



**Kamau v Athi Water Works Development Agency (Environment and Land Appeal E064 of 2021) [2023] KEELC 16057 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16057 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E064 OF 2021  
OA ANGOTE, J  
FEBRUARY 23, 2023**

**BETWEEN**

**SAMUEL MACHARIA KAMAU ..... APPELLANT**

**AND**

**ATHI WATER WORKS DEVELOPMENT AGENCY ..... RESPONDENT**

**RULING**

1. In the notice of motion dated May 25, 2022, the appellant has sought for the following orders:
  - a. That pending the hearing and determination of this appeal, this honourable court be pleased to grant a stay of execution of the judgement/ decree of the subordinate court in Nairobi CMCC No 2506 of 2019.
  - b. That the costs of this application be in the cause.
2. The grounds of the application, as stated in the application and in the affidavit sworn by Samuel Macharia Kamau in support, are that on August 9, 2021, the subordinate court in Nairobi CMCC No 2506 of 2019 delivered its Judgment dismissing the applicant's suit with costs; that the applicant lodged an appeal against the said decision on September 3, 2021 and that the record of appeal was filed and served on April 28, 2022.
3. The applicant has deposed that he has an arguable appeal with high chances of success against the decision of the trial court, which will be rendered nugatory unless the application is granted; that the appellant stands to suffer substantial loss and prejudice if execution is not stayed as the respondent is in the process of obtaining a certificate of costs and that the application has been brought without unreasonable delay.
4. The respondent opposed the application vide a replying affidavit sworn on June 17, 2022. The respondent's director deposed that the respondent is entitled to costs of defending the subordinate



court suit as decreed by the court; that the merit of the applicant's appeal does not affect the respondent's entitlement to costs; that the applicant's assertions that he would suffer substantial loss has not been demonstrated or supported by evidence and that the respondent is a state agency/ parastatal well capable of reimbursing the costs should the applicant's appeal succeed.

5. It was the respondent's averment that the trial court's judgement is negative in nature and there are no orders to be stayed; that the prayers sought in this matter are incapable of being granted and that this application fails to satisfy the requirements prescribed under order 42 rule 6 of the [Civil Procedure Rules](#) by offering security for the respondent's costs as awarded by the trial court and is fatally defective.
6. It was deposed that the application is an afterthought, as it was filed 9 months and 17 days after the lower court delivered its judgment; that no explanation has been given for this delay and that should this court grant the orders sought, the respondent's costs should be deposited in an interest earning account in the joint names of the parties' advocates. The parties filed submissions which I have considered.

### **Analysis and Determination**

7. Having considered the application, the pleadings and the submissions, the only issue for determination is whether this court should grant to the applicant a stay of execution of the judgement/decree of the subordinate court in Nairobi CMCC No 2506 of 2019, particularly with respect to the trial court's orders on costs.
8. Order 42 rule 6 of the [Civil Procedure Rules](#) provides that this court may grant a stay of execution of a decree upon satisfaction of the elements of just cause, substantial loss and security. The said provision provides as follows:

“(1) 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 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.”

9. In [Butt v Rent Restriction Tribunal](#) [1979] eKLR, the Court of Appeal held that a relief of stay of execution is a discretionary remedy:-

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying



execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459.”

10. The applicant in this matter has sought to stay the decree of the lower court, particularly with respect to costs, which were accorded to the respondent herein. The respondent has argued that the decree of the lower court cannot be stayed as it constitutes negative orders. The Court of Appeal in *Kanwal Srjit Singh Dhiman v Keshavji Jivraj Shah* [2008] eKLR has however held that where a court issues negative orders, the same are incapable of execution:

“The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & others* [1976] KLR 63 at page 66 paragraph C).”

11. The Court of Appeal for *East Africa in Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR also found that where a trial court has dismissed the suit with costs, any execution can only be in respect of costs. Further in *Governors Ballon Safaris Ltd v Skyship Company Ltd & another* [2015] eKLR, the Court of Appeal held that a court has jurisdiction to grant orders of stay, or injunction as the case may be in order to ensure a just and proportionate resolution of an appeal.

12. The applicant’s claim is that they stand to suffer loss if taxation proceedings in the lower court are allowed to proceed. In the case of *Deposit Protection Fund v Rosaline Njeri Macharia* [2006] eKLR, the court drew a distinction between stay of taxation proceedings as against stay of a certificate of costs and opined that no loss would be occasioned by taxation proceedings. The court held as follows:

“To my mind, the taxation of a bill of costs cannot occasion any loss to the person against whom it is taxed. Therefore, the issue of taxation causing substantial loss does not even arise. The only effect of taxing a bill of costs is the ascertainment of the quantum of costs payable by one person to another. Thereafter, the party whose costs had been ascertained could take out execution proceedings. The applicant did not, in my considered view, make out a case for stay of proceedings, and in particular a stay of the taxation of the defendants’ bills of costs. Furthermore, if the learned taxing officer were to proceed to tax the defendants’ bills of costs, the sums would be ascertained, and that would be the foundation upon which this court could base the size of the security which the applicant would need to raise, if the court did order that there be a stay of execution.”

13. In *Pius Musimba Muasya & 15; others v Onesmus Ndolo Ngeta & 3 others* [2022] eKLR this court drew further distinction between taxation proceedings and an appeal against the substantive decree of a court as follows:

“From the facts as presented, it is my considered view that the taxation of the bill of costs is not prejudicial to the applicants as it is thereafter, that they can proceed to apply for stay of execution if the respondents seek to execute the decree. Further, the Court of Appeal has not granted a stay of execution of the judgement in which the respondents were awarded costs. It is trite that it is only through taxation that the costs can be ascertained. To my mind, I am



of the view that taxation proceedings are independent as this is the mandate of the taxing officer and in this instance, the bill of costs is not subject of appeal.”

14. This court must agree with these decisions. At this point, this court cannot issue stay orders as the taxation proceedings are aimed at ascertaining the costs that would be owed to the respondent based on the suit that was heard before the trial court. This process will not be affected nor will it affect the intended appeal. The applicant may thereafter seek to stay the product of this process, the certificate of costs, and the respondent may claim for a deposit of security based on such certificate.
15. Having found that the applicant has not demonstrated the substantial loss they stand to suffer should the taxation proceedings in this matter be stayed, this court must find that the application dated May 25, 2022 lacks merit.
16. The application dated May 25, 2022 is dismissed with costs.

**Dated, signed and delivered virtually in Nairobi this 23<sup>rd</sup> day of February, 2023.**

**O. A. Angote**

**Judge**

**In the presence of;**

Mr. Onyanje for Respondent

No appearance for Appellant

Court Assistant - June

