



**Awino v Megascope Healthcare (K) Limited & 2 others; Ethics and Anti-Corruption Commission (Interested Party) (Petition E001 of 2023) [2023] KEHC 19740 (KLR) (Anti-Corruption and Economic Crimes) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19740 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES**

**PETITION E001 OF 2023**

**EN MAINA, J**

**JULY 10, 2023**

**BETWEEN**

**FRANCIS AWINO ..... PETITIONER**

**AND**

**MEGASCOPE HEALTHCARE (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF HEALTH ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY**

**RULING**

1. By the Notice of Motion dated June 6, 2023, which is supported by the affidavit of the Petitioner/Applicant sworn on even date, the Applicant seeks an order to stay taxation of the 1<sup>st</sup> Respondent's Bill of Costs dated April 26, 2023.
2. The gist of the application, as can be discerned from the grounds on the face of the application and the supporting affidavit of Francis Awino, is that the Petition filed by the Applicant against the parties herein was a public interest litigation against which costs ought not to have been awarded; that the Applicant has appealed the order for costs and the appeal shall be rendered nugatory were the taxation to proceed.



### **Response by the 1st Respondent**

3. The 1<sup>st</sup> Respondent opposed the Application through the replying affidavit of John Gikandi Thongori, the Company Secretary of the 1<sup>st</sup> Respondent, sworn on June 19, 2023.
4. The 1<sup>st</sup> Respondent contends that the present application lacks merit and is an abuse of the court process; that this court awarded costs to the 1<sup>st</sup> Respondent on the basis that the 1<sup>st</sup> Respondent ought not to have been enjoined to the Petition as the documents sought by the Petitioner could only be obtained from the 2<sup>nd</sup> Respondent; that in the Petition the Petitioner had sought undisclosed documents from the Respondents and the Petition was withdrawn only after the 1<sup>st</sup> Respondent had filed a Preliminary Objection on the issue of jurisdiction, taken directions, carried out extensive research and filed submissions thereby incurring costs. The 1<sup>st</sup> Respondent contends that subsequent to the withdrawal of the Petition, the Petitioner filed another Petition in the Constitutional Division being Constitutional Petition No E119 of 2023 Francis Awino V Megascop Healthcare Limited and 2 Others in a sustained bid to harass it.
5. The 1<sup>st</sup> Respondent contends further that the application for stay was brought after it had filed its Bill of Costs on April 26, 2023; that the Petitioner/Applicant served it with the present Application on June 12, 2023 after the parties had already appeared before the taxing officer and two months after service of the Bill of Costs and as such the delay in bringing the application is inordinate and inexcusable.
6. The Respondent further contends that the Petitioner has not demonstrated that he would suffer substantial loss incapable of compensation in damages should the stay be denied; that the 1<sup>st</sup> Respondent is a reputable company supplying hospital equipment, capable of reimbursing the costs should the Petitioner succeed on appeal; that as the successful litigant the Respondent is entitled to costs; that there is no guarantee that the appeal will be successful; that the Petitioner has not offered security for costs and that the Petitioner has not met any of the conditions for grant of stay and further that no prejudice would be occasioned to the Petitioner if the stay orders are denied.
7. Learned Counsel for the parties consented to canvassing the application by way of written submissions and the same were duly received.

### **Issue for determination**

8. From the application, response and submissions filed, the following issue arises for determination:

Whether the Petitioner/Applicant has met the threshold for grant of stay of taxation of the 1<sup>st</sup> Respondent's Party and Party Bill of Costs pending appeal.

### **Analysis and determination**

9. It is trite that the jurisdiction of this court to grant stay of proceedings is discretionary. Unlike stay of execution which is provided for in Order 42 Rule 6 of the [Civil Procedure Rules](#) the jurisdiction to stay proceedings is exercised under Sections 1A and 3A of the [Civil Procedure Act](#) which states:

' 1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.



- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

10. Learned Counsel for the Applicant argued that it is in the interest of justice that a stay of the taxation be granted and placed reliance on the case of *Re Global Tours & Travel Ltd HCWC No 43 of 2000* where the court held 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 case, 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.’

11. Counsel also cited the case of *Niazsons (K) Ltd v China Road & Bridge Corporation [Kenya] [2001] eKLR*, cited with approval in the case of *Port Florence Community Health Care v Crown Health Care Limited [2022] eKLR* where the court stated that:

‘ Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay should be granted.’

12. Flowing from the above this court must be satisfied that it is in the interest of justice to grant the stay before it can grant it.
13. The Order which the Applicant seeks to appeal is dated April 17, 2023 but this application was filed only on June 23, 2023 after the 1<sup>st</sup> Respondent had filed its Bill of Costs for taxation and parties had appeared before the taxing officer. Clearly therefore there was delay in filing the application. The delay has not been explained. The discretion of the court ought never to be exercised in favour of a party whose sole intention is to delay finalization of a case or proceedings. Good faith would have necessitated that the Applicant file its application before the 1<sup>st</sup> Respondent incurred further costs as it did in instructing Counsel to file the bill for taxation. It is also my finding that the Applicant stands to suffer no substantial loss or prejudice at all were the costs to be taxed as he can always seek a stay of execution of the taxed costs once the quantum is ascertained. The Taxation of the costs per se cannot render the appeal nugatory.



14. In the premises the application is dismissed with costs to the 1<sup>st</sup> Respondent noting that the other Respondents and the Interested Party did not participate in the proceedings.

Orders accordingly.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 10TH DAY OF JULY 2023.**

**E.N. MAINA**

**JUDGE**

**In the presence of:-**

**Mr. Nthei for Wachira for the Defendant**

**Miss Amuka & Mr. Thuo for the 1st Respondent**

**Potishoi – Court Assistant**

