



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 673 OF 2015

IN THE MATTER OF LAND PARCEL NUMBER KISUMU/DAGO/387

AND

IN THE MATTER AFFECTING THE RIGHTS OF THE HEIRS OF THE ESTATE OF PETER DEYA GUMBA

AND

IN THE MATTER OF ASCERTAINING THE HEIRS OF PETER DEYA GUMBA

IN THE MATTER OF ORDER 37 RULE 1 OF THE CIVIL PROCEDURE RULES

BETWEEN

MICHAEL ACHIENG DEYA-OKONG'O.....1ST PLAINTIFF

CORNER OMONDI ODUOR.....2ND PLAINTIFF

VERSUS

JOSEPH OBUGE ONGOTA.....1ST DEFENDANT

THE COUNTY LAND REGISTRAR, KISUMU COUNTY....2ND DEFENDANT

RULING

BRIEF FACTS

The 2nd Plaintiff/applicant has moved this Court vide the Notice of Motion application dated 28/01/2020 and premised on Order 42 Rule 6 of the Civil Procedure Rules 2010 and Sections 1A, 3A and 63 of the Civil Procedure Act, Cap 21. The applicant seeking orders that pending the hearing and determination of the instant application, the Honourable Court be pleased to grant a stay of taxation of the decree holder's bill of costs on 30/01/2020 and subsequent proceedings. There be a stay of taxation of the decree holder's bill of costs and subsequent proceedings pending the hearing and determination of the appeal in the superior Court.

The grounds of the application can be deduced from the face of the application and the supporting affidavit of **CORNER ODUOR OMONDI** sworn on 28/01/2020 with the authority of the 1st Plaintiff/Applicant and are:

- 1. That judgement was delivered in this matter by this Honourable Court on 27/06/2019 and a notice of appeal was filed in respect thereof on 9/07/2019 and an application for proceedings for purposes of compiling a record of appeal was made on 21/08/2019 as per the annexure marked 1 and 2.***
- 2. That since then, the typing of the proceedings has not been completed to enable the compiling of the record as is the practice in the superior court.***
- 3. That the decree holder has moved to tax his bill of costs despite knowing very well that an appeal is pending.***

4. That the applicant is currently unemployed and will suffer great loss if taxation proceeds and the defendant/deed holder will not suffer any prejudice as the judgement issued did not materially interfere with the status quo on the ground.

The application is opposed vide the 1st defendant/respondent's grounds of opposition filed on 4/02/2020, in which he states that;

1. That the application is incompetent, defective, unknown in law, vexatious, frivolous and scandalous.

2. That the applicant has not described the hardship or loss that he would suffer if he were to be forced to settle the costs before the intended appeal is heard.

3. That the application is an abuse of Court process and ought to be struck out with costs.

When the application came up for *inter partes* hearing on 10/5/21, the 2nd plaintiff/applicant appearing in person reiterated the grounds of application as sworn in his supporting affidavit. Mr. Ojuro appearing for the 1st Defendant chose to rely on the filed grounds of opposition.

ANALYSIS AND DETERMINATION

The main issue for determination is whether the applicants have met the requirements for grant of stay of taxation proceedings pending appeal.

I have noted that the application is premised on Order 42 Rule 6 of the Civil Procedure Rules. The said provision provides that:

Stay in case of appeal.

6. (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.

Order 42 Rule 6 (2) in particular provides for conditions to be met for grant of an order of stay of execution of a decree pending appeal. What the applicants are seeking in the instant application is **stay of taxation proceedings pending appeal**. Order 42 Rule 6 (1) on the other hand is clear to the effect that no appeal or second appeal shall operate as a stay of execution or proceedings unless it is ordered by the Court appealed from.

In the case of *David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001 [2002] 1 KLR 867; [2002] 1 EA 296* (quoted in *Ezekiel Mule Musembi v H. Young & Company (E.A) Limited [2019]*), the Court of Appeal when citing *Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another Civil Application No NAI 50 of 2001* held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.

Further in the case of *Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Ltd (2015) eKLR*, the Court observed that;

“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

The Applicants are seeking to stay the taxation of the bill of costs dated 23/10/2019. As per the said Bill of costs, the prima facie amount sought by the Respondent, is Kshs. 149,095/-. Therefore, the amount is a money decree and hence quantifiable. From the Applicant's supporting affidavit, he has stated that he will suffer substantial loss if the taxation proceeds as he is currently unemployed. What this essentially implies is that the applicant will be unable to settle the taxed amount because he is unemployed. I do not think this suffices to be termed as substantial loss in terms of the finding of the Court in *James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR* where it was stated that:

. “...Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

The applicant should also be alive to the fact that in the event the appeal fails, he will still be required to pay the taxed costs regardless of whether or not he is employed, and his employment or non-employment for that matter will only be a matter of interest during the execution proceedings and not at this point in time. The Applicant has also not at any one time stated that the Respondent will be unable to repay the

said amount if the Appeal succeeds.

In the circumstances, I find that no special circumstances have been presented to warrant the Court to exercise its discretion in favor of the Applicants. This is more so as any loss occasioned to the Applicants if the appeal is successful, can be compensated by an award of costs. The Court has also considered the amount of money involved.

In any event, and as was held in the case of *Fulchand M. Shah v Panachand J Shah & 6 others [2010] eKLR* if there are any issues arising from taxation the applicant can always file a reference to this Court.

CONCLUSION

Based on the above, I find that the application lacks merit and should be dismissed with costs to the 1st Defendant/Respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE