



REPUBLIC OF KENYA

IN THE ENVORNMENT AND LAND COURT OF KENYA A KISUMU

ELC PETITION NUMBER 29 OF 2017

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 35, 40

47, 50, 159, 258, 259, & 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 7, 9, 10, 14, 25 AND 26 THE

LAND REGISTRATION ACT NO.3 OF 2012

AND

IN THE MATTER OF THE LAND ACT NO.6 OF 2012

AND

IN THE MATTER OF SECTIONS 3, 4, 5 AND 8 OF THE ACCESS

TO INFORMATION ACT NO.31 OF 2016

AND

IN THE MATTER OF SECTION 2, 3, 4, 5, 6, 7, 8, 9, AND 11

OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO.4 OF 2015

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL
RIGHTS UNDER THE CONSTITUTION OF KENYA ARTICLES 10, 19, 20,**

21, 22, 23, 35, 40, 47 AND 50

BETWEEN

THOMAS KHAMALA BIFWOLI.....PETITIONER

VERSUS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

RULING

1. Thomas Khamala Bifwoli, the Petitioner, filed the notice of motion dated 6th June 2018 seeking for an order of stay of proceedings and or execution pending the hearing and determination of the appeal preferred by the Petitioner and costs. The application is based on the five grounds on its face summarized as follows;

- a) That the Petitioner has an arguable and meritorious appeal and it would be rendered nugatory if the stay order is not granted.
- b) That owing to the substantial amount of money involved, and the grounds on the Draft of Memorandum of Appeal, the balance of convenience weighs in favour of issuing the stay order as sought.
- c) That the application should be granted in the interest of justice and fairness.

2. The application is supported by the affidavits of Thomas Khamala Bifwoli, sworn on the 6th June 2018 and 19th July 2018, among others deponing as follows;

- That after the court delivered its judgment on the 2nd May 2018 in favour of the Respondents, the Petitioner filed the Notice of Appeal on the 16th May 2018 and served the Respondents.
- That the 3rd Respondent has filed a bill of costs and the Notice of Taxation shows it is fixed for hearing on the 13th June 2018.
- That the Draft Memorandum of Appeal has shown the serious matters of law and fact that would be canvassed before the Court of Appeal and there is need to stay further proceedings and or taxation pending the hearing and determination of the appeal.
- That unless the stay is granted the Petitioner stands to suffer substantial loss and the appeal rendered nugatory.
- That the application has been filed expeditiously and without undue delay.
- That the Petitioner is willing to furnish reasonable security.
- That he believes the order condemning him to pay costs was aimed to threaten, coerce and intimidate him from raising serious Constitutional issues that unravels fraud and corruption in Kisumu ELC 144 of 2012 and this petition.
- That there is a serious collusion between private individuals and state officers to misrepresent forged and fraudulent documents as genuine and use them to defraud the Government of Kenya and the Petitioner of millions of shillings.
- That it is settled law that *“where the state is shown to have failed to fulfill its Constitutional and statutory obligations, and where different private parties are affected, the state should bear the costs of the litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved.”*
- That the award of costs against the Petitioner is contrary to Rule 26 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice.
- That the Judgment did not specify that the Petitioner was to pay the costs and if such an order was made, no reasons were given and it is out rightly unconstitutional and unlawful
- That it is shocking, outrageous and extremely disturbing that the court awarded costs to the 3rd Respondent without first asking him to explain the obvious and patent lack of authenticity of his certificate of lease and supporting documentation which the court should know from the 23rd March 2017 to date are not signed, stamped, authenticated and no stamp duty has been paid.
- That the 3rd Respondent’s position as discerned in the Grounds of Opposition is irrelevant and inapplicable to the proceedings before the court and the authorities cited were of before the Constitution of Kenya 2010, and should be disregarded.
- That the application was filed before this court because certified copies of the proceeding and Judgment applied for through their letter dated the 7th May 2018, and received by the Court on the 16th May 2018, are yet to be provided. That had the certified proceedings and Judgment had been provided the Petitioner would have moved the higher Court (Court of Appeal) for the desired order without delay.

3. The application is opposed by William Ndinya Omollo, the 3rd Respondent through their grounds of opposition dated the 22nd June 2018,

summarized as follow;

- That the application is grossly incompetent as it seeks to stay a negative order in the form of the dismissal of the petition which is incapable of being executed or stayed.
- That the application is frivolous and vexatious and made in bad faith to frustrate the taxation of the 3rd Respondent's bill of costs.
- That the application was filed on 12th June 2018, which is almost 1½ months after the Judgment, and that by then the Petitioner had been served with the 3rd Respondent bill of costs on the 18th May 2018. That the application was therefore not made without undue delay.
- That **"Rule 32" of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013**, requires stay of execution or proceeding applications to be made either informally, upon delivery of the Judgment or through a formal application filed in 14 days or such other time the court directs. That the application is therefore incompetent as it was filed outside the time.
- That the only proceedings pending in this petition is the taxation of the bill of costs and this court has no jurisdiction to stay it merely because the Petitioner desires to appeal.
- That the Petitioner has not disclosed details or the nature of substantial loss he is likely to suffer if stay order is not granted.
- That further, the Petitioner has not given any security for the due performance of the decree as required by the law, or offered to deposit the costs once taxed, in an interest earning account as a sign of good faith.
- That the Petitioner has not demonstrated that he has an arguable appeal or that his appeal would be rendered nugatory if the stay order is not granted.
- That the taxation of the 3rd Respondent's bill of costs would not render the Petitioner's appeal nugatory or worthless.
- That the Petitioner has not shown that the costs, if taxed and paid, would not be recoverable in the event his appeal succeeds.

