



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC CASE NO.69 OF 2018**

**MICHAEL MALUTI .....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**JOHN MATU MALUTI .....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**BENEDICT MAWIO MALUTI .....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**FEDELIS KIMOTE MALUTI..... 4<sup>TH</sup> PLAINTIFF/APPLICANT**

**MUTISO MALUTI ..... 5<sup>TH</sup> PLAINTIFF/APPLICANT**

**JOSEPHAT WAMBUA MALUTI ..... 6<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**JULIUS BAU NZYUKO .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COUNTY LAND REGISTRAR**

**MAKUENI COUNTY GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. What is before court is the Plaintiff's/Applicant's Notice of Motion Application expressed to be brought under Order 51 Rule 1 & 2, Order 21 Rule 1 and 2 of the Civil Procedure Rules, Sections 1A and 1B of the Civil Procedure Act Cap 21 of the Laws of Kenya and all the enabling provisions of the law for orders: -

**1) Spent.**

**2) Bill of costs filed on 19/07/19 coming for taxation on 25/09/19 be stayed pending the determination of Boundary Dispute by the Land Registrar Makueni County between parcel No.94 and the land of Michael Maluti as indicated on summons served upon us.**

**3) Any other Order this Court may deem just.**

**4) Costs of this Application be borne by the Respondents.**

2. The application is predicated on the six (6) grounds on its face and is supported by the affidavit of Mutiso Maluti, the 5<sup>th</sup> Plaintiff/Applicant herein, sworn at Machakos on 20<sup>th</sup> September, 2019.

3. The Defendants/Respondents have opposed the application vide the grounds of opposition dated 23<sup>rd</sup> October, 2019 and filed in court on 24<sup>th</sup> October, 2019.

4. The Defendants/Respondents contend that: -

**1) The ruling of the Court dated 12<sup>th</sup> February, 2019 striking out the Plaintiffs suit is a negative one and not a positive one capable of being enforced and executed.**

**2) The Application is totally incompetent and pre-mature as the "COSTS" of the suit have not yet been established hence the stay being sought is made to curtail this court from performing its statutory duty.**

**3) Stay can be obtained and given in the event of an execution which is not the case/position currently.**

**4) In any event the Plaintiffs have failed to meet the threshold in Order 42 Rule 6(2) for the grant of a STAY, viz: -**

- (i) Proof of substantial loss to be suffered if a stay is refused.**
- (ii) That the Application has been made without unreasonable delay.**
- (iii) Giving of adequate security, sufficient enough to satisfy the Decree.**
- (iv) Establishment of sufficient cause.**

5. The application was disposed off by way of written submissions and by the time of writing this ruling, only the Plaintiffs'/Applicants' Counsel had filed his.

6. Mutiso Maluti has deposed in paragraphs 4, 5, 6, 10 and 11 of his affidavit that the dispute over the boundary has not yet been settled and is still pending, that the Applicants are disputing the date on which the Registrar would visit the site and also the ambiguity of the Notice dated 06<sup>th</sup> May, 2018 to name the land of Maluti whether it was parcel number Okia/Nzuuni/94 or any other land suspected to be Okia/Nzuuni/90, that the court dismissed both the application and the main suit as bad in law and pre-mature on technical grounds, that if the bill is taxed and eventually the determination of the dispute is against the Respondents, it will be contrary to the spirit of the law and practice to execute costs and that if however the court is of the view that taxation do proceed, then the execution of the taxed costs be stayed until the outcome.

7. In his submissions, the Counsel for the Plaintiffs/Applicants submitted that the application is for stay of taxation of bill of costs pending the hearing of an appeal and or administration of the estate of the father of the Plaintiffs/Applicants herein. That by the time of filing the application, none of the foregoing transactions had taken place. The Counsel went on to submit that even though the bill of costs is framed to indicate that the substantive suit has been heard and determined, the Plaintiffs/Applicants contend that this was not so. As such, the Counsel was of the view that it is prudent for the taxation to await the hearing of the Applicant or for the Applicant to apply for letters of administration of the estate of their father.

8. I have read the application, the grounds of opposition as well as the submissions filed by the Counsel for the Plaintiffs/Applicants and in my view, no sufficient reasons have been proffered on why there should be stay of taxation of bill of costs filed by the Defendants/Respondents. The gist of the application is that they seek stay of taxation of bill of costs dated 09<sup>th</sup> July, 2019 pending the determination of the boundary dispute involving parcel number 94. The Plaintiffs/Applicants appear to contest the way the Dispute summons dated 06<sup>th</sup> May, 2018 from the Land Registrar are framed in that they have not indicated the plot number of the 1<sup>st</sup> Plaintiff/Applicant. That in itself cannot be ground for staying of the taxation of the bill of costs filed by the Defendants/Respondents taking into consideration that the Plaintiff's/Applicant's suit was dismissed on 12<sup>th</sup> February, 2018. The ambiguity in the notice by the Land Registrar ought to be raised before the said Registrar. The 1<sup>st</sup> Defendant/Respondent was awarded costs which he is entitled to have taxed. On whether or not the taxed costs can be stayed pending the final determination of the boundary dispute, that question can be addressed by the Taxing Master.

9. The upshot of the foregoing is that the application lacks merit and same is dismissed with costs to the 1<sup>st</sup> Defendant/Respondent.

Signed, dated and delivered at Makueni via email this 22<sup>nd</sup> day of May, 2020.

**MBOGO C.G.,**

**JUDGE.**

**Court**

**Assistant:**

Mr.

G.

Kwemboi