



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 148 OF 2015

BENJAMIN BOSIRE OGERO.....PLAINTIFF

VERSUS

ALOYS MATAYA MOSETI..... 1ST DEFENDANT

PRISCA KERUBO MAUTI.....2ND DEFENDANT

SAMWEL ISABOKE MWAMBI.....3RD DEFENDANT

COUNTY LAND REGISTRAR.....4TH DEFENDANT

RULING

INTRODUCTION

1. This ruling pertains to the 1st and 2nd Defendants' application dated 8th April 2021, seeking a stay of execution and/or implementation of the limb of the judgment pertaining to payment of the costs and in particular the Certificate of costs issued by the Taxing Master on the 18th day of March 2021, pending the hearing and determination of the intended Reference against the Taxation of Costs.

2. The application is anchored on the grounds set out on the face of the Notice of Motion and the Supporting Affidavit of Aloys Mataya Moseti, the 1st Defendant/Applicant herein. The thrust of the Supporting Affidavit is that judgment was delivered in favour of the Plaintiff and he was awarded costs which have since been taxed in the sum of Kshs. 752,115/=. The 1st and 2nd Defendants being dissatisfied with the Ruling of the Taxing Master dated the 18th day of March 2021 intend to file a Reference to this court. It is his further contention that even though the Defendants have filed a Notice of Objection to the Taxation and requested for reasons for the Taxation, they are yet to be furnished with the said reasons. They are therefore apprehensive that the Plaintiff who has since extracted a Certificate of costs may proceed with execution in order to recover his costs thus subjecting the 1st Applicant to substantial loss. He depones that he is willing to furnish security in the sum of Kshs. 200,000/=

3. The application is contested by the Plaintiff/Respondent through his Replying Affidavit of Ouma Maurice Otieno Advocate sworn on the 3rd May 202, in which he contends that the application is premature as no Reference has been filed. He further contends that the Applicants' argument that they have not been furnished with reasons for the Taxation does not hold water as they ought to have filed a Reference based on the Ruling of the Taxing Master. He deposes that the Applicants have not met the conditions for grant of stay pending appeal under Order 42 Rule 6(2) (a) and (b) of the Civil Procedure Rules. He contends that in the event the court is inclined to grant the stay, then the Applicants should deposit the entire sum of costs awarded in a fixed interest earning account in the joint names of the advocates as security.

4. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

5. The singular issue for determination is whether the Applicants should be granted a stay of execution.

ANALYSIS AND DETERMINATION

6. By dint of rule 11 of the Advocates Remuneration Order, the Applicants ought to have filed a reference within 14 days from the date of receipt of the reasons. That notwithstanding, the Applicants were not precluded from filing the reference based on the reasons provided in

the Ruling of the Taxing Master. See the case of **Twiga Motor Limited v Hon Dalmas Otieno Anyango (2015) eKLR**.

7. Learned counsel for the Applicants submitted that the Applicants had met the conditions for the grant of a stay pending appeal. He contended that the payment of the costs which he considers to be colossal will subject the Applicants to substantial loss as he is of the view that in case the Applicants' reference is successful, the Plaintiff may not be in a position to refund the same. He submitted that the Applicants have filed the application timeously and that the Applicants are willing to furnish security in the sum of Kshs. 200,000.

8. On the other hand, learned counsel for the Respondent submitted that the failure to file the Reference within 14 days means that there is no appeal and therefore a stay cannot be granted in a vacuum. He placed reliance on the case of **Municipal Council of Kisumu v Kenya Power and Lighting Company Limited (2017) eKLR** for the proposition that the Oxygen principle does not empower the court to grant a stay of execution where the Applicant has not appealed against the order or decree sought to be stayed. He therefore termed the Applicants' application premature and incompetent.

9. It was counsel's contention that in any event, the Applicants have not met the conditions for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. In particular, he pointed out that the Applicants have not demonstrated that they will suffer substantial loss nor have they offered sufficient security by showing that they are willing to deposit the decretal sum either in court or in a fixed term joint interest bearing account.

10. It is not in dispute that the Applicants intend to contest the ruling of the Taxing Master and that if they have to pay the costs that were taxed before their reference is heard, the same shall be rendered nugatory. Although the said reference ought to have been filed within 14 days, I am aware that the court has power to enlarge time for filing of the reference. I also note that the application for stay has been filed with promptitude. The Applicants have also demonstrated that they are willing to furnish security though the amount offered is not reasonable in view of the Certificate of costs.

11. In view of the foregoing and in the interest of justice, I grant a stay of execution pending hearing of the Intended Reference against the Certificate of costs on condition that the Applicants deposit the sum of Kshs. 500,000/= in an interest bearing account in the joint names of the Plaintiffs' and Defendants' advocates within 45 days failing which the order for stay shall automatically lapse.

The costs of this application shall be borne by the Applicants.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF OCTOBER, 2021

J.M ONYANGO

JUDGE