**REPUBLIC OF KENYA**

**IN THE HIGH COURTOF KENYA AT ELDORET**

**CIVIL APPEAL NO. 147 OF 2019**

**KANAMPIUS MUREITHI T/A**

**KANAZ TECHNOLOGIES SOLUTIONS ELDORET.................APPELLANT**

**VERSUS**

**BEN LANGAT T/A INTO COMPUTERS (ELD) LTD..............RESPONDENT**

**RULING**

1. The applicant **(KANAMPIUS MUREITHI T/A KANAZ TECHNOLOGIES SOLUTIONS ELDORET)** has by an application dated 28/10/2019 alongside a supporting affidavit, has sought that:

a) there be temporary stay of any execution in **Eld. CMCC No. 427 of 2011** pending the hearing and determination of this application and

b) that the ruling in **Eldoret CMCC No. 427 of 2011** delivered on 19.9.2019 be stayed pending the hearing and determination of this appeal.

The said application is premised on the grounds that applicant had applied for an order to set aside the ex-parte taxation and to have the same taxed interpartes, the application dated 8.7.2019 was seeking to set aside the taxation and not to stay the judgment. This was different from the application dated 3.9.2018 yet the court dismissed it on the ground that it was similar. It is contended that the ruling ought not to have favored the respondent as they did not engage the appellant in the taxation cause.

2. Further that taxation had been done ex-parte at the registry and they had not been served with a notice of taxation nor a date for taxation, the appellant's advocates were unaware of the said taxation and since the suit was defended it was unfair to tax the bill at the registry.

3. He deposed that the application dated 8.7.2009 was not 'res judicata'

4. The respondent filed his grounds of opposition stating that the applicant was seeking to stay a dismissal order, which was unexecutable and incapable of being stayed. Further that this court has no jurisdiction to set aside a taxation of the bill of costs as it was not a taxing court, and the leave of the court was not sought before filing of the appeal. Therefore, this court cannot grant a stay on an incompetent appeal.

5. The Applicant in the written submissions urges this court to consider the elements an applicant has to meet in order to succeed which include that his appeal or intended appeal was arguable, that unless the court granted an injunction or stay the appeal would be rendered nugatory and that the application had been brought without undue delay.

6. The application that is said to be res judicata sought to set aside taxation of the plaintiff's/ respondent's bill of costs and its dated 8.7.2019 The said bill of costs had been taxed ex-parte without notice to the applicant whereas the application dated 3.9.2018 sought to stay judgment. In **Joseph Mwangi Kamau(administrator of the estate of Wilson Kamau Itume(deceased) v. Jacob Ngigi Kanini & 3 Ors[2019] eKLR**, the court held that a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.

7. Further that the respondent would proceed to execute and the appeal may be rendered nugatory, yet the court has already given a date of 27.2.2020 for notice to show cause then.

8. The response is that that the order issued by the court was appealable as of right as provided under **Order 43 rule 1(k)**, there was no need to seek leave of the court to appeal, reference being made to **Order 22 rule 25** which shows that it is among the orders in execution which are appealable.

9. The argument presented is that the applicant was appealing against a dismissal dated 8.7.2019, the court did not make any executable order

capable of being stayed under Order 42 rule 6 of the civil procedure rules. The respondent supports their argument that a dismissal is un-executable and incapable of being stayed by referring to ***Eldoret. HCCA no. 120 of 2001, Stanley Kamau Mboce v. Eldoret Municipal Council* and in *Eldoret. HCCC no. 95 of 2001, Samross Investments Ltd & Anor. v. Kenya Commercial Finance Co. Ltd***.

10. It is also argued that the application that had been dismissed was under **order 51 rule 1 as read with sections 3 and 3A of the Civil Procedure Act**. The appeal under **order 51 rule 1 does not lie as of right under Order 43 Rule 1(1) of the Civil Procedure Rules** and the applicant had to have sought leave as provided by **Order 23 rule 2 of the Civil Procedure Rules**. In the absence of such leave the application and appeal is faulted as incompetent.

