



REPUBLIC OF KENYA



KENYA LAW
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**Sawe v Ekaterra Tea Kenya PLC & 2 others (Civil Suit
E005 of 2023) [2025] KEHC 3916 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL SUIT E005 OF 2023
JK SERGON, J
MARCH 27, 2025**

BETWEEN

DAVID SAWE PLAINTIFF

AND

EKATERRA TEA KENYA PLC 1ST DEFENDANT

KENNETH ODIRE 2ND DEFENDANT

SYDNEY MUSEKIWA SHONIWA 3RD DEFENDANT

RULING

1. The application coming up for determination is a notice of motion dated 10th February, 2025 seeking the following orders;
 - (i) Spent
 - (ii) That this Honourable Court be pleased to grant an order of stay of taxation proceedings in this matter pending the filing, hearing and determination of Applicant's Intended Appeal to the Court of Appeal.
 - (iii) That this Court be pleased to issue any other consequential orders as may be necessary to meet the ends of justice.
 - (iv) That the costs of the Application abide the outcome of the Appeal.
2. The application is supported by grounds on the face of it and the supporting affidavit of David Kipkorir Sawe the Plaintiff/Applicant herein.
3. He avers that on 30th October 2024, the Hon. Justice Joseph Sergon delivered a ruling striking out the suit he filed herein and awarding costs to the Respondents herein.



4. He avers that he is dissatisfied with the entire ruling of the Court and has lodged a Notice of Appeal to the Court of Appeal dated 31st October, 2024, challenging the core findings of the Court, the reasoning, and the final orders granted.
5. He avers that he has an arguable appeal whose substratum will be defeated were the taxation proceedings herein to be allowed to proceed. He avers that in the appeal he challenged fundamental findings of the Court's ruling delivered on 30th October, 2024, filed a Notice of Appeal dated 31st October, 2024, and requested for the trial court proceedings to enable him to pursue the Appeal. It is therefore in the interest of justice that any further proceedings in the matter be frozen pending the filing, hearing and determination of the Appeal.
6. He avers that the Respondents' Advocates have filed bill of costs dated 11th December, 2024 and taken out a notice of taxation for 12th February, 2025 which they have served upon his advocates on record and he is therefore apprehensive that the Respondents' advocates are keen on proceeding with taxation in this matter. He reiterated that he has an arguable appeal with high chances of success and the appeal risks being rendered nugatory if the taxation proceedings herein are allowed to proceed.
7. He avers that unless the taxation proceedings are stayed, he is afraid that he may be compelled to pay costs which cannot be recovered in the event the appeal is successful since the said costs are payable to the Respondents' advocates whose financial standing and capability are unknown. He is apprehensive that if the orders sought are not granted, he risks being committed to civil jail hence taking away his right to fair hearing and his undoubted right to pursue an appeal in the matter.
8. He avers that this matter having gone on appeal, there is likely to be either additional costs against him if the appeal is lost, or he may be discharged from the burden of payment of costs if he succeeds considering the peculiar circumstances of the case and its unique requirements discretion ought to be exercised in favour of granting the reliefs sought.
9. The respondent filed a replying affidavit in response to the application sworn by Jonathan Mwita the 1st Defendant's General Counsel-Plantations who is familiar with the facts of this case and duly authorized by the Defendants/Respondents to swear this affidavit on their behalf.
10. He avers that the Ruling of 30th October 2024 is a negative order incapable of being stayed, the Honourable Court, by its Ruling of 30th October 2024, struck out the Applicant's suit for want of jurisdiction and awarded costs to the Defendants. There is nothing that the Court ordered to be done or restrained from being done. There is therefore no reasonable basis for the Application.
11. He avers that the above notwithstanding, the Applicant has failed to satisfy the threshold for stay of execution as provided under Order 42 Rule 6(2) of the Civil Procedure Rules 2010. Firstly, there is no appeal and/ or arguable appeal. The Applicant has not set out the grounds of appeal in the substance of the Application or by annexing a draft memorandum of appeal. There are, therefore, no grounds before the Court for it to assess whether the intended appeal raises any arguable points for determination by the Court of Appeal. Secondly, the Applicant has not demonstrated that he would suffer substantial loss by the Defendants' proposed taxation of the party and party costs, taxation is a legal process and the mere fact that it is carried out is not in itself as evidence of substantial loss. Thirdly, it was apparent from the averments made by the Applicant in his Supporting Affidavit that he is unwilling to provide security for the issuance of the stay orders sought and therefore the instant motion is purely aimed at delaying the Defendants' entitlement to costs.
12. He contends that the Applicant is burdened to demonstrate how substantial loss would arise by illustrating that the Defendants would be unable to refund any monies paid to them or that payments