4. That on the 13th June 2018, prayer 2 of the motion, which is for stay pending the hearing of the application was granted *ex parte* by ELC Busia. The Court further directed that the Respondents be served with the application for interpartes hearing on the 27th June 2018. That the interim stay order was extended by consent on the 27th June 2018 to the 26th July 2018, and again to the 15th October 2018 by the Deputy Registrar. That when Counsel for the parties appeared before the Court on the 15th October 2018, Counsel for the Petitioner informed the court that they would rely on the already filed and exchanged written submissions, dated 20th July 2018. The Counsel for the 3rd Respondent informed the court that they would rely on the Grounds of Opposition and authorities filed. The Counsel for the Petitioner then adopted their written submissions and indicated he had nothing to add. The court then set the ruling for the 6th February 2019. That however, the court was not able to prepare its ruling in time and deliver on that date because the Judicial Service Commission called for the record, and it was only returned to the Judge's Chambers on the 5th February 2019. That for that reason the ruling was rescheduled to today.

5. The following are the issues for the Court's determination;

- a) **Whether the Petitioner has established a reasonable case for stay of proceedings and or taxation to issue.**
- b) **Who pays the costs of this application.**

6. The Court has after considering the grounds on the application, affidavit evidence by the Petitioner, the grounds of opposition, submissions by Counsel for the Petitioner and the record come to the following determinations;

- a) That the application dated the 6th June 2018, brought under Certificate of Urgency dated the 8th June 2018, and both filed on the 12th June 2018, seeks to stay the ***"proceedings and or taxation"*** that may or have already been commenced after the Judgment of the Court delivered on the 2nd May 2018, in which the petition filed by the Petitioner was "dismissed with costs to the 3rd Respondent." That though the Petitioner has through their submissions, supporting and supplementary affidavits sworn on the 6th June 2018 and 19th July 2018 raised many issues, the court will only pronounce itself on those matters that are relevant to the determination of whether or not the order of stay sought should issue. That the court's view is that the other issues raised are matters to be canvassed before, and decided by the Court of Appeal during the hearing of the appeal on this court's Judgment. That the application before this court is not one to review the court's Judgment, and obviously this court is without Jurisdiction to seat on an appeal against its decision.
- b) That the net effect of the Court's Judgment of 2nd May 2018 was to dismiss the Petitioner's petition with costs to the 3rd Respondent. That the 3rd Respondent then filed their bill of costs dated the 18th May 2018 on that same day. The notice of taxation dated the 18th May 2018 for the taxation of the bill of costs to take place on the 13th June 2018 was issued and served, with other

documents, on Counsel for the Petitioner as confirmed in the affidavit of service sworn by Moses J. A. Orenge Advocate on the 21st May 2018.

c) That the filing of the Bill of costs and its taxation scheduling was the next expected process after the petition was dismissed and the costs awarded to the 3rd Respondent. That by the time the application dated the 6th June, 2018 was filed on the 12th June 2018, about forty (40) days had lapsed from the date the Judgment was delivered, that is 2nd May 2018. There has been no explanation tendered to explain why the application was not filed earlier as the petitioner did not require to obtain the certified copies of Judgment and proceedings first. That the copy of the Judgment which is attached to the application and marked "TKB" under paragraph 5 of the supporting affidavit was sufficient.

d) That while the delay in filing the application as detailed in (c) above may not be said to be unreasonable or inordinate, the position taken by the 3rd Respondent that the application was only filed to frustrate the taxation of their bill of costs do not appear far fetched. That this is because by the time the application was filed, the 3rd Respondent' bill of costs and notice of taxation had been served upon the Petitioner's Counsel. That further, the application was filed the day before the date set for taxation. That the taxation did not take place probably because the file had been taken to ELC Busia where ex parte interim order of stay was issued on the 13th June 2018, which was the date set for taxation.

e) That as the only logical proceedings expected in this file after the Judgment of 2nd May 2018 is the taxation of the bill of costs, the Court finds that the Petitioner has not shown how that proceeding, if taken would render his appeal to the Court of Appeal nugatory, or expose him to substantial loss. That there is nothing to suggest that the 3rd Respondent is a person of straw who cannot make a refund of the costs in the event it will have been taxed and paid, and the Petitioner becomes successful in the appeal.

f) That Superior Courts have time and again held that where the Judgment and or ruling contains negative orders, there would be nothing to stay. That the Counsel for 3rd Respondent has referred to several decisions of the Superior Courts, including those of the Court of Appeal, that take the position that stay of execution orders in respect of costs would not issue pending appeal. That the Petitioner has pointed out that those decisions should be disregarded as they were of pre-2010 Constitution of Kenya. The Petitioner has however not availed any case law or provision of the law to support that position. That the decisions of the Court of Appeal in **Francis Kabua vs Nancy Wambui & Another [1966] eKLR**, **Chanase Investment Limited vs Registered Trustee of Kenya Episcopal Conference (1999) eKLR** and **Sonalux Limited & Another vs Barclays Bank of Kenya Limited & 2 Others [2008] eKLR** are binding upon this Court. That as the only positive order that arises out of the Judgment of 2nd May 2018, is costs in favour of 3rd Respondent, the Court finds no reasonable case has been made by the Petitioner upon which stay of taxation and or proceedings order pending appeal can issue.

7. That accordingly, the Petitioner's application dated 6th June 2018 and filed on the 12th June 2018, is without merit, and is dismissed with costs to the 3rd Respondent.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 8TH DAY OF APRIL 2019

In the presence of:

Petitioner Absent

Respondent1 Absent

Counsel Mr. Ngumbao for Simba for Petitioner

M/s Aliongo for 1st & 2nd Respondents

Mr. Orenge for 3rd Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE