



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC. CASE NO. 777 OF 2017**

**DICKSON SINKEET MAPI (*Suing as the Personal Representative of***

**BENJAMIN MAPI OLE PARTIMO – Deceased).....PLAINTIFF**

**VERSUS**

**NAISENYU PARGARNA MUTUNKEI.....DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 9<sup>th</sup> October, 2020 brought pursuant to Rules 13A and 16 of the Advocates (Remuneration) Order; Section 1A and 3A of the Civil Procedure Act; and Article 159 of the Constitution. The Applicant seeks the following orders:

- 1.The taxation proceedings in relation to the Defendant/Respondent's Party and Party Bill of Costs dated 21<sup>st</sup> August, 2020 be stayed pending the hearing and determination of the Plaintiff/Applicant's Notice of Motion Application in Nairobi Court of Appeal Civil Appeal No. E 41 of 2020; and
2. The costs of this Application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavit of DICKSON SINKEET MAPI where he deposes that the Respondent's Party and Party Bill of Costs relate to a civil case which he filed against the Respondent way back in 2017 but the same was dismissed vide a judgement dated the 27<sup>th</sup> May, 2020. Further, that he has lodged an appeal against the said judgement in the Court of Appeal being Civil Appeal No. E 41 of 2020. He confirms having filed an application dated the 24<sup>th</sup> July, 2020 seeking a stay of execution of the judgement which application is still pending determination. He argues that the Application for stay of execution in the Court of Appeal is meritorious, has a high probability of success and unless taxation proceedings herein are put on hold, the said Application if successful, will be rendered nugatory. Further, that the Respondents have duly submitted themselves to the jurisdiction of the Court of Appeal and it would be defeatist of the process of the Court of Appeal and particularly the substratum of the application for stay. He reiterates that stay of taxation of the party and party Bill of Costs is not prejudicial to the Defendant/ Respondent as the dispute whose determination the party and party Bill of Costs herein arise from, is still germane in the Court of Appeal.

The Application was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the Notice of Motion dated the 9<sup>th</sup> October, 2020 including the supporting affidavit and the rivalling submissions, the only issue for determination is whether there should be a stay of the taxation proceedings pending the outcome of the application dated the 24<sup>th</sup> July, 2020 in the Court of Appeal.

The Applicant in his submissions reiterated his claim and contended that no useful purpose would be served if the taxation proceeded during the pendency of the Appeal. Further, that if the taxation proceedings are allowed to proceed concurrently with the Appeal lodged and the Notice of Motion both filed by the Applicant at the Court of Appeal, there would be multiplicity of suits. He further submits that the taxation of costs is part enforcement of the judgement of the Court and should not be allowed to proceed. Further, that granting stay as sought would serve the purpose of preventing multiplicity of proceedings both at the Court of Appeal and before the Taxing master. To buttress his averments, he relied on the following decisions: **Commercial Bank of Africa Vs Lalji Karsan Rabadia & 2 Others (2012) eKLR; Moses Wachira Vs Niels Bruel & 2 others (2016) eKLR; and Homi Dara Adrinwalla V Jeane Hogan & Another (1966) EA.**

The Respondent in her submissions insists taxation proceedings are independent and within the province of the Taxing Officer. Further, the party and party Bill of Costs is not subject of Appeal. She avers that the application is premature as the taxation proceedings are designed to determine the quantum of costs. She reiterates that the Plaintiff has not demonstrated what substantial loss he stands to suffer if orders of stay

of taxation of Bill of Costs is not granted. To support her arguments, she relied on the following decisions: **Deposit Protection Fund V Rosaline Njeri (2006) eKLR; Tom Ojienda & Associates V Mumias Sugar Company Limited & Another (2018) eKLR; Governors Ballon Safaris Ltd V Skyship Company Ltd & Another (2015) eKLR; and Francis Muriuki Muraguri t/a Lusoi Stores & 2 Others V Milling Corporation of Kenya (2009) Limited (2018) eKLR.**

The Applicant has sought for stay of the taxation proceedings pending the determination of the application dated the 24<sup>th</sup> July, 2020 in the Court of Appeal, which has been opposed by the Respondent. I note the Applicant has only sought for Application for stay of execution of the Judgement dated the 27<sup>th</sup> May, 2020 in the Court of Appeal. Be that as it may, I will first proceed to highlight various legal provisions governing stay pending appeal.

Order 42 Rule 6(2) of the Civil Procedure Rules provides that: **' 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.'**

In the current scenario, the Applicant claims the taxation of the Respondent's Party and Party Bill of Costs should not proceed as it will result in multiplicity of suits. Further, that it is unnecessary until the Application for stay of execution in the Court of Appeal is determined. He has however not indicated what prejudice he stands to suffer if the taxation of the said Bill of Costs proceeds and neither has he offered any security for costs.

In the case of **Deposit Protection Fund V Rosaline Njeri Macharia [2006] eKLR**, the Court while dealing with an application of stay of taxation proceedings, observed as follows: **' Going back to the 2<sup>nd</sup> defendant's arguments, I note them as saying that if the court did not grant an order for stay of the proceedings, the applicant would not suffer substantial loss, on account of the taxation of the defendants' Bills of Costs. When faced with those submissions, the applicant did not tell the court how the taxation of the defendants' Bill of Costs would cause them substantial loss. To my mind, the taxation of a Bill of Costs cannot occasion any loss to the person against whom it is taxed. Therefore, the issue of taxation causing substantial loss does not even arise. 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. The applicant did not, in my considered view, make out a case for stay of proceedings, and in particular a stay of the taxation of the defendants' Bills of Costs. Furthermore, if the learned taxing officer were to proceed to tax the defendants' Bills of Costs, the sums would be ascertained, and that would be the foundation upon which this court could 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.'** Emphasis Mine

I would like to distinguish the decisions cited by the Applicant, as the same are distinct from the facts herein. In the decisions of **Commercial Bank of Africa Vs Lalji Karsan Rabadia & 2 Others (2012) eKLR and Moses Wachira Vs Niels Bruel & 2 others (2016) eKLR** the courts granted stay of taxation of costs emanating from interlocutory applications unlike in this instance where the judgement had already been delivered.

It is my considered view that the taxation of the Respondent's Party and Party Bill of Costs is not prejudicial to the Applicant, as he can seek for stay of execution after that, if the Respondent seeks to execute the Decree. Further, the Court of Appeal has not granted a stay of execution of the Judgement in which the Respondent was awarded costs. I opine that it is only through taxation that the costs would be ascertained. Further, that taxation proceedings are independent as this is the mandate of the Taxing Officer and that the party and party Bill of Costs is not subject of Appeal.

Based on the facts as presented while relying on the legal provisions cited above and associating myself with the decision quoted, I find that the Applicant has failed to meet the threshold set for granting stay of taxation of the Respondent's party to party Bill of Costs pending the outcome of the aforementioned application in the Court of Appeal and will decline to grant the said orders as sought.

In the circumstances, I find the Notice of Motion dated 9<sup>th</sup> October, 2020 unmerited and will disallow it with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**