- assessed as costs of the suit would occasion difficulty to the Applicant. The Defendants, by their professional and societal standing, are very capable of refunding the costs should the Applicant be successful in his appeal.
13. He contends that it is trite law founded on the provisions of Article 162 of the *Constitution* of Kenya and Section 12(1) of the *Employment and Labour Relations Court Act*, that the Employment and Labour Relations Court has exclusive jurisdiction to hear and determine all claims arising out of an employment relationship. This position remains the law to date and the intended appeal would thus not raise reasonably arguable points for determination by the appellate court.
 14. He therefore contends that the Applicant's Notice of Motion Application dated 10th February 2025 lacks merit and should be dismissed in its entirety.
 15. The matter came up for inter partes hearing and this court directed the parties to file submissions.
 16. The plaintiff/applicant submitted reiterated that this matter having gone on appeal, there is likely to be either additional costs against the Applicant if the appeal is lost, or the Applicant may be discharged from the burden of payment of costs if it succeeds and cited the case of Patrick Wafula Kuloba v Director/Chief Executive Officer, Kenya Industrial Research Research & Development Institute [2021] KEELRC 1223 (KLR) where the Court granted stay of taxation proceedings commenced by the decree holder pending the determination of an appeal that had been lodged. In allowing the application for stay of taxation, the Court held: "It therefore makes judicial sense to avoid a situation where the taxation will eventually have to be repeated or become redundant depending on the outcome of the appeal. It is for the foregoing reasons that I find that the application is merited and grant orders prayed for in the application."
 17. At the time of writing this ruling the defendant/respondent had not yet uploaded their submissions on the Case Tracking System.
 18. I have considered the pleadings and submissions by both parties and the issue (s) for determination are whether to grant an order of stay of taxation proceedings in this matter pending the filing, hearing and determination of Applicant's Intended Appeal to the Court of Appeal.
 19. On the issue of whether to grant a stay of taxation proceedings in this matter pending the hearing and the determination of the applicant's intended appeal to the Court of Appeal. On one part the applicant argues that the matter having gone on appeal, there is likely to be either additional costs against him if the appeal is lost, or he may be discharged from the burden of payment of costs if he succeeds considering the peculiar circumstances of the case and its unique requirements discretion ought to be exercised in favour of granting the reliefs sought. On the other part, the respondent contended that the ruling of 30th October 2024 is a negative order incapable of being stayed, this court vide its ruling of 30th October 2024, struck out the Applicant's suit for want of jurisdiction and awarded costs to the Defendants. There is nothing that the Court ordered to be done or restrained from being done. There is therefore no reasonable basis for the Application. The respondent is adamant that the above notwithstanding, the applicant has failed to satisfy the threshold for stay of execution as provided under Order 42 Rule 6(2) of the Civil Procedure Rules 2010. This court having considered the parties' respective cases finds that the import of the ruling of this court dated 30th October, 2024 was that if the applicant's suit was struck out for want of jurisdiction and costs awarded to the Defendants, there were no positive orders capable of being stayed. In Cooperative Bank Limited v Banking Insurance & Finance Union Kenya [2015] eKLR, the Court of Appeal explained that: "An order of stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposed the existence of a situation to stay – called a "positive order"- either an order that has not been complied with or has



partly been complied with... The court has identified negative orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order.”

20. The upshot is that there is no merit in the application. The same is thereby dismissed with no orders as to costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 27TH DAY MARCH, 2025.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Miss Onyango for the Defendant

Kipkorir for the Plaintiff

