



**Intercountries Importers & Exporters Limited v Total Security Limited & 7 others
(Environment and Land Appeal 10 of 2017) [2024] KEELC 3846 (KLR) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3846 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 10 OF 2017**

MD MWANGI, J

MAY 14, 2024

BETWEEN

INTERCOUNTRIES IMPORTERS & EXPORTERS LIMITED APPELLANT

AND

TOTAL SECURITY LIMITED 1ST RESPONDENT

LE MOLOK LIMITED 2ND RESPONDENT

**TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES ... 3RD
RESPONDENT**

COMMISSIONER OF LANDS 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

JUBILEE INSURANCE COMPANY LIMITED 6TH RESPONDENT

PARK AVENUE INVESTMENTS LIMITED 7TH RESPONDENT

TRUST BANK LIMITED (IN LIQUIDATION) 8TH RESPONDENT

(In respect of the Appellant's application dated 27th November, 2023 seeking an order of stay of execution pending hearing and determination of the appeal before the Court of Appeal)

RULING

Background

1. This is a ruling in respect of the application dated 27th November, 2023 filed under certificate of urgency and wherein the Applicant seeks the following orders:



- a. This Honourable Court be pleased to stay execution of the 1st, 2nd and 3rd Respondents' Certificate of Costs of Kshs. 481,020/= and Kshs. 562,344/= respectively pending the hearing and determination of the Court of Appeal Civil Case No. E 216 of 2021.
 - b. This Honourable Court be pleased to review the 1st, 2nd and 3rd Respondents' Bill of Costs dated 21st July, 2021 and 8th November, 2021 respectively taxed at Kshs. 481,020/= and Kshs. 562,344/- respectively.
 - c. That costs of this application be awarded to the Applicant.
2. The application is based on the grounds on the face of it and the Supporting Affidavit of Naushad Abid sworn on 27th November, 2023.
 3. The Applicant argues that it has a right of Appeal which it has exercised by filing the Court of Appeal Civil Case Number E216 of 2021 against the judgement of this court. The Applicant prays for a stay of execution of payment of costs pending the final determination of the Appeal by the Court of Appeal. The execution of the taxed costs should await the outcome of the Appeal.
 4. The Applicant alleges that the Taxing Master erred in determining instruction fees. It therefore argues that its application is therefore merited.

1st and 2nd Respondent's Replying Affidavit

5. The 1st and 2nd Respondents filed a Replying Affidavit sworn by Everton Tek deponed on 15th March, 2024 in opposition to the application. The deponent contends that the application by the Appellant is unmerited and should therefore be dismissed. They argue that the application is an afterthought meant to deny them their rightly awarded costs. It is alleged that in any event, the Respondents have not initiated any execution proceedings.
6. The deponent further avers that the Applicant has not met the threshold for the grant of stay pending appeal. He asserts that since the Decree herein is a monetary Decree, the Applicant is required to deposit a security in court. However, in the instant case, the Applicant has not shown any willingness or intention to avail a security.
7. The deponent urges the court; in the event the Court grants the application to direct the Appellant to deposit the security in a joint interest earning account.
8. In response to the prayer for review of the Bill of Costs, the 1st and 2nd Respondent assert that the same is not provided for in law thus there is no legal basis for the grant of the order sought by the Appellant.

3rd Respondent's Replying Affidavit

9. The 3rd Respondent in opposing the application by the Appellant filed a Replying Affidavit deponed by Peter K. Rotich deponed on the 1st February, 2024. The deponent avers that the existence of an appeal does not confer an automatic right for stay of execution. He avers that the Court exercised its discretion in granting the costs which were procedurally taxed with full participation of the Applicant.
10. The 3rd Respondent avers that the taxed costs were not excessive considering the amount taxed off from the Bill of Costs dated 8th November, 2021. He emphasized that the purpose of taxation is to fairly reimburse a successful litigant of the costs incurred in a matter. He maintains that the Bills of Costs were taxed on a lower scale and the Taxing Officer duly taxed the Instruction Fees taking into account the considerations provided for in law. As such, the Taxing Officer's decision cannot be interfered with.



11. Regarding the Appeal, the 3rd Respondent argues that the pending Appeal is separate and distinct from the taxation of the Respondents' Bill of Costs. The costs were properly awarded to them as successful litigants following the dismissal of the Appeal. The 3rd Respondent asserts that the Appellant/Applicant has not demonstrated the substantial loss it will suffer in the event that stay is not granted neither has it indicated its willingness to deposit a security. Its application herein should therefore be dismissed with costs.

