

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CASE NO. 576 OF 2016**

**SOPHINA KALONDU MBITI .....**

**PLAINTIFF**

**VERSUS**

**ARUN MAHENDRA ADALJA ..... 1<sup>ST</sup>**

**DEFENDANT**

**KIRAN HIRJI SHAH ..... 2<sup>ND</sup>**

**DEFENDANT**

**HIRJI LALJI SHAH ..... 3<sup>RD</sup>**

**DEFENDANT**

**RAJNI SHAH ..... 4<sup>TH</sup>**

**DEFENDANT**

**RAJESH ADALJA ..... INTERESTED**

**PARTY**

**RULING**

***ELC CASE NO. 576 OF 2016***

***Ruling***

1. What is before the Court for determination is the 1<sup>st</sup> Defendant's Notice of Motion application dated the 7<sup>th</sup> April 2025 where he seeks the following Orders:

**a) Spent.**

**b) Spent.**

**c) This Honourable court be pleased to grant an order of stay of proceedings with respect to the taxation of the Plaintiff's Bill of costs dated 28<sup>th</sup> October 2024, pending hearing and determination of Civil Appeal No. E006 OF 2024-Arun Mahendra Adalja v Sophinah Kalondu Mbiti, Kiran Hilji Shah, Hirji Lalji Shah and Rajni Shah.**

**d) The costs of and incidental to this application be provided for.**

2. The application is premised on grounds on its face and on the supporting affidavit of Victor Muthuri N'konge, Advocate in conduct of the matter on behalf of the 1<sup>st</sup> Defendant. He avers that after judgement was entered in the matter on 26<sup>th</sup> October 2023 in favour of the Plaintiff, the 1<sup>st</sup> Defendant filed

**Civil Appeal No. E006 OF 2024-Arun Mahendra Adaljah v Sophinah Kalondu Mbiti, Kiran Hirji Shah, Hirji Lalji Shah & Rajni Shah** seeking orders that this Court's judgement be set aside and replaced with an order dismissing the Plaintiff's suit and allowing the 1<sup>st</sup> Defendant's Counterclaim with costs.

3. Further, that on 21<sup>st</sup> February 2024, the 1<sup>st</sup> Defendant also filed **Civil Application No. Nai E100 of 2024** seeking stay of execution of the said judgement but the application was denied by the Court of Appeal. He states that despite the pending Appeal, the Plaintiff has filed a party and party Bill of Costs dated 28<sup>th</sup> October 2024 for taxation of costs arising out of the said judgement. He contends that the 1<sup>st</sup> Defendant's Appeal has reasonable prospects of succeeding and that the 1<sup>st</sup> Defendant is ready to abide by any condition for security of costs.

4. The application is opposed by the Plaintiff who filed a replying affidavit. She avers that the application is an abuse

of Court process as the affidavit in support is sworn by an Advocate who is not competent to depose contested matters on whether the 1<sup>st</sup> Defendant may suffer substantial loss and the issue of provision for security. Further, that the Advocates on record for the Plaintiff have also abused the Court process by filing several Notices of Change of Advocates in the same matter.

5. She asserts that the application is seeking to overturn the finding of the Court of Appeal delivered on 7<sup>th</sup> June 2024 in **Civil Appeal No. E006 of 2024**, dismissing the 1<sup>st</sup> Defendant's application for stay. Further, that taxation of a party to party Bill costs cannot be stayed. She reiterates that there is no evidence that the 1<sup>st</sup> Defendant shall suffer any substantial loss or prejudice if the Bill of Costs proceeds to taxation and that the application has not been filed timeously as the Bill of Costs was served on the 1<sup>st</sup> Defendant on 30<sup>th</sup> October 2024.

6. In rejoinder, the 1<sup>st</sup> Defendant filed a further affidavit where he avers that there is no factual allegation deposed to, by his advocates outside the grounds raised in his Memorandum of Appeal, which are issues that pertain to procedural steps taken in the matter. Further, that he is entitled to change legal representation.
7. He also contends that his application (**Civil Application No. NAI E100 of 2024**) dated 21<sup>th</sup> February 2024 before the Court of Appeal sought an order allowing the Court-appointed agents, Messrs Lloyd Masika to continue collecting rental income from the suit properties and to manage them pending determination of the Appeal. Further, that there was no prayer seeking stay of taxation proceedings, nor was there a Ruling by the Court of Appeal denying such a stay.
8. He insists that the if the orders sought are not granted, his Appeal will be rendered nugatory and he will suffer

substantial losses because the Plaintiff has filed an exaggerated Bill of Costs amounting to kshs.20,685,155/=, the payment of which would impose significant financial hardship on him as he has two young children, a wife, and a mother to maintain. Further, that the Plaintiff has sworn under oath that her expenses outstrip her income thus should she be successful in the Appeal, it would be rendered nugatory. He further avers that his family will suffer irreparable reputational and financial harm as well as public ridicule from society, family and friends.

9. He also asserts that the Plaintiff was initially employed by the deceased as a house help as she has no other known employment or source of income apart from the disputed rental income from the suit properties thus any taxed amount executed against him is unlikely to be recoverable.

10. He also claims that he only became aware of the Plaintiff's application on or about 16<sup>th</sup> January 2025, instructed new Counsel as soon as possible, and thereafter moved the Court,

by filing the present Application on 7<sup>th</sup> April 2025, before the Bill of Costs was set down for taxation on 23<sup>rd</sup> April 2025.

**11.** The application was canvassed by way of written submissions.

### **Submissions**

**12.** The 1<sup>st</sup> Defendant submits that an order of stay of proceedings is distinct from an order of stay of execution, thus the instant application is not res judicata, the one filed in the Court of Appeal as alleged. To this end, he relied on the case of **Laly Furnishing House Limited v Kenya National Highways Authority & 2 others [2025] KEELC 429 (KLR)**.

**13.** He also submits that a stay of execution decision does not bar him from moving this Court for an order of stay of proceedings in respect of the Bill of Costs. Further, that this Court has jurisdiction to issue a stay of taxation of a Bill of Costs. To this end, he relied on the case of **Patrick Wafula**

**Kuloba v Director/Chief Executive Officer, Kenya Industrial Research & Development Institute [2021] eKLR.**

- 14.** It is also the 1<sup>st</sup> Defendant's submission that he has met the principles applicable to the grant of an order for stay of execution under Order 42 Rule 6(2)(a) of the Civil Procedure as reiterated in **Ouandji v Bank of India & 2 others [2022] KEHC 112 (KLR)** and **Ewaso Ngiro North Development Authority v Apa Insurance Limited (Civil Appeal 58 of 2018) [2024] KEHC 3779 (KLR) (4 April 2024) (Ruling)**.
- 15.** He reiterates that his Advocates on record, only deposed on procedural issues arising in the context of taxation proceedings, which issues an Advocate is permitted to depone as stated in the decisions of **Cartridge and Print Services (K) Limited v Techno Service Limited (Civil Appeal E037 of 2021) [2021] KEHC 295 (KLR)** and

**Regina Waithira Mwangi Gitau vs Boniface Nthenge  
[2015] eKLR.**

16. On her part, the Plaintiff submits that the application is res judicata owing to the Court of Appeal's Ruling dated 7<sup>th</sup> June 2024 in **Civil Application No. Nai E100 OF 2024**, which sought an order of stay of execution of the judgement issued herein. Further, that the application is an abuse of Court process and lacks merit.

17. To buttress her averments, the Plaintiff relied on the following decisions: **Kanonerio River Farm Ltd & 3 others v National Bank of Kenya Ltd, Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR, Satya Bhama Gadhi v Director of Public Prosecutions & 3 others [2018] eKLR.**

**Analysis and Determination**

- 18.** I have considered the instant Notice of Motion application including the respective affidavits and rivaling submissions and the only issue for determination is whether the taxation of the Plaintiff's Bill of Costs dated the 28<sup>th</sup> October, 2024 should be stayed pending the outcome of Civil Appeal No. E006 of 2024.
- 19.** The 1<sup>st</sup> Defendant has sought for stay of taxation of the Plaintiff's Bill of Costs dated the 28<sup>th</sup> October, 2024 pending outcome of the Civil Appeal No. E006 of 2024 filed against the impugned judgement. The Plaintiff has vehemently opposed the instant application insisting that the said application is res judicata as it had already been dealt with in the Court of Appeal vide its Ruling dated the 7<sup>th</sup> June 2024 in **Civil Application No. Nai E100 of 2024.**
- 20.** Judgment was entered for the Plaintiff in this matter on the 26<sup>th</sup> October 2023. Dissatisfied with the said Judgement, the 1<sup>st</sup> Defendant filed the aforementioned Appeal and an application for stay of the said Judgement pending Appeal.

