



Republic v Nairobi Environmental Management Authority & 2 others; One Hundred and Two Peponi Road LLP & another (Exparte Applicants) (Environment and Land Case Judicial Review Application E014 of 2020) [2024] KEELC 332 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 332 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E014 OF 2020
J OMANGE, J
JANUARY 25, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**NAIROBI ENVIRONMENTAL MANAGEMENT AUTHORITY 1ST
RESPONDENT**

NAIROBI COUNTY GOVERNMENT 2ND RESPONDENT

AIRVIEW PROPERTIES LIMITED 3RD RESPONDENT

AND

**ONE HUNDRED AND TWO PEPONI ROAD LLP EXPARTE APPLICANT
PEPONI ROAD RESIDENTS ASSOCIATION (IN FORMATION) EXPARTE
APPLICANT**

RULING

1. In the notice of motion application dated 12th August 2022, the applicant seeks the following orders:
 - a. The taxation of the Party and Party Bill of Costs dated 18 November 2021 in ELC Judicial Review Application No. E014 of 2020 be stayed pending the hearing and determination of Civil Appeal No. E326 of 2021 and Civil (Application) No. E326 of 2021.
 - b. The costs of and incidental to this application be provided for
2. The application is supported by the affidavit of Karim S. Anjarwalla. The applicants' case is that the partnership of one hundred and two Peponi road and the Peponi Road Residents Association filed a Judicial Review Application against the Respondents. A ruling was delivered on the matter on 15th



- April 2021. Being dissatisfied with the Ruling, they have since filed Civil Appeal No. E326 of 2021 in the Court of Appeal. which raises triable issues. The appeal was admitted for hearing and a temporary injunction was issued pending the hearing and determination of the appeal.
3. In the meantime, the 2nd Respondent has filed a bill of costs exceeding Kshs 20,000, 000. The applicants contend that if the taxation is allowed to proceed, they are likely to suffer substantial loss as the 2nd Respondents will not be in a position to reimburse the money paid as fees if the appeal were to be successful. The Applicants aver that the application has been made without undue delay and the 2nd Respondents shall not suffer any prejudice if the orders sought are granted.
 4. The application came up for mention in court on four occasions. On each occasion, the Respondents had not filed any response. On the 11th November 2023 leave was given to the 2nd Respondent to file a replying affidavit and parties to thereafter file submissions. The 2nd Respondent has not filed a Replying Affidavit. As such the application is unopposed.
 5. The only issue for determination is whether there should be a stay of the taxation proceedings pending the outcome of Civil Appeal No. E326 of 2021 and Civil (Application) No. E326 of 2021. The 2nd Respondents herein did not participate hence the applicant's evidence is unchallenged and uncontroverted. However, the applicants are required to prove their case. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR the court stated "It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest."
 6. 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.'
 7. It is the Applicants contention that taxation of the 2nd Respondents' bill of costs should not proceed as they will suffer irreparable loss should they be compelled to pay the taxed amount and later succeed in the appeal. They allege that the 2nd Respondent is facing financial difficulties and any monies paid to it will most likely be irrecoverable if the appeal is successful. They have attached newspaper articles as proof that the 2nd Respondent has financial challenges.
 8. The evidence by the Applicants is uncontroverted as the 2nd Respondent did not file any affidavit to counter the averments. As the 2nd Respondent has not challenged the averment that they are facing financial difficulties and might not be in a position to refund the decretal amount I find that the applicants have discharged the burden which was stated in *Antoine Ndiaye v African Virtual University* [2015] eKLR; in which the court posited;-

"The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the applicant; it follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed."
 9. Regarding the issue of security it is trite law that one of the conditions for grant of stay of execution in the High Court is to furnish security. However, the court has inherent jurisdiction to give such



orders as are in the interest of justice in each case. In the instant case the applicants aver that the Judicial Review proceedings were brought in the public interest. Public Interest Litigation is litigation brought in the interest of the public or a section of the public. A positive outcome of the litigation benefits not only the initiator but other persons as well. Public interest cases are the vehicle by which the voiceless majority access the courts. This was a case brought on behalf of the residents of Peponi Road and citing threats to the Right to Environment. I find that this is a fit case for the court to dispense with the requirement for security.

10. The appeal is pending in the Court of Appeal. If the appeal were to be successful, the taxation would have been a waste of scarce judicial time. This court is required to ensure efficient use of judicial and administrative resources. In my view, it is not efficient use of judicial resources for the taxation to proceed while the appeal is yet to be heard. If the appeal is not successful, the taxation can always proceed.
11. In view of the foregoing, I find that the application has merit and is allowed in the following terms;
 - a. Taxation of the Party and Party Bill of Costs dated 18th November, 2021 in ELC Judicial Review Application No E014 of 2020 is hereby stayed pending the hearing and determination of Civil Appeal No E 326 of 2021 and Civil Application No E 326 of 2021
 - b. Costs of application to be in the cause.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF JANUARY 2024.

JUDY OMANGE

JUDGE

In the presence of:

Mr. Kanja for Ex parte Applicants

No appearance for the Respondents

Steve - Court Assistant

