



**Republic v Retirement Benefits Authority & another; Kilonzi & 119 others (Exparte Applicant)  
 (All Suing as Members of the Zamara Fanaka Retirement Fund Pension Scheme) (Judicial  
 Review E129 of 2021) [2024] KEHC 9495 (KLR) (Judicial Review) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9495 (KLR)

**REPUBLIC OF KENYA  
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW  
 JUDICIAL REVIEW E129 OF 2021**

**JM CHIGITI, J  
 JULY 25, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**RETIREMENT BENEFITS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
 ZAMARA FANAKA RETIREMENT FUND (PENSION SCHEME)  
 (FORMERLY ALEXANDER FORBES FINANCIAL SERVICES EAST AFRICA  
 LIMITED) ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ABEDNEGO MUSYOKA KILONZI AND 119 OTHERS . EXPARTE APPLICANT  
 ALL SUIING AS MEMBERS OF THE ZAMARA FANAKA RETIREMENT FUND  
 PENSION SCHEME**

**RULING**

1. Before this court for determination is a Notice of Motion dated 16<sup>th</sup> February, 2024 by the 2<sup>nd</sup> Respondent/Applicant. The Application is said to be brought under Section 1A, 1B, 3, and 3A of the [Civil Procedure Act](#); and Order 42 Rule 6(1), (2) and (4) of the [Civil Procedure Rules](#).
2. The Applicant seeks for the following orders:
  - i. Spent.
  - ii. Spent.



- iii. That pending hearing and determination of the intended Appeal this Honourable Court be pleased to grant an order of stay of the taxation proceedings herein.
  - iv. That this Honourable Court does issue such further orders or directions that it may deem fit to grant.
  - v. That Costs of the Application be in the cause.
3. The grounds relied upon are on the face of it, and on a Supporting Affidavit similarly dated, and sworn by Peter Wachira Maina, a principle officer of the trustee of the Applicant.
  4. The Applicant's case is that they are aggrieved – and have filed a Notice of Appeal dated 22<sup>nd</sup> December, 2023 for having been wrongly ordered to pay costs of the judicial proceedings in a judgment dated 15<sup>th</sup> December, 2023. That on 13<sup>th</sup> January, 2024 the Applicant applied to court for certified typed proceedings; and copied the Respondents.
  5. It was averred that on 22<sup>nd</sup> January, 2024 the Applicant was served, by the Respondent herein, with a Bill of Cost dated 15<sup>th</sup> January, 2024 seeking Kes. 1,069,950 together with a Taxation Notice indicating that taxation will be done on 12<sup>th</sup> February, 2024. That on the said 12<sup>th</sup> February, 2024 the Deputy Registrar gave the 18<sup>th</sup> March, 2024 as the date for mention to confirm filing of submissions and is also likely to give a ruling date.
  6. As a result, the Applicant is apprehensive that the intended appeal would be rendered nugatory by the taxation proceedings, decree and execution thereof. To that end, the Applicant beseeches this court to order stay of taxation proceedings pending the hearing and determination of the intended appeal.
  7. Further, that the Applicant would suffer irreversible prejudice in the event that the Certificate of Taxation is challenged by way of Reference, only for the Appeal to be successful.
  8. As per the Applicant, the Appeal is arguable with high chance of success; and that the balance of convenience tilts in the favor of granting an order to stay the taxation proceedings. Also, that they are ready to comply with conditions set by the court, including deposit of security, pending the hearing and determination of the intended appeal.
  9. The Application is opposed
  10. The Respondent filed their Replying Affidavit dated 8<sup>th</sup> March, 2024 and deponed by William Malonza the 118<sup>th</sup> *Ex-Parte* Applicant/Respondent on his behalf and on behalf of the 1<sup>st</sup> – 119<sup>th</sup> *Ex-Parte* Applicant.
  11. The deponent stated that the Application is frivolous, vexatious, lacks merit, and ought to be dismissed with costs. That it is premature as the total cost is yet to be ascertained, thus security - which is an essential condition for grant of stay – cannot be offered on an unascertained cost.
  12. That the Applicant has merely mentioned, but not demonstrated the prejudice they would suffer should the taxation proceedings be allowed to continue; and that Bill of Costs cannot occasion any loss as the only effect of taxing a Bill of Costs is the ascertainment of the quantum of costs payable.
  13. To the Respondent, it is only after the Bill of Cost has been taxed and ascertained that the High Court would find basis of establishing the security require to satisfy this condition. It is maintained that the taxation of a Bill of Cost is not the same as execution; but the two are distinct and separate.
  14. According to the deponent, the Court of Appeal has not granted a stay of execution of the judgment that is the basis of this instant matter – costs. Also, that the taxation proceedings would neither render



the appeal nugatory nor violate the rights of appeal. That the intended appeal is not arguable and has negligible chances of success.

