



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MAKUENI**

**ELC CASE NO. 75 OF 2017**

**JOHN SILA NGANDA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**JOHN KYALO MUTUA.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**ALFRED MUEMA MAKAU.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**DIRECTOR OF LAND**

**ADJUDICATION & SETTLEMENT.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**PERMANENT SECRETARY MINISTRY OF LANDS,**

**HOUSING & URBAN DEVELOPMENT.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application before this court for ruling is the one dated 30<sup>th</sup> November, 2020 and filed in court on 2<sup>nd</sup> December, 2020 by the counsel for the 1<sup>st</sup> Defendants/Applicant. It is expressed to be brought under Order 10 Rule 11 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Articles 48, 50 and 159 of the Constitution of Kenya 2010 and all other enabling provision of the law.

2. The 1<sup>st</sup> Defendant/Applicant seeks the following orders: -

**i. Spent.**

**ii. Spent.**

**iii. That the court be pleased to grant an order of stay of execution of costs to the 1<sup>st</sup> Defendant pending hearing and determination of this application and the appeal.**

**iv. That costs of this application be provided for.**

3. The application is supported by the affidavit of Alfred Muema Makau, the 1<sup>st</sup> Defendant/Applicant herein, sworn at Nairobi on 30<sup>th</sup> November, 2020.

4. The basis of the application is that judgement was entered in favour of the Plaintiffs/Respondents on 3<sup>rd</sup> October, 2019 and they have started the execution process. The 1<sup>st</sup> Defendant/Applicant being dissatisfied with the said judgement lodged an appeal which is pending hearing and determination. The 1<sup>st</sup> Defendant/Applicant has stated that he stands to suffer irreparable loss if the order of stay is not granted and that the Plaintiffs/Respondents will not suffer any prejudice and that whatever hardship they may suffer can be compensated by way of costs.

5. The application is opposed by Ferister Ndanu Mwanja and John Kyalo Mutua, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents, vide the replying affidavit of 1<sup>st</sup> Plaintiff/Respondent, sworn at Machakos on 14<sup>th</sup> December, 2020 and filed in court on 15<sup>th</sup> December, 2020.

6. The 1<sup>st</sup> Plaintiff/Respondent has deposed *inter alia* that the application is ill conceived and time barred in view of the fact that there has been inordinate delay in bringing it, that they have been advised by their advocate on record which advise they verily believe that the costs which the 1<sup>st</sup> Defendant/Applicant is disputing arose from a bill of cost which was filed on 27<sup>th</sup> July, 2020 and the Defendant/Applicant participated through his advocate on record in the said bill of costs, that if the 1<sup>st</sup> Defendant/Applicant was challenging the judgement, then he would not have proceeded with the bill of costs dated 27<sup>th</sup> July, 2020 but instead should have filed an application of stay of the bill of costs pending the hearing and determination of the intended appeal, that they are further advised by their advocates on record which advise they verily believe that the application offends the mandatory provisions of the law in challenging the said costs as the 1<sup>st</sup> Defendant/Applicant should have filed a reference under miscellaneous application within 15 days from the date when the ruling on the bill of costs was delivered, that they are advised by their advocate on record which advise they verily believe that since the 1<sup>st</sup> Defendant/Applicant filed the notice of appeal on 17<sup>th</sup> October, 2019, he has never moved the Court of Appeal for over one year and as such is not entitled to the reliefs sought and that the applicant has not complied with Order 42 Rule 6(2) (b) of the Civil Procedure Rules.

7. The application was canvassed by way of written submissions.

8. In their submissions, the counsel on record for the 1<sup>st</sup> Defendant/Applicant submitted that the main issue for determination is whether the Applicant has shown sufficient cause to warrant the court to exercise its discretion in his favour and stay execution of decree and payment of the costs as taxed.

9. The counsel went on to submit that it is not in dispute that the 1<sup>st</sup> Defendant/Applicant has filed an appeal against the judgement which the Plaintiffs/Respondents used to tax the bill of costs.

10. The counsel went on to submit that the Plaintiffs/Respondents filed their bill of costs with full knowledge that the 1<sup>st</sup> Defendant/Applicant had moved the Court of Appeal to challenge the judgement of this court. The court pointed out that the Plaintiff/Respondents have been served with the notice of appeal and it is therefore disingenuous of them to state that the 1<sup>st</sup> Defendant/Applicant ought not to have participated in the taxation on account of the notice of appeal.

11. The counsel further submitted that no prejudice will be occasioned to either party if execution is stayed (*Emphasis are mine*) pending the determination of the appeal and urged the court to allow the application.

12. On the other hand, the counsel for the Plaintiffs/Respondents relied on the case of **Butt –Vs- Rent Restriction Tribunal [1982] KLR 417** where the Court of Appeal considered the provisions of Order 41 Rule 4(2) (now Order 42 Rule 6(2) of the Civil Procedure Rules as follows: -

**“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

**5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

13. The counsel went on to submit that the 1<sup>st</sup> Defendant/Applicant must show that he will suffer irreparable harm if stay is not granted and that security has been given by the Applicant for the due performance of the decree as may ultimately be binding on him.

14. The Plaintiffs/Respondents further contend that the 1<sup>st</sup> Defendant/Applicant has filed this application in the wrong forum. That he ought to comply with Rule 11 of the Advocates Remuneration Order which provides as follows: -

1) *Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.*

2) *The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.*

15. The counsel urged the court to dismiss the application with costs.

16. Having read the application together with the replying affidavit and the rival submissions filed by the counsel on record for the parties, I wish to point out all the outset that it would seem that the 1<sup>st</sup> Defendant/Applicant is out to stay execution of the judgement delivered on 3<sup>rd</sup> October, 2019 and subsequent decree and order issued pursuant to the said judgement. Ground 2 upon which the application is predicated on indicates that the costs of the suit are burdensome and exceedingly exaggerated.

17. The above being the case, I would agree with the counsel for the Plaintiffs/Respondents that the taxing officer having given reasons for the taxation of the Plaintiffs/Respondent's bill of costs, the only avenue available to the 1<sup>st</sup> Defendant/Applicant was to approach this court under Rule 11 of the Advocates Remuneration Order. Be that as it may, I will assume that the 1<sup>st</sup> Defendant/Applicant intended to approach this court under Order 42 Rule 6(2) of the Civil Procedure Rules. Under the said Order, the prerequisite conditions for the grant of stay order pending appeal are: -

- i) That substantial loss may result to the Applicant unless the order is made;
- ii) That the application has been made without unreasonable delay;
- iii) That security has been given by the Applicant for the due performance of the decree as may ultimately be binding on him.

18. In the application before me, the 1<sup>st</sup> Defendant/Applicant has not addressed his mind to any of the three conditions precedent to the grant of the order of stay pending appeal so as to warrant this court to exercise its discretion in his favour. Besides, the 1<sup>st</sup> Defendant/Applicant filed his application dated 30<sup>th</sup> November, 2020 on 2<sup>nd</sup> December, 2020 which is fourteen (14) months from the date when the judgement he seeks to appeal was delivered. To my mind, that is inordinate delay.

19. The upshot of the foregoing is that the application has no merits and I proceed to dismiss it with costs to the Plaintiffs/Respondents.

**SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 2ND DAY OF SEPTEMBER, 2021.**

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**MBOGO C.G.**

**JUDGE**

**Court Assistant: Mr. Kwemboi**