



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE NO. 11 OF 2017**

**MWANGI STEPHEN MURIITHI..... PLAINTIFF**

**VERSUS**

**HON. DANIEL T. ARAP MOI, EGH.....1ST DEFENDANT**

**RAYMARK LIMITED.....2ND DEFENDANT**

**RULING**

1.The first defendant herein was the second and longest serving President of Kenya from 1978 to 2002. I have taken judicial notice that he passed away on 4th February 2020, while this ruling was pending. I have considered whether or not to proceed with delivery of the ruling. Ultimately, I have decided to deliver the ruling since the death occurred after final determination of the suit and in any case the other two parties in the suit remain. Further, the issues raised in the application before the court relate to execution of the final judgment herein as regards costs of the suit. I have also taken into account that in view of the provisions of Order 24 rule 10 of the Civil Procedure Rules, substitution and abatement do not arise in proceedings in execution of a decree or order.

2. By Notice of Motion dated 14th October 2019, the plaintiff seeks stay of further proceedings in this matter including taxation of party and party bills of costs pending hearing and determination of an appeal to the Court of Appeal. He further prays that the costs of the application do abide the outcome of the appeal.

3.The application is supported by an affidavit sworn by the plaintiff. He deposed that he has filed an appeal in the Court of Appeal being Nakuru Civil Appeal No. 20 of 2018 against the order and ruling of this court dated 21st September 2017 through which this court struck out this suit for being res judicata. He added that the second defendant has filed a bill of costs and that it would be a waste of judicial time if taxation were to proceed only for the order of striking out to be set aside by the Court of Appeal.

4.The defendants opposed the application through grounds of opposition in which they took the position that this court lacks jurisdiction to interfere with taxation before the taxing master, that the application has been brought after unreasonable delay and that the applicant has failed to demonstrate that he will suffer substantial loss if the orders sought are not granted.

5.The application was canvassed through written submissions. For the applicant, it is argued that he will suffer an unjust and oppressive outcome if he taxation proceeds and he is forced to pay the taxed sum while on the other hand the defendants will only be subjected to a delay pending determination of the appeal and that the delay can be compensated by an award of costs. Regarding the issue of delay, it is argued that the applicant has diligently pursued typing of proceedings and has filed the record of appeal timeously. Citing the case of KTK Advocates v CPF Financial Services Limited [2018] eKLR, it is argued that the court has jurisdiction to grant stay of taxation.

6. For the first defendant, it is argued that taxations are exclusively governed by the Advocates Act and not the Civil Procedure Act and therefore they remain the province of the taxing master until they arrive in this court as references as provided under paragraph 11 of the Advocates Remuneration Order. Citing the cases of Kenya Pipeline Company Limited v Nyamongo & Nyamongo Advocates [2006] eKLR and M G Sharma v Uhuru Highway Development Limited [2001] eKLR, it is argued that this court lacks jurisdiction to grant the orders sought herein. It is further argued that the applicant is guilty of a delay of over two years and that in any case the proceedings sought to be stay are no longer before this court but before the taxing master. Finally, it is argued that the applicant has not demonstrated that he will suffer substantial loss if stay is not granted.

7. As regards, the second defendant it is equally argued that this court lacks jurisdiction to grant the orders sought and the case of Lubullellah & Associates Advocates v Nasser Ahmed t/a Airtime Business Solutions [2010] eKLR is relied on in that regard. It is further argued that the applicant has not met the requirements for granting stay of execution under Order 42 Rule 6 (2) of the Civil Procedure Rules and that there has been an inordinate delay.

8. I have considered the application, the grounds of opposition and the submissions. The first issue that I must deal with is whether I have jurisdiction. It has to be remembered that the present application was triggered by bills of costs filed by the defendants following the ruling of this court dated 21st September 2017 through which I court struck out this suit with costs to the defendants for being res judicata. Thus, the bills of costs referred to are filed in this same file and are party and party bills of costs as opposed to advocate client bills of costs which are usually filed as miscellaneous causes. In other words, the taxing officer in this matter will be taxing pursuant to an order for costs made in this very case. The cases referred to by the defendants relate to advocate client bills of costs, a totally different scenario from that obtaining herein. I am therefore persuaded that I have jurisdiction to consider the application.

9. The applicant seeks stay of further proceedings in this matter including taxation of party and party bills of costs pending hearing and determination of an appeal to the Court of Appeal against the ruling of this court dated 21st September 2017. The application is brought

under the general provisions of Sections 1A, 1B and 3A of the Civil Procedure Act. The applicant contends that that he will suffer an unjust and oppressive outcome if he taxation proceeds and he is forced to pay the taxed sum. I take him to mean that he will suffer substantial loss. I however do not see the supposed substantial loss since the costs are yet to be taxed and the quantum thereof is unknown. There is no suggestion that the defendants would not refund it if the appeal succeeds. Further, the present application is filed over two years after the order appealed from was made. The argument that the applicant was pursuing typed proceedings doesn't hold any water since no typed proceedings would have been necessary to bring the application before this court. The delay is so inordinate as to disentitle the applicant to the orders sought.

10. For the foregoing reasons, I find no merit in Notice of Motion dated 14th October 2019. I dismiss it with costs to the defendants.

11. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

**Dated, signed and delivered at Nakuru this 4th day of June 2020.**

**D. O. OHUNGO**

**JUDGE**