It is further that this court has no jurisdiction to set aside a taxation of the bill of costs since it was not a taxing court and cannot set aside the same. The court was urged to dismiss the application with costs.

11. **The issues that arise for determination are:**

> **i. Whether the application dated 8.7.2019 was res judicata**
>
> **ii. Whether this court has jurisdiction to stay and or set aside taxation**
>
> **iii. Whether the application dated 8.7.2019 is merited.**

12. On his grounds in support of the application paragraph 12 states as follows: ***"the bill of costs have also been taxed ex-parte contrary to accepted practice when both parties participated in the proceedings"*, paragraph 13 reads as follows: "*the application before the court is for stay of execution, the notice to show cause and any further proceedings pending the hearing and final disposal of the appeal being Eldoret HCCA no. 65 of 2018*".**

13. This was clear that the application dated 8.7.2019 was similar to the one dated 3.9.2018 and thus ***res judicata***. In **Enock Kirao Muhanji v. Hamid Abdalla Marul[2013] eKLR**, the court stated as follows:

> ***"The law pertaining to the doctrine of res judicata is captured under the provision of Section 7 of the Civil Procedure Act as follows: No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally by such court."***

14. In addition the Court of Appeal in ***Njue Ngai v. Ephantus Njiru Ngai & Anor [2016]* eKLR**, the 3 judge bench in analyzing stated thus:

> ***"13. What is res judicata and when does it apply? The Latin of it is simply "a thing adjudicated". But it has overtime received extensive judicial interpretation in various jurisdictions of the globe which we shall not be tempted to explore here. Suffice it to adopt the definition in Black's Law Dictionary, Ninth edition, as:***
>
> ***"(i)An issue that has been definitively settled by judicial decision;***
>
> ***(ii)An affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction, or series of transactions and that could have been –but was not- raised in the first suit.***
>
> ***14. In the case of <u>Ukay Estate Ltd & another vs Shah Hirji Manek Ltd & 2 others [2006] eKLR, (supra)</u>, cited by the appellant, Waki JA stated as follows:***
>
> ***"The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause."***

15. The respondent argued that the applicant had to have sought for leave as provided for under **Order 23 rule 2** since it was not as of right to appeal as urged by the applicant. The applicant on the other hand urged that they were allowed to appeal as provided by **Order 43 Rule 1(k) of the Civil Procedure Rules**. The applicant urged that **order 22 rule 25** did not require one to seek for leave. The same states as follows**:**

> ***"Stay of execution pending suit between decree- holder and judgment- debtor.?25. Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as suit it thinks fit, stay execution of the decree until the pending suit has been decided."***

16. In view of the above, since the matter was still pending before the trial court when it dismissed their application dated 8.7.2019 and gave a date for notice to show cause, the applicant did not need to seek leave of the court to file an appeal.

17. **Has the applicant met the elements to be granted stay of execution?** The applicant stated that he had filed the application without delay. The application was dismissed on 17.10.2019 and the instant application filed on 28.10.2019, in my view there was no delay.

18. The appeal is arguable and is merited thus this application be ought to be allowed, and indeed even one single ground was enough to convince the court to allow the application. The memorandum of appeal has various grounds regarding the taxation. The respondent maintains that this court does not have jurisdiction to determine the matter since it did not tax the bill, however determining such an issue is tantamount to hearing and disposing the entire appeal prematurely. As stated by the Court of Appeal in **Joseph Mwangi Kamau** (administrator of the estate of **Wilson Kamau Itume)** (supra), the court held that a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable, and I find that this situation merits the prayers sought.

19. Costs are awarded to the applicant

**E-Delivered and dated this 4$^{th}$ day of May 2020 at Eldoret**

**H.A. OMONDI**

**JUDGE**