Vide its Ruling in **Civil Application No. Nai E100 of 2024** delivered on 7<sup>th</sup> June 2024, the Court of Appeal dismissed the 1<sup>st</sup> Defendant's application for stay of execution pending Appeal.

**21.** By reason of the said Ruling, the Plaintiff asserts that the 1<sup>st</sup> Defendant's application is res judicata, is an abuse of Court process and it is not merited. On his part, the 1<sup>st</sup> Defendant contends that an application for stay of execution pending appeal is distinct from one seeking stay of taxation proceedings pending appeal hence his application is not res judicata.

**22.** On res judicata, Section 7 of the Civil Procedure Act provides as follows:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court***

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*competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

**23.** The Supreme Court stated as follows in **John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)**;

*“...whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.”*

**24.** From the facts as presented while relying on decision quoted, I note the Court of Appeal did not deal with an Application for stay of taxation pending Appeal and only issued a Ruling in respect to an Application for stay of execution pending Appeal. In the foregoing, I find that the instant application is not res judicata as claimed.

**25.** As to whether there should be an Order to stay taxation of the Plaintiff's impugned Bill of Costs, I wish to highlight various legal provisions governing stay pending appeal. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

***'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.'***

26. In the current scenario, the 1<sup>st</sup> Defendant claims that the taxation of the Plaintiff's impugned Bill of Costs should be stayed pending the outcome of his Appeal as it would it will prejudice him. Further, that the Plaintiff has presented an exorbitant Bill of Costs and has not demonstrated how she could repay costs if awarded as she has no known source of livelihood, except for the rental income from the suit properties.

27. In the case of **Deposit Protection Fund V Rosaline Njeri Macharia [2006] eKLR**, the Court while dealing with an application of stay of taxation proceedings, observed as follows:

*'Going back to the 2<sup>nd</sup> defendant's arguments, I note them as saying that if the court did not grant an order for stay of the proceedings, the applicant would not suffer substantial loss, on account of the taxation of the defendants' Bills of Costs. When faced with those submissions, the applicant did not tell the court how the taxation of the defendants' Bill of Costs would cause them substantial loss. To*

*my mind, the taxation of a Bill of Costs cannot occasion any loss to the person against whom it is taxed. Therefore, the issue of taxation causing substantial loss does not even arise. The only effect of taxing a Bill of Costs is the ascertainment of the quantum of costs payable by one person to another. Thereafter, the party whose costs had been ascertained could take out execution proceedings. The applicant did not, in my considered view, make out a case for stay of proceedings, and in particular a stay of the taxation of the defendants' Bills of Costs. Furthermore, if the learned taxing officer were to proceed to tax the defendants' Bills of Costs, the sums would be ascertained, and that would be the foundation upon which this court could base the size of the security which the applicant would need to raise, if the court did order that there be a stay of execution.' Emphasis Mine*

**28.** Further, Munyao Sila J Stated as follows in **Abere v Ondieki (Appeal 9 of 2022) [2023] KEELC 16494 (KLR) (22 March 2023) (Ruling):**

***“I am not therefore persuaded to stop taxation of costs. I will allow the taxation to proceed and once taxed, half the taxed costs be deposited in a joint interest earning account.”***

**29.** From the facts as presented, it is my considered view that the taxation of the Bill of Costs is not prejudicial to the 1<sup>st</sup> Defendant as it is thereafter, that he can proceed to apply for stay of execution if the Plaintiff seeks to execute the Decree. It is trite that it is only through taxation that the costs can be ascertained. I opine that taxation proceedings are independent as this is the mandate of the Taxing Officer and in this instance, the Bill of Costs is not subject of Appeal.

**30.** It is against the foregoing while relying on the legal provisions cited above and associating myself with the decisions quoted, I find that the 1<sup>st</sup> Defendant has failed to meet the threshold set for granting stay of taxation of the Bill of Costs pending the outcome of the aforementioned case in

the Court of Appeal and will decline to grant the said orders as sought.

**31.** In the circumstances, I find the Notice of Motion application dated 7<sup>th</sup> April, 2025 unmerited and will disallow it.

**32.** Costs will be in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS  
16<sup>TH</sup> DAY OF DECEMBER, 2025**

**CHRISTINE OCHIENG  
JUDGE**

**In the presence of:**

Ms Muluvi holding brief for Mutua SC for Plaintiff/Respondent

Ms Kamau for Applicant/1<sup>st</sup> Defendant

Court Assistant: Joan