 30th January, 2019 when counsel for the parties agreed to file written submissions. That the learned counsel for the Defendants and Plaintiff subsequently filed their submissions dated the 28th May, 2019 and 30th May, 2019 respectively.

4. The following are the issues for the court's determination:

- a. Whether the plaintiff has made a case for the order of stay of proceedings and taxation pending hearing and determination of the appeal.**
- b. Who pays the costs.**

5. The court has carefully considered the grounds on the motion, and opposition, affidavit evidence, submission by both counsel, the record and come to the following conclusion;

a. That the Plaintiff had commenced this suit against the Defendant, vide the plaint dated the 20th June, 2012 and amended on the 19th September, 2012 seeking for general damages for breach of trust; order cancelling registration of Kisumu/Kasule/530 to 533 and reverting ownership to Samuel Otula Dete and costs.

b. That the suit was heard on merit and vide the court's judgment of the 24th October, 2017 dismissed with costs. The record shows that a decree was drawn and issued on the 5th June, 2018, and on the 18th July, 2018 the Defendants bill of costs was filed.

c. That the plaintiff had filed their notice of appeal on the 8th November, 2017 and received by the Deputy Registrar on the 10th November, 2017.

d. That the Defendants counsel served the Taxation Notice upon the Plaintiff's counsel on the 19th July, 2018 but was received under protest. The notice indicates that the taxation was scheduled for the 11th September, 2018. The court record confirms that on the 11th September, 2018 the taxation did not take place but was rescheduled to the 10th October, 2018 when it was again set for the 13th November, 2018. Then on the 5th November, 2018 the current application was filed and ten (10) days stay granted, which stay has since lapsed.

e. That from the deposition in support of the application, the plaintiff fear is that the defendants are unlikely to refund the costs if proceedings/taxation is allowed to continue in the event he emerges successful on appeal. The defendants have submitted that the taxation should be allowed to continue and the taxed costs be deposited with the court pending the hearing and determination of the appeal. That the provision of **Order 42 Rule 6(2) (a) of Civil Procedure Rule** requires the court to consider whether substantial loss would occur if stay is not granted. The plaintiff has not disclosed the nature of the loss that he is likely to suffer if costs are taxed and paid. The claim that the Defendants would be unable to refund the costs if he succeeded on the appeal is unsubstantiated in view of the fact that his plaint contained a prayer for damages, which is a signal that he believed he would have made them pay had he been successful in the suit.

f. That the Plaintiff has not offered any security for the performance of the decree as required by **Order 42 Rule 6(2) (b) of the Civil Procedure Rules**. That the proposal by the Defendants through their submissions that the taxed costs be deposited with the court may be taken as their proposal for security and appear reasonable.

6. That for the reasons set out above, the court finds and orders as follows:-

a. That the Plaintiff's Notice of Motion dated the 5th November, 2018 is without merit and hence dismissed with costs.

b. That notwithstanding order (a) above, and so as protect the interest of both parties as the appeal is heard and determined, the court allows the taxation of the Defendants bill of costs to proceed, and the amount taxed to be deposited in an interest earning account in the joint names of the parties advocate in thirty (30) days after taxation.

Order accordingly.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 3RD DAY OF JULY, 2019.

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mr. Arikho for Oyuko for Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE