



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 75 OF 2008

MUTUKU NGEI.....PLAINTIFF

VERSUS

JULIUS MAKENZI MWATU (*Suing as the legal representative*)

and on behalf of the Estate of MWATU MUTUNE alias

MWATU WAITA NGUYO – (*Deceased*).....1ST DEFENDANT

ROBERT MUTYANGO MUSAU.....2ND DEFENDANT

RULING

Introduction:

1. This Ruling is in relation to the Notice of Motion Application dated 11th November, 2020, brought under Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In the Application, the Plaintiff/Applicant is seeking for the following orders:

a) That pending the hearing and determination of the Plaintiff's/Applicant's Application dated the 3rd day of September 2020, the court do stay Taxation of the Bill of Cost herein and any other proceedings herein.

2. The Application was supported by the Affidavit of the Plaintiff's advocate who deponed that the Plaintiff being dissatisfied with the Judgment of this court delivered on the 30th day of July, 2020 had filed an Application dated 3rd September, 2020 which sought for orders to extend time within which to file and lodge a Notice of Appeal against the decision of this.

3. The Plaintiff's counsel deponed that they had been served with a Bill of Costs together with the Taxation Notice by the Defendants which had been fixed for Taxation on 12th November, 2020; that if they are successful in their Application seeking to extend time to lodge a Notice of Appeal, one of the prayers they shall seek is an award for costs and that unless a stay of Taxation is granted, the intended Appeal will be rendered nugatory as far as the issue of costs is concerned.

4. Counsel deponed that the Applicant will suffer irreparable loss and damage unless a stay of proceedings is issued as execution may issue thereafter and that if the Plaintiff's property was sold, and he became successful in the Appeal, he would be required to file another case to recover costs.

5. The Application was opposed vide a Replying Affidavit sworn on 16th February, 2021 by the 2nd Defendant. The 2nd Defendant deponed that the Application does not satisfy the requirements for the prayers sought; that the Applicant has not disclosed any substantial loss that cannot be remedied and that this court lacks jurisdiction to stay proceedings in respect of taxation before a Taxing Officer as it is a special jurisdiction by dint of the provisions of Rule 11 of the Advocates Remuneration Order.

6. The 2nd Defendant deponed that the Application sought for an order that would have the effect of interfering with the special jurisdiction of the Taxing Officer, a jurisdiction that this court cannot arrogate itself; that the hearing of this Application is a nullity from inception and that what could be stayed was the recovery of costs.

7. The parties filed their respective submissions which I have considered. The only issue that arise for determination is whether the court should stay the Taxation of the Bill of Costs herein.

8. The principles guiding the grant of stay of execution or proceedings pending Appeal are well documented. Order 42 Rule 6(2) of the Civil Procedure Rules provides that for an Applicant to be granted a stay of execution or proceedings pending the hearing of an Appeal, he must

satisfy the Court that:-

a) *Substantial loss may result to him unless the order is made;*

b) *The Application has been made without unreasonable delay; and*

c) *The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.*

9. In the case of ***Sichuan Huashi Development Company Ltd vs. Remax Realtor Ltd (2020) eKLR***, the court quoted ***Halsbury's Laws of England, 4th Edition. Vol. 37*** page 330 and 332, which provides as follows:

“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 proceeding beyond all reasonable doubt ought not to be allowed to continue.”

10. In the case of ***Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokabii Civil Appeal No. 326 of 2013 (2014) eKLR***, the Court quoted Ringera J. (*as he then was*) in the case of ***Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*** where he stated as follows:

“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.”

11. As observed in the above decisions, the stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation. The court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond all 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.

12. The Plaintiff in this matter has not filed a Notice of Appeal against the decision of this court, in which decision he was directed to pay costs. To the extent that the Plaintiff has not argued successfully his Application for leave to lodge an Appeal out of time, he cannot succeed in staying these proceedings, or the Taxation of the Bill of Costs.

13. Considering that the court directed that the Plaintiff pays costs, the taxing of the Bill of Costs cannot be stayed just because the Plaintiff intends to lodge an Appeal. Indeed, it is only after the Bill of Costs has been taxed by the taxing master that this court may, in exceptional cases, stay the execution of the taxed amount.

14. For those reasons, I find the Application dated 11th November, 2020 to be unmeritorious. The Application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 24th DAY OF SEPTEMBER, 2021.

O. A. ANGOTE

JUDGE