



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO.115 OF 2003

FRANCIS MASUNI KYANGANGUAPPELLANT/RESPONDENT

VERSUS

BARNES MWEMARESPONDENT/APPLICANT

RULING OF THE COURT

1. By a Notice of Motion dated 28/08/2015 and filed on 31/08/2015 the Respondent/Applicant seeks the following prayers:-

(1) THAT pending the hearing and determination of the intended Appeal, there be stay of execution in respect of taxed costs awarded to the Appellant through the Ruling delivered on 26/01/2015.

(2) THAT this Honourable Court be pleased to stay the execution of the certificate of costs obtained in the taxation by the Appellant pending the intended Appeal.

2. The Application is supported by the annexed affidavit of the Respondent/Applicant and the following grounds namely:-

(a) That the Bill of Costs dated 15/01/2014 was taxed at Kshs.66,815.00 pursuant to the taxing master's Ruling delivered on 26/01/2015.

(b) The Applicant had filed a Notice of Appeal to the Court of Appeal on 9/03/2012 against this Court's judgment dated 27/02/2012.

(c) The Applicant is waiting for the certified copies of the proceedings in order to file an appeal against the Judgment delivered on the 27/02/2012.

(d) That if the Applicant is made to pay for the awarded costs and succeeds in the Appeal he will be gravely prejudiced as he will suffer loss.

(e) The Applicant received certified proceedings but which had errors and which had to be returned to court for correction.

(f) The corrected certified proceedings have not yet been furnished to enable Applicant file the

Appeal.

(g) It is in the interest of justice that the Application is allowed to protect the Applicant until the outcome of the Appeal.

3. The Application is opposed by the Appellant/Respondent whose counsel filed the following grounds of Opposition:-

(a) Costs the subject of these proceedings have been taxed and that the Applicant has brought the instant Application eight (8) months thereafter.

(b) Payment of costs is merely one part of the of the Judgment of the Court and it makes no sense to stay one part and leave out the other part covering the main decision of the court.

(c) The Applicant has not demonstrated what loss he is likely to suffer unless stay is granted and it is not enough to merely allege that he would suffer great loss.

(d) The Respondent is entitled to enjoy the fruits of his successful litigation which right should only be restricted or postponed where there is sufficient cause.

(e) The Applicant has not offered any security for the due performance of the decree in the likely event that his appeal will be disallowed.

(f) The Applicant does not demonstrate that he would be totally ruined in the Appeal if he pays the taxed costs and that he would be reduced to a mere explorer in the judicial process if he does what the decree demands him to do.

4. Parties filed submissions which I have carefully considered. The only issue for consideration is whether this court should stay execution of the taxed costs herein pending the intended Appeal.

5. Order 42 Rule 6 (2) of the Civil Procedure Rules grants this court power to order stay of execution if sufficient cause is shown. It is at the discretion of the court. The above provision lays down the conditions to be fulfilled for the stay orders to be given. These conditions have been enunciated in several court decisions in several court decisions one of which is the case of **AGGREY MAULA MALUINGU =VS= SANYA MWAKAVI [2015] eKLR** where the court noted as follows:-

“For a stay of execution to be granted an Applicant must satisfy three (3) conditions stated in rule 6(2) to the effect that:-

(a) The Application for stay must be made without unreasonable delay from the date of the decree or order to be stayed.

(b) The Applicant must show that he will suffer substantial loss if the orders of stay are not granted.

(c) The Applicant offers security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.”

The court went further to state that:

“The essence of an Application for stay pending appeal is to preserve

The matter of litigation to avoid a situation where a successful Appellant only gets a paper judgment.”

6. With regard to the first condition, it is noted that the Ruling on the taxed costs was delivered on the

26/1/2015 and the present Application filed on 31/08/2015 which is roughly about eight (8) months. The Applicant's Counsel has submitted that the delay was due to them waiting for the Applicant to issue instructions to file the Application. It must be noted that the person aggrieved by the taxation is none other than the Applicant himself and if that was so then he was expected to have made a move to seek for stay of execution early enough. It is also noted that the taxation was carried out in the presence of the parties' representatives and so far there is no indication that the Applicant has either appealed against the same or even lodged a reference. It seems the Applicant's main concern is the judgment delivered on 27/02/2012 in which he has filed a Notice of Appeal. I find the reasons advanced for late filing of Application herein not convincing and hence I find the Application has been filed with unreasonable delay. The Applicant therefore has not fulfilled the first ground for grant of stay of execution.

