



**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA**

**ELC CASE NO. 482 OF 2014**

**HASSAN MUSAMBAYI MBARUKU :::::::::::::::::::::::::::::::APPELLANT**

**VERSUS**

**NASHON ASEKA :::::::::::::::::::::::::::::::::::::::REPOUDENT**

**RULING**

The application is dated 2<sup>nd</sup> March 2017 and is brought under order 22 rule 22, Order 42 rule 6, Order 43 and Order 51 of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeking the following orders;

1. **THAT** this application be certified as urgent and heard ex-parte and service of the same be dispensed with at the first instance.
2. **THAT** pending the hearing and determination of this application inter-parties this honourable court be pleased to stay proceedings of the main suit herein, more specifically the taxation proceedings relating to HCCC 123OF 1998 and all consequential orders relating thereto or emanating therefrom.
3. **THAT** pending the hearing and determination of the appeal preferred by the appellant/applicant on the ruling of this honourable court made on 16<sup>th</sup> December, 2016 this honourable court be pleased to stay proceedings of the main suit herein more specifically the taxation proceedings relating to HCCC 123 OF 1998 and all consequential orders relating thereto or emanating therefrom.
4. **THAT** the costs of this application be provided for.

The application is supported on the grounds and submissions as follows, the appellant filed Kisumu Civil Review Application No. 44 of 2016 Hassan Musambayi Mbaruku vs. Nashon Aseka emanating from Kisumu Civil Appeal 96 of 2015 Hassan Musambayi Mbaruku vs Nashon Aseka with respect to the judgment of the learned Judge Said Juma Chitembwe in Kakamega HCCC 123 OF 1998 Hassan Musambayi Mbaruku vs. Nashon Aseka. That the learned judges erred in law and in fact by finding that the High Court in first instance had jurisdiction to hear and determine Kakamega HCCC 123 OF 1998 Hassan Musambayi Mbaruku vs. Nashon Aseka. That in so determining, the High Court in Kakamega made judgment on 11<sup>th</sup> June, 2015 in favour of the defendant and condemned the appellant to costs. That in the said judgment (Kakamega HCCC 123 OF 1998 Hassan Musambayi Mbaruku vs. Nashon Aseka) the honourable court held, among other findings, that it had jurisdiction to hear and determine the main suit herein. That the said court also failed, neglected and or refused to consider the illegal processes employed to transfer the appellant's piece of land in favour of the respondent herein. The said judgment was upheld by the honourable Court of Appeal in two instances and the appellant/applicant herein feels aggrieved by the said findings and has preferred an appeal against the same vide his petition to the Supreme Court and application dated 2<sup>nd</sup> February, 2017. The said petition raises triable issues that the Supreme Court ought to make a determination on. That the respondent has purported to commence taxation proceedings over a matter he verily believe is defective and non-existent. That there is need therefore that this honourable court be pleased to stay proceedings of the main suit herein pending the hearing and determination of this application inter-parties. That there is need therefore that this honourable court be pleased to stay proceedings of the main suit herein pending the hearing and

determination of the petition at the Supreme Court.

The respondent in his replying affidavit and submissions stated as follows; that sometimes in the year 1998, the plaintiff sued him seeking for, a declaration that non-completion of the purchase price amounts to a fundamental breach of contract and have transactions consequential thereto declared null and void. That the land register be rectified after cancellation of subdivision of L.R. NO. ISUKHA/SHIRERE/3186 and transfer of LR. NO. ISUKHA/SHIRERE/3245. Costs and interest at court rates.

That after a protracted court process judgment was delivered on 11<sup>th</sup> June, 2015 whereby the plaintiff/applicant suit was dismissed with costs. (Copy of the judgment is marked NA-1). That as a consequence thereof, his advocates on record filed a bill of costs dated 3<sup>rd</sup> July, 2015. Subsequently the plaintiff/applicant preferred an appeal to the court of Appeal to wit KISUMU CIVIL APPEAL NO. 96 OF 2015 which appeal was dismissed with costs (Copy of the judgment is marked NA-2) That consequent to the judgment referred to as annexure NA-2 above the applicant filed an application in the Court of Appeal seeking for review of the Court of Appeals judgment which application was dismissed with costs (Copy of the ruling is marked NA-3) That in this matter the applicant has now filed 3 applications seeking similar orders as against him to wit: the application dated 3<sup>rd</sup> August, 2015 and the one dated 16<sup>th</sup> August, 2016 and the instant application now before this honourable court and dated 2/3/2017. That all the above applications are clearly calculated at frustrating the taxation of his Bill of Costs dated 3<sup>rd</sup> July, 2015 as the said applications have only been filed by the applicant upon being served with taxation notice dated 27/7/2015, 29/7/2016 and 15/2/2017. (Copy of taxation notices are marked NA-4 'a' and 'c').

I have considered both the applicant's and the respondent's submissions and the annexures therein. I find that a similar application dated 16/8/2016 was dismissed with costs (Copy of ruling is marked NA-5). It is apparent from annexure NA-5 that there cannot be stay on taxation of costs. In the case of John Mburu v Consolidated Bank of Kenya Limited (2016) eKLR Fred A. Ochieng J held that;

“Taxation is the process through which the Taxing Officer determines the quantum of the costs payable. Such a determination cannot occasion any loss to the party against whom the order for costs was made. Secondly, the taxation cannot render the appeal nugatory.”

This application is mischievous, misconceived, baseless and generally bad in law and the applicant has become a vexatious litigant. I find no reason to warrant granting of a stay of proceedings of the main suit herein and more specifically the taxation proceedings. The instant application is an afterthought and solely aimed at delaying the taxation of the bill of costs. I find the application has no merit and I dismiss it with costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21<sup>ST</sup> DAY OF JUNE 2017.**

**N.A. MATHEKA**

**JUDGE**