



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 196 OF 2018

ROBERT MULI MATOLO.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

PETER NZESYA MAITHYA *alias* KIMEU MAITHYA....2ND DEFENDANT

ROBERT MUTHIANI VUTHI.....3RD DEFENDANT

RULING

1. In an undated Application filed on 26th September, 2018, the Plaintiff is seeking for the following orders:

- a. That there be a stay of execution of the Judgment and/or Decree in this suits pending the hearing and determination of the intended Appeal.*
- b. That in the alternative, the Certificate of Costs be set aside and the Bill of Costs be heard and determined de novo.*
- c. That the costs of this Application be provided for.*

2. In his Affidavit, the Plaintiff deponed that on 29th November, 2017, this court dismissed the suit with costs to the 2nd and 3rd Defendants; that he has lodged a Notice of Appeal in respect to the said Ruling; that he was never granted an opportunity to defend the Bill of Costs and that the Application should be allowed.

3. In the Grounds of Opposition, the 1st and 2nd Respondents averred that the Applicant's advocates did not attend court although they were served with a hearing notice in respect to the Bill of Costs; that the impugned Ruling was delivered on 29th November, 2017 and that the Applicant has not complied with the provisions of Order 42 Rules 6(1) and (2) of the Civil Procedure Rules.

4. The Plaintiff's advocate submitted that he has invested heavily in the proclaimed motor vehicle registration number KCQ 085E; that the Applicant is likely to suffer substantial loss if the order of stay is not granted and that the Applicant is willing to furnish security for costs.

5. Counsel submitted that the Applicant was never served with a draft Decree, the Bill of Costs or the Taxation notice; that he only became aware of the Bill of Costs when his motor vehicle was proclaimed on 19th September, 2018 and that there was no unreasonable delay in filing the Application.

6. Counsel submitted that the mistakes of an advocate should not be visited upon his client; that the Applicant's former law firm is no longer on record for the Plaintiff and that the Bill of Costs should be prosecuted *de novo*.

7. The Respondents' advocate submitted that the Applicant has not shown what substantial loss he will suffer; that there is nothing to show that the intended Appeal shall be rendered nugatory if the execution proceeds and that no security has been given by the Applicant.

8. The Respondents' counsel submitted that no Application for stay of execution was made after the Ruling of 29th November, 2017 within a reasonable time and that the prayer for setting aside the Certificate of Taxation cannot be granted because the Applicant's counsel was duly served.

9. The Application before me is seeking for two substantive prayers: stay of Judgment pending the hearing of the intended Appeal and in the alternative, the Certificate of Costs to be set aside and the Bill of Costs to be heard and determined *de novo*.

10. The Ruling that the Applicant is seeking to stay pending the hearing of the Appeal was made by Mbogo J. on 29th November, 2017. In the said Ruling, the court allowed the 1st and 2nd Defendants' Preliminary Objection and struck out this suit with costs to the second and third Defendants. Being dissatisfied with the said Ruling, the Plaintiff/Applicant filed the Notice of Appeal on 5th December, 2017.

11. The Ruling that the Applicant is seeking to stay its execution is a negative order. Indeed, the said Ruling is incapable of execution save for costs. As was held in the case of **Raymond M. Omboga vs. Austine Pyan Maranga, HCCA No. 15 of 2010**, save for costs, a negative order is incapable of execution or being stayed.

12. It could appear that the current Application is geared towards staying the execution of costs as assessed by the Taxing Officer. According to the Applicant, the execution of the assessed costs will occasion him substantive loss; that the Bill of Costs was never served on him and that the said Bill of Costs should be heard *de novo*.

13. Other than the Notice of Appeal that was filed in respect of the Ruling of Mbogo J, the Plaintiff/Applicant has not filed an Appeal or a reference in respect of the Ruling of the Taxing Master of 28th August, 2018. That being the case, it follows that the Application for stay of execution can only be in reference to the Ruling of Mbogo J, which Application was filed ten (10) months after the decision of the court. The period of ten (10) months to file an Application for stay of execution in my view is an inordinate delay. Having known that the Defendants will tax their costs after the delivery of the Ruling, the Plaintiff should have sought for a stay of execution of the yet to be taxed costs within a reasonable time.

14. The evidence before this court shows that the Plaintiff's former advocate was duly served with the Bill of Costs and the hearing notice. Indeed, the said former advocate has not disputed the fact that he was served with the Bill of Costs together with the Taxation Notice on 13th July, 2018. That being the case, I find that no good reason has been given to warrant the setting aside of the Certificate of Taxation that was issued by the Taxing Master.

15. Considering that I have found that there was an unreasonable delay in filing the Application for a stay of execution of the Ruling of Mbogo J, and in view of the evidence showing that the Plaintiff's advocate was duly served with the Taxation Notice and the Bill of Costs, I find and hold that the Application dated 26th September, 2018 is unmeritorious.

16. For those reasons, I dismiss the Application dated 26th September, 2018 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE