



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

MISC.APP.NO. 18 OF 2017

MURI MWANIKI & WAMITI ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

WINGS ENGINEERING SERVICES LIMITED.....RESPONDENT/CLIENT

RULING

The matter for determination is the **Notice of Motion Application** dated **27th September 2019**, by the Applicant herein seeking for orders that;

- 1. That there be stay of execution of the ruling and order of this Court made on 26th April 2019 pending the hearing and determination of the intended Appeal against the said ruling and order.***
- 2. That there be stay of Party and Party taxation proceedings herein pending the hearing and determination of the intended appeal against the ruling and order herein made on 26th April 2019.***
- 3. Costs of this Application be in the cause.***

The Application is premised on the grounds that by a Ruling made by this Court and delivered on **26th April 2019**, the Respondent's Preliminary Objection dated **20th April 2017**, was upheld dismissing the Applicant's bill of costs and awarding costs to the Respondents. That on **9th May 2019**, the Applicant being dissatisfied and aggrieved by the said Ruling lodged a **Notice of Appeal** dated **8th May 2019**. Further that the Respondent has filed a Party and Party Bill of Costs dated **19th June 2019**, which is slated for taxation on **1st October 2019**. That the Applicant is apprehensive that unless there is stay of proceedings, and **Stay of Execution** of the ruling, the Intended Appeal will be rendered **nugatory** and the Applicant will suffer substantial loss. That the Applicant has a good arguable Appeal with high chances of success.

In his Supporting Affidavit **Martin G Mwaniki** averred that on **10th March 2017**, the Applicant filed an Application seeking taxation of Bill of costs dated **9th March 2017**, against the Respondent. That in response, the Respondent filed **Notice of Preliminary Objection** challenging the existence of an **Advocate/Client Relationship**, and the said Notice of Preliminary was upheld and the Applicant's **bill of costs** was dismissed with costs to the Respondent.

That the Applicant being dissatisfied with the said Ruling has lodged a Notice of Appeal dated **8th May 2019**. Further that the Respondent filed **Party to Party Bill of Costs** dated **19th June 2019**, which was slated for taxation on **1st October 2019**. That unless there is a **stay of taxation** proceedings and **stay of execution** of the ruling, the intended Appeal will be rendered nugatory and the Applicant will suffer substantial loss. That the Applicant has an arguable Appeal principally on the grounds that the Ruling is based on error of fact and law in framing of the issue for determination and applying a restrictive meaning of client contrary to the definition of client under **Section 2** of the **Advocates Act**. It is in the interest of Justice the stay of execution should be granted.

The Application is opposed and the Respondent through **Charles Ng'ang'a** its Managing Director swore a Replying Affidavit on **23rd November 2019**, and averred that the Application is an abuse of the Court process. He averred that the Application is overly late being brought 5 months after the date of the Ruling. That the Ruling sought to be stayed is a decision that dismissed a **Miscellaneous Suit** for lack of Advocate/ Client Relationship. That the said decision is a negative order that is not capable of being stayed and there is therefore no positive and enforceable order by the Court which can be subject of the Application

Further that the Ruling or decision of taxation sought to be challenged by the Applicant is **reasonable fair** and **justified** and no plausible reason has been given or demonstrated by the Applicant to justify need to fault the decision of the taxing officer. He further averred that

there are no other proceedings which can take place before the Court, save for execution and if the Court was to grant an order for stay of execution, it would be superfluous to also issue an order of stay of proceedings as there are no other proceedings to be stayed. That the Applicant has failed to show any arguability of the Appeal and has also failed to demonstrate how if the Application is not granted, then the success of the Intended Appeal would not be rendered nugatory.

It was his contention that stay of proceedings is a grave judicial action that interferes with the right of a litigant to conduct its litigation and therefore the test is high. Further that nothing is irreversible including payment of any costs as the same are repayable by refund. That no allegation has been made to the effect that the Respondent will be incapable of making such refund in the event the appeal is successful. Further that the Application is **pre mature** as no **bill of costs** has been determined. He further averred that the Applicant has not demonstrated the hardship or loss that it would suffer if it were to be forced to settle the costs.

That a Respondent cannot be barred from taxing its bill of costs arising from a dismissed suit as costs follow the event. The Respondent is being gravely prejudiced by the Applicant. That there is need for the Court to balance the rights of both parties and exercise its discretion in dispensing justice. The Court was urged to dismiss the Application.

The Application was canvassed by way of written submissions which the Court has considered. The issue for determination is **whether the Applicant is entitled to the orders sought**.

The Applicant has sought for the **stay of execution** pending the hearing and determination of the Intended Appeal. The Applicant has also sought for stay of the taxation proceedings pending the hearing and determination of the said intended Appeal. It is the Applicant's contention that unless the stay is granted, it will suffer irreparable loss. The Court notes that in its Ruling dated **26th April 2019**, it upheld the Preliminary Objection by the Respondent and dismissed the **Bill of costs** with costs to the Respondent. That the Respondent filed its **Bill of Costs** on **4th July 2019**, in furtherance to the Ruling to recover its costs. It is this taxation of the Costs of the Ruling that the Applicant is seeking to halt pending the hearing and determination of the Intended Appeal.

Though the Applicant has sought for **Stay of Execution** and **Stay of Proceedings**, It is the Court's considered view that the TWO are essentially the same as any order given will have the net effect of stopping the taxation proceedings.

Order 42 Rule 6(2) of the Civil Procedure Act sets out the principles that the court should consider while deciding whether to grant **Stay of Execution Pending Appeal**. These are:-

“No order for stay of execution shall be made under subrule (1) unless—

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

Further in the case of **Christopher Ndolo Mutuku & Another ...Vs... CFC Stanbic Bank Ltd (2015) eKLR**, the Court observed that;

“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

In the case of **Kenya Women Microfinance Ltd ...Vs...Martha Wangari Kamau [2020] eKLR** the Court cited the case of **Samvir Trustee Limited ...Vs... Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where the Court held that;

*“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the **Court of Appeal** and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”*

From the above decision, it is clear that for the Court to grant stay of execution of the Ruling, the Applicant needs to satisfy the Court that it will suffer substantial loss. In the case of Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 the court stated

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

Further in the case of RWW ...Vs.... EKW [2019] eKLR, the Court held that;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

With the above in mind, the Court must then determine whether the Applicant has established that it will suffer substantial loss and or has presented special circumstances that will warrant the Court to exercise its discretion and grant stay of Execution.

The Applicant is seeking to stay the taxation of the bill of costs dated **15th June 2019**. As per the said **Bill of costs**, the **prima facie** amount sought by the Respondent, is **Kshs.69,860/=**. Therefore the amount is a **money decree** and hence quantifiable. From the Applicant's Supporting Affidavit and its submissions, it has stated that it will suffer substantial loss and that the intended Appeal will be rendered nugatory. However, the Applicant has not indicated to the Court what the substantial loss it will suffer and what it entails.

The Applicant has not at any one time stated that the Respondent will be unable to repay the said amount if the Appeal succeeds. Therefore the Court finds and holds that the Applicant has not demonstrated what loss it will suffer given that the Applicant has not even offered security for costs.

In exercising its discretion on whether to allow a stay of execution pending appeal, the Court while seeking to ensure that the Intended Appeal will not be rendered nugatory should not do so at the prejudice of a successful party. The Court ought to balance the rights of the two. In this instant case the Court is not satisfied that any special circumstances has been presented to warrant it exercise its discretion in favor of the Applicant. This is more so as any loss occasioned to the Applicants if the appeal is successful, can be compensated by an award of costs. The Court has also considered the amount of money involved.

Further it is not in doubt that an application seeking stay should be brought without inordinate delay. The Applicant was served with the **Bill of costs** by the Respondent as per their annexures on **5th July 2019** and were informed that the matter was scheduled for taxation on **1st October 2019**. The instant Application was filed under Certificate of Urgency on **27th September 2019**, **four (4)** days before the taxation date. It is the Court's considered view that there was inordinate delay in filing the instant Application.

Having carefully considered the instant Application and the written submissions, the Court finds and holds that the Applicant has **not** met the threshold to warrant the Court exercise its discretion in its favour. Consequently the Court finds and holds that the **Notice of Motion Application** dated **27TH September 2019** is **not** merited and the same is dismissed entirely with costs to the Respondent.

It is so ordered

Dated, signed and Delivered at Thika this 10th day of December, 2020.

L. GACHERU

JUDGE

10/12/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by

His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Erick Mose for the Applicant

Mr. Jesse Kariuki for the Respondent

L. GACHERU

JUDGE

10/12/2020