Supplementary Affidavit by the Applicant

12. The Applicant filed a Supplementary Affidavit deponed by Naushad Abid on the 13th March, 2024 arguing that regardless of the fact that taxation at the trial court was done procedurally, there is still a pending appeal with a likelihood of success. It states that it will not be able to recover the taxed costs from the 1st, 2nd and 3rd Respondents in the event the appeal succeeds.

Court's directions

13. The court directed that the Application be canvassed by way of written submissions. Parties complied and filed their respective submissions. The Court has had occasion to read the submissions which now form part of the record of the Court.

Issues for determination

14. I have considered the application, the responses and the submissions filed by the parties to buttress their assertions. The issues for determination in this matter are:
- a. Whether the court should grant stay of execution of the Taxed Bill of Costs pending the hearing and determination of the appeal in the Court of Appeal.
 - b. Whether the court has the mandate to review the 1st, 2nd and 3rd Respondents' Bill of Costs dated 21st July, 2021 and 8th November, 2021 respectively taxed at Kshs. 481,020/= and Kshs. 562, 344/- respectively.

Analysis and Determination

A. Whether the court should grant stay of execution of the Taxed Bill of Costs pending the hearing and determination of the appeal in the Court of Appeal.

15. In the case of *Edward Kamau & Another v Hannah Mukui Gichuki & Another* [2015] eKLR, the Court held that:

“The right of appeal, it has been held time and again, is a Constitutional right which is the Cornerstone of the rule of Law. To deny a party that right would in essence be denying them access to justice which is guaranteed under Article 48 of the *Constitution* and also a denial of a right to a fair hearing guaranteed under Article 50 of the *Constitution* which latter right cannot be limited under Article 25 of the said *Constitution*.”

16. In the case of *Tanui Robert & Another -vs- Jessica Adikinyi Afwande* [2021] eKLR, the High Court while considering a similar application as the one before this court held that it was obligated to balance the Applicant's undoubted right of appeal against the Respondent's right to enjoy the fruits of her judgment.



17. I agree with the reasoning in the above cited case. Whereas this Court is obligated to uphold the Applicant's right of appeal, it must balance the same against the 1st, 2nd and 3rd Respondents' right to the costs awarded to them.
18. The Court of Appeal in the case of *Visbham Ravjiltalai v Thornton & Turnip* (Civil Application No. Nai 15 of 1990 [1990] KLR 365 observed that whereas the Court of Appeal's power to grant stay pending appeal is unfettered, the High Court's (and now, Courts of equal status') jurisdiction to do so under Order 41 Rule 6 (now Order 42 Rule 6) is fettered by 3 conditions, namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay.
19. It is not disputed that the Appellant herein has filed an appeal against the judgement of this court. It is equally a common ground that the costs awarded to the 1st, 2nd and 3rd Respondents were duly taxed by the Taxing Officer.
20. With that in mind, this Court will then proceed to determine whether the Appellant/Applicant herein has satisfied the threshold for the grant of stay orders pending Appeal.
21. The law concerning stay of execution pending Appeal is Order 42 Rule 6 of the *Civil Procedure Rules* which stipulates as follows:

“No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.”

(2) No order for stay of execution shall be made under sub rule (1) unless—

- (a) the Court is satisfied that substantial loss may result to the 1st 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 1st Applicant.

22. From the rule 6 of Order 42 of the *Civil Procedure Rules*, there are three conditions that should be considering before the court makes the decision whether to grant the Orders of stay of execution pending Appeal under Order 42 Rule 6(2) of the *Civil Procedure Rules*, namely:
 - i. Whether the Applicant has established substantial loss that may result to him unless stay of execution is ordered;
 - ii. Whether the application has been brought without undue delay; and
 - iii. Whether 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.



