



**Shimaka v Clerk Kakamega County Assembly & another (Constitutional  
Petition 18 of 2022) [2024] KEHC 12283 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12283 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CONSTITUTIONAL PETITION 18 OF 2022  
S MBUNGI, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**LEONARD NECHEZA SHIMAKA ..... PETITIONER**

**AND**

**CLERK KAKAMEGA COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF KAKAMEGA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 6<sup>th</sup> March 2024 is seeking for stay of proceedings pending the hearing and determination of the Petitioner/Applicant's application for leave to appeal out of time. The Petitioner/Applicant seek for production of the court file and supply of proceedings. The Petitioner/Applicant further seek to be granted leave to file submissions to the respondents' Bill of Costs.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 8<sup>th</sup> April 2024.

**Applicant's case**

3. The applicant states that the respondents herein proceeded ex parte to tax the respondents party to party Bill of Costs dated 14<sup>th</sup> November 2023 and the same was scheduled for delivery on 8<sup>th</sup> March 2024. The applicant further stated that he was not accorded an opportunity to respond thereto and if the same is taxed without his input it will amount to a miscarriage of justice. The Petitioner/Applicant was also disenfranchised through out the conduct of the instant Petition and the subsequent Bill of Costs and he was bound to suffer immense loss and damages if the orders so sought herein were not granted as prayed.



## **Respondent's Case**

4. The respondent opposes the application on grounds that there is no such an application filed pending or served on the respondents to date. There is also no annexures to the supporting affidavit of such application or to that effect it remains in the mind of the Petitioner yet to be actualized.
5. At the time of writing this ruling the Petitioner/Applicant had not filed submissions.

## **The Respondents' Submissions**

6. Prayer 1 and 2 were interim orders thus spent. On prayer 3 the respondents submit that there is no such application filed, pending or served on them to date. There is also no annexures to the supporting affidavit of such an application. The Petitioner/Applicant has not filed any further affidavit to challenge ground 1 of the Grounds of opposition.
7. On prayer 4 the respondents submitted that the court file has never gone missing and on all occasions this matter has come up including 26/6/24, 8/3/2024, 5/3/24, 23/1/24, 20/6/23, 13/10/23, the court file has been available and proceedings and orders were taken and made in the court file.
8. The respondents also submitted that prayer 5, the Petitioner/Applicant in paragraph 17 of the supporting affidavit admits that the petitioner was aware of the Bill of Cost and no explanation is offered as to why there was no appearance in court or reply/submissions to the bill of costs.

## **Issues for determination.**

9. The main issue for determination is ;
  - i. Whether court should exercise its discretion to grant the applicant stay of proceedings pending hearing and determination of the petitioner/applicant's application for leave out of time.
10. On stay of proceedings it was held In the case of Kenya Wildlife Service Vs James Mutembei (2019) eKLR, Gikonyo J held that: "Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent".
11. Further, in the persuasive case of Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000 Ringera J, (as he then was) stated that: "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".
12. In the Kenya Wildlife Case (Supra), Gikonyo J quoted Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, that: "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." This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional



cases.”It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

13. I am persuaded by the above authorities which lay down the clear principles that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case.
14. The court is concerned with preserving the rights of both parties pending that appeal.
15. I have perused the court record, I have not seen any application filed by the applicant seeking for leave to file the appeal out of time. What is on record is a notice of appeal dated 20<sup>th</sup> of June,2023 and a memorandum of appeal dated on 29<sup>th</sup> June ,2023 and received on 7<sup>th</sup> March 2024.
16. There being no application for leave to appeal out of time the court cannot grant the leave.
17. No stay can be granted in a vacuum for obviously the Notice of Appeal and the Memorandum of Appeal are improperly on record for they were not filed within the prescribed time.
18. This Court being a court of justice I will allow prayer 5 in that the applicant is at liberty to file a response to the Respondents’ party to party Bill of Costs dated 1November 4, 2023 within the next 14 days and serve the respondents for a rejoinder if necessary, failure of which the taxing master will proceed and tax the bill of costs.
19. The matter be mentioned before the taxing master on October 16, 2024 to set a ruling date/further direction.
20. Since the application has partly succeeded, each party to bare its own costs of this application.
21. Right of appeal within 30 days explained.

**DATED, AND SIGNED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**S. N MBUNGI**

**JUDGE**

**In the presence/absence of:**

Petitioner – absent

1<sup>st</sup> Respondent – absent

2<sup>nd</sup> Respondent – absent

Court Assistant – Elizabeth Angong’a

**Ruling delivered on 19.09.2024 for on 18.09.2024 the court was engaged in the Bar-Bench meeting.**

