



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 607 OF 2011**

**GEORGE STEPHEN MUHORO.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**CATHERINE WANJIKU.....1<sup>ST</sup> DEFENDANT**

**RICHARD MWANDORO SAFARI.....2<sup>ND</sup> DEFENDANT**

**SEENNA LIMITED.....3<sup>RD</sup> DEFEDNANT**

**PATRICK OTSOMO KONDO.....4<sup>TH</sup> DEFENDANT**

**MAURICE OTIENO OYUGI.....5<sup>TH</sup> DEFENDANT**

**SARAH MWERU MUHU.....6<sup>TH</sup> DEFENDANT**

**RULING:**

The matter coming up for determination is the Plaintiff/Applicant's Notice of Motion dated **18<sup>th</sup> June 2014** brought under **Section 95 of the Civil Procedure Act, Section 7 of the appellate jurisdiction Act, and Order 42 of the Civil Procedure Rules** seeking for these Orders.

- i. *That the applicant be granted leave to file its Notice of Appeal out of time and that time be given for filing the said Notice .*
- ii. *That time for filing the record of Appeal be extended.*
- iii. *That the Court be pleased to issue a stay of proceedings/ taxation of the 6<sup>th</sup> Defendant Bill of costs scheduled for 23<sup>rd</sup> June, 2014 or any other time/date pending the hearing and determination of this application and intended appeal.*
- iv. *That the costs of this application abide with the result of the said appeal or be dealt with as the justice of the case shall seen to require.*

The application is premised on the grounds stated on the face of the application and on the annexed

affidavit of **George Stephen Muhoro**.

Among these grounds are ;

- i. *The 6<sup>th</sup> Defendant filed an application dated 5<sup>th</sup> September, 2012 seeking for an Order that she be struck out of the suit and that the costs of that application be met by the Plaintiff.*
- ii. *Further that a Ruling was delivered on 25<sup>th</sup> of February 2014 by the Court and the application was allowed and the Plaintiff was ordered to bear the costs, thus the suit against the 6<sup>th</sup> Defendant was thus dismissed.*
- iii. *That the Plaintiff/Applicant advocates then on record **Riunga Raiji & Co. Advocate** failed to attend Court for the said Ruling and failed to inform their client that the Ruling was to be delivered on the said date.*
- iv. *That the Plaintiff learned of existence of the said Ruling through a letter dated 22<sup>nd</sup> may 2014 from their former Advocate when they received Notice of bill of costs. That the said bill of costs for taxation was scheduled for 23<sup>rd</sup> June 2014 .*
- v. *Further that the applicant is aggrieved by the said Ruling and would like to exercise his right of appeal against the same and if this application is not allowed, the applicant will be shut out on its right to lodge its appeal in the Court of Appeal.*
- vi. *Therefore the applicant should not be penalized for the inadvertent mistake of its advocates and indeed the 6<sup>th</sup> Defendant had been included in the suit due to fraud and breach of contract on her part.*
- vii. *That applicant is apprehensive that unless this application is allowed and the intended Appeal is heard and determined on priority basis, the entire appeal will be defeated and rendered nugatory as the intended appeal has overwhelming prospects of success.*

The application is contested. The 6<sup>th</sup> Defendant/Respondent filed a Replying Affidavit and averred that the 6<sup>th</sup> applicants delay was ordinate and she should not be inconvenienced or penalized for his advocates mistakes. It was her contention that the Plaintiff's Appeal has overwhelming prospects of failure as no order claimed by the Plaintiff can lie against her. Further that the prayer for injunction was overtaken by events and the claim for refund can only be addressed by the 1<sup>st</sup> – 5<sup>th</sup> Defendants.

Further that the applicant has not provided any form of security for the amount, though he is seeking for stay of taxation. Moreover the Plaintiff does not stand to suffer any substantial loss or in any event, the Plaintiff's advocate or the 1<sup>st</sup> – 5<sup>th</sup> Defendants can adequately address any alleged substantial loss and the application should therefore be dismissed with costs.

The application herein was canvassed by way of written submissions which I have carefully considered. I have also considered the relevant laws, the pleadings generally and authorities attached and I make these findings; .

There is no doubt that a Ruling was delivered on **25<sup>th</sup> February, 2014** in favour of 6<sup>th</sup> Defendant with costs to be borne by the Plaintiff /Applicant. There is also no doubt that the Plaintiff /Applicant counsel was absent though as the record shows he had been notified. There is no doubt that the matter had been fixed for taxation before the Deputy Registrar as the 6<sup>th</sup> Defendant had filed a **bill of costs** to the tune of **Kshs.229,518/=**

The applicant alleges that he was not aware of the Ruling delivered by the Court on **25<sup>th</sup> February 2014** and thus delay in filing of the appeal. I have also seen the Plaintiffs annexure being a letter dated **22<sup>nd</sup>**

**April, 2014** to the Deputy Registrar inquiring about the Ruling. I have however not seen the Reply by the Deputy Registrar to the Plaintiffs Advocates inquiry.

It is evident that the Plaintiff former Advocate was aware of the Ruling by **19<sup>th</sup> May 2014** when a Notice of the **Bill of costs** was served on him. However, the applicant did not file any application for stay of that taxation until 18<sup>th</sup> June 2014 .why?. No explanation has been offered for that delay.

However, the applicant has explained in his application that he was not aware of the date of the Ruling and thus he could not appeal on time though he was aggrieved by the Ruling of this Court. Though the applicant's herein delayed in filing this application, the reason for the delay has been explained and the mistake of this counsel should not be visited on him.

It is trite law that a successful litigant should not be deprived of the fruits of her success and that stay of execution involves judicial discretion.

The applicant has alleged that he is aggrieved by the Ruling of this Court and if stay of taxation is not granted, the 6<sup>th</sup> Defendant would proceed and tax his bill of costs and that would render his Appeal on the issue of costs nugatory. Though, the applicant has not argued that if the stated amount is paid to the 6<sup>th</sup> Defendant, she would not be in a position to refund incase the intended appeal succeeds, I find that there would be no prejudice occasioned to the 6<sup>th</sup> Defendant if the said stay is granted for a particular period until the plaintiff /Applicants lodges his appeal at the Court of Appeal and also apply for stay of taxation pending the hearing of the appeal.

Having considered the Notice of motion filed by the applicant on 18<sup>th</sup> June, 2014, the Court grants the applicants leave to file his appeal on the Ruling dated 25<sup>th</sup> February 2014.

However, on the issue of Appeal out of time, and time be extended to file the record of appeal, the same should be canvassed at the Court of Appeal.

On the prayer of stay of taxation by the 6<sup>th</sup> Defendant Bill of costs, I will grant the applicant stay of taxation for a period of 45 days within which time the applicant will have filed his Appeal at the Court of Appeal and also his substantial application for stay of taxation in the said Court.

The upshot of this Ruling therefore is that the applicant is granted leave to file his appeal and also granted stay of taxation of the 6<sup>th</sup> Defendant's Bill of costs for a period of 45 days from the date of this Ruling. Meanwhile, applicant to file application for leave to file appeal out of time and extension of time and stay of taxation pending the hearing of the appeal at the Court of Appeal. Failure to abide by the above time frame, the parties are at liberty to proceed with intended taxation.

It is so ordered.

Dated, Signed and delivered this **27<sup>th</sup> day of November, 2014**

**L. GACHERU**

**JUDGE**

In the Presence of:-

Mr. Nzuva holding brief Mr Macharia Kahonge for Plaintiff/Applicant

Mr. Sato for the 6<sup>th</sup> Defendant/Respondent

Kamau: Court Clerk

**L. GACHERU**

**JUDGE**