23. It is further evident from the above provisions of law that the Court has the discretion to issue an Order of Stay of execution pending appeal. However, the said discretion must be exercised judicially. In the case of *Canvass Manufacturers Ltd v Stephen Reuben Karunditu*, Civil Application No.158 of 1994, [1994] KLR 4853, the Court held that the court's discretion must be judicially exercised.
24. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR 645 in the following words:
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
25. As I stated earlier on in this ruling, the Court is bound not only to consider the interest of the Applicants but must also consider those of the 1st, 2nd and 3rd Respondents. The court finds that no prejudice will be occasioned to the 1st, 2nd and 3rd Respondents if the execution is stayed pending the determination of the appeal. In my view, the Respondents will still have their costs should the pending appeal be dismissed. However, in the event the judgement is in favour of the Appellant, the Appellant would have to seek a refund from the Respondents.
26. On the second condition, the rulings subject of these proceedings were delivered on 27th October, 2023, while the Applicant filed the instant application on the 17th November, 2023. I find that the said application was brought without undue delay.
27. On the last condition as to the provision of security, I agree with the sentiments in the case of *Aron C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 4 Others* [2014] eKLR, where the court stated that:
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
28. The Applicant herein has sought stay of execution of the taxed costs pending the determination of Court of Appeal Civil Case Number E216 of 2021.
29. The Applicant has not expressed its willingness to deposit any security. The Respondents contend that in the event the court is inclined to grant the stay, the Applicant be directed to deposit the security in a joint interest earning account.
30. In *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, the court observed that:
- “... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the Appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the



latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

31. In *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, the Court stated that:

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of Appeal from money decree of the lower court for an order of stay must satisfy this condition on security”.

32. In this case I find it appropriate to order a stay of execution but on condition that the Appellant provides a security in form of a deposit in an interest earning account. The taxed costs are the basis upon which this court should assess the amount of the security which the Applicant should provide as a condition for the grant of an order of stay of execution.

33. I grant the Appellant an order of stay of execution on condition that the Appellant/Applicant deposits a sum of Kshs. 1,000,000/= in an interest earning account in the joint names of its Advocates and the Advocates for the 1st, 2nd and 3rd Respondents within thirty (30) days of this ruling. In default the Respondents will be at liberty to execute against the Appellant.

B. Whether the court has the mandate to review the 1st, 2nd and 3rd Respondents’ Bill of Costs dated 21st July, 2021 and 8th November, 2021 respectively taxed at Kshs. 481,020/= and Kshs. 562, 344/- respectively.

34. Rule 11 of the Advocates Remuneration Order makes provision for the procedure to be followed by an aggrieved party against the decision of the taxing officer after the taxation of a bill of costs. It provides that:

1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

35. A party aggrieved by the decision of a Taxing Master has to file a Reference. In the case of *Donholm Rabisi Stores (firm) v East African Portland Cement Ltd* [2005] eKLR, Waweru J (as he then was) held that:

“Taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration



Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the *Advocates Remuneration Order*".

36. The Applicant has sought for an order that, "this Honourable Court be pleased to review the 1st, 2nd and 3rd Respondents' Bill of Costs dated 21st July, 2021 and 8th November, 2021 respectively taxed at Kshs. 481,020/= and Kshs. 562, 344/- respectively."
37. I am at a loss. What exactly is the Appellant seeking? Review of the Bill of costs! That is an issue that was raised in the 1st, 2nd and 3rd Respondents' submissions. The Appellant did not respond to the submissions by the Respondents on that issue nor did it seek to amend the prayer if what it was seeking was to set aside and or review the ruling of the Taxing Master under the provisions of Rule 11 of the *Advocates Remuneration Order*. Otherwise, the prayer as framed does not qualify as a reference challenging the decision/ruling of the Taxing Master.
38. The prayer is a mystery unknown in our laws. The prayer is therefore dismissed.
39. The costs of this application shall be in the cause.

Conclusion

40. From the foregoing, Appellant/Applicant's application is allowed in the following terms:
 - a. An Order a stay of execution is hereby granted in favour of the Appellant/Applicant staying execution of the 1st, 2nd and 3rd Respondents' Certificate of Costs of Kshs. 481,020/= and Kshs. 562,344/= respectively pending the hearing and determination of the Court of Appeal Civil Case No. E216 of 2021, on condition that the Appellant/Applicant deposits a sum of Kshs. 1,000,000/= in an interest earning account in the joint names of its Advocates and the Advocates for the 1st, 2nd and 3rd Respondents within thirty (30) days of this ruling. In default the Respondents will be at liberty to execute against the Appellant.
 - b. The prayer for review of the Bills of Costs is dismissed.
 - c. Costs of the application shall be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF MAY, 2024.

M.D. MWANGI

JUDGE.

In the virtual presence of:

Ms. Onsongo holding brief for Ms. Kilonzo for the Appellant/Applicant

N/A for the 1st, 2nd and 3rd Respondents

Yvette: Court Assistant