15. It is deponed that a stay being an equitable remedy, the court must strike a balance between the competing interests of the parties, keeping in mind the right to a fair hearing, which the Respondent argues would be denied if the stay is granted. In the end, that the Application is an abuse of court's time and as such it ought to be dismissed with cost.
16. In buttressing their cases, the Applicant filed their written submissions dated 21<sup>st</sup> March, 2024; while the Respondent's written submissions are dated 26<sup>th</sup> April, 2024. I have paid due regard to the submissions.
17. In the main, the Applicant submissions reiterated their case as captured herein before. Relied on [Civil Procedure Rules](#): Order 42 Rule (6) sub-rule (4); and Order 50 Rule 4. Further reliance was placed on the Court of Appeal case of [Hall Equatorial Limited v Abdul Rahim](#) [2020] eKLR; and the High Court cases of [Njoro Canning Factory v John Michael Mbugua & another](#) [2015] eKLR; [National Industrial Credit Bank Ltd v Aquinas Francis Wasike and another](#) [2006] eKLR; and [Muthee Giciaini & another v Kevin Oduor Odbiambo](#) [2021] eKLR.
18. On their part, the Respondent similarly repeated their case as discussed herein before. Moreover, they submitted that an appeal cannot lie as to an order of cost only, as cost is by court's discretion. The court of Appeal case of [Alibhai Bhanji v Essa Thawer \(5\)](#), (1911--12), 4 EALR 59 was relied upon.
19. The Respondent further posited that the Applicant has not met the threshold required to grant the stay of taxation proceedings pending appeal as prayed for. Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#) were relied on. Reliance was placed on the cases of [Dr. Kevin A Ggrey & another v Housing Finance Company Ltd & 2 others](#) (2013) eKLR; and [Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu](#) (Civil Appeal No E030 of 2021).

### **Analysis And Determination**

20. I have considered the application, responses, annexures thereto, and the learned counsel's submissions. The issue for determination is whether the Application is merited to grant the reliefs sought.
21. Order 42 Rule 6(1) of the [Civil Procedure Rules](#) stipulates inter alia, that no appeal or second appeal shall operate as a stay of execution on proceedings under a decree or order appealed from unless by order of the court appealed from and for sufficient cause. Further, Rule 6(2) [Civil Procedure Rules](#) sets out the conditions for stay of execution.
22. At this juncture, it is imperative to note that there is a difference between stay of proceedings and stay of execution. I am in agreement with the observations of Gikonyo J in [Kenya Wildlife Service v James Mutembei](#) [2019] eKLR, citing from [Halsbury's Law of England](#), 4th Edition vol. 37 page 330 of 332, where the leaned judge observed that stay of proceedings is a serious, grave and fundamental interruption of the right of a party to conduct litigation; it impinges on access of justice, expeditious trial and the right to fair trial.
23. The order of stay of taxation proceedings as sought herein, are proceedings in which the Respondent who was the successful party in this case, seeks to have his costs assessed. Therefore, all the following factors apply: expeditious disposal of the matters, access to justice and the right to be heard and to have the issue determined.



24. The issues before this court is not novel. Dealing with a similar issue stay of taxation proceedings pending appeal I am in consonance with the High Court’s observations in the case of *NCBA Bank Kenya Limited v Seaman Building & 3 others* [2022] eKLR where it was stated that;

“ 19. What about the pros and cons? The application is premature, as the applicant does not stand to suffer any prejudice by the mere fact of the taxing of the costs. Those proceedings in my view will not in any way violate the applicant’s right of appeal neither will they in any way render the appeal nugatory. The outcome of taxation proceedings can be dealt with, but by themselves they are not prejudicial to the applicant and in any event no sufficient cause has been placed before me to show how the proceedings will render the appeal nugatory. It is in my view not in the interests of justice to allow the application for stay of proceedings.”

25. Similarly, I find that the instant matter is premature, taxation by itself does no prejudice the Applicant, the right of appeal is not shown will be violated, and the appeal has not been demonstrated how it will be rendered nugatory.

**Order**

26. ...

- 1. The Application lacks merit and the same is dismissed with cost to the *Ex-Parte* Applicants/ Respondent.
- 2. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAIROBI ON 25<sup>TH</sup> JULY, 2024.**

.....

**CHIGITI J (SC)**

**JUDGE**