7. With regard to the second condition for grant of stay namely that the Applicant will suffer substantial loss if an order of stay is not granted, the Applicant has stated that he has already made his intention known that he intends to appeal against the judgment delivered on the 27/02/2012. He has already lodged a notice of appeal to the court of appeal against the whole judgment. He is yet to be supplied with the certified copies of proceedings so that he commences the appeal process. The Applicant maintains that if the Respondent executes the costs, he stands to suffer substantial loss. Applicant's Counsel has relied on the case of **DANIEL CHEBUTUK ROTICH & 3 OTHERS =VS= EMIRATES AIRLINES - NKU HCC NO. 368 of 2001** where Justice Musinga (as he then was) stated thus:-

“Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequence which an applicant is likely to suffer if stay of execution is not granted and that the Applicant is therefore forced to pay the decretal sum”

Applicant's counsel further relied on the authority in **ANTOINE NDIAYE =VS= VIRTUAL UNIVERSITY [2015] eKLR** where Gikonyo J held:

“Applicant must show that he will totally be ruined in relation to the appeal if he pays over the decretal sum to the Respondent”

8. On the other hand, counsel for the Respondent submitted that a mere financial burden does not constitute substantial loss for purposes of grant of an order of stay of execution. He relied on the case of MACHIRA T/A MACHIRA & CO. ADVOCATE =VS= EAST AFRICA STANDARD [2002] KLR 63 where the court held thus:-

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss would result. He must prove specific details and particulars where no pecuniary or tangible loss is shown to the satisfaction of the court, the court would not grant stay.”

Counsel for the Respondent further submitted that the Application should be dismissed as there is no evidence shown of substantial loss being visited upon the Applicant if stay is not granted. He finally submitted that in the alternative of a dismissal then this court should order that the taxed costs be deposited in an interest earning account.

9. Looking at the circumstances of the Applicant, I note that he is not so much concerned with the decree emanating from the judgment delivered on 27/02/2012 but only on the taxed costs. As observed above, the taxation of the Bill of Costs was conducted in the presence of both Applicant's and Respondent's Counsels and in the absence of an intention to Appeal or file a reference thereto, then it follows that the said taxed costs were lawful in their very nature. It is indeed trite that there cannot be stay of taxed costs. My view is fortified in the decision of the Court of appeal in the case of **FRANCIS KABAA =VS= NANCY WAMBUI AND JANE WANJIRU – NAIROBI CIVIL APPLICATION NUMBER 298 OF 1996** which held thus:-

“In any case even if that were so, the Appellant if he succeeds in his appeal would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs.”

Hence it is clear that the Applicant has not fulfilled the second condition for grant of stay of execution.

10. As regards the third condition, I note the Applicant has not indicated in the body of his Application or even Affidavit in support that he is ready to furnish security for costs in the event the same may become binding upon him to meet. In the absence of such an undertaking, it follows that the Applicant has not fulfilled the third condition for grant of stay of execution as required under Order 42 Rule 6(2) of the Civil Procedure Rules.

11. In view of the foregoing observations it is clear that the Applicant has not met the requisite threshold so as to merit a grant of an order of stay of execution of the taxed costs and which warrants an order of dismissal of his application. However, in view of the fact that Respondent's counsel has extended an olive branch vide his submissions when he proposed an alternative order for deposit of the taxed costs in an interest earning account and also in view of the fact that orders of stay of execution are discretionally remedies by the courts, I am inclined to allow the Applicant's Application on certain conditions. The Applicant is hereby granted stay of execution of the taxed costs of Kshs. 66,815/= on condition that the said sums are deposited into an interest earning account in the joint names of both Advocates herein within the next thirty (30) days from the date hereof. The costs of the Application shall abide in the Appeal.

It is so ordered.

Dated, signed and delivered at Machakos this 9TH day of MAY 2017.

D. K. KEMEI

JUDGE

In the presence of:

Kyalo for Ndolo for Respondent.....

C/A: Kituva