



RA (Suing as mother and next friend of SOO) & another v Holy Ghost Coptic Church of Africa & 6 others; National Gender and Equality Commission & another (Interested Parties) (Constitutional Petition 23 of 2018) [2023] KEHC 3981 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION 23 OF 2018**

JN KAMAU, J

APRIL 27, 2023

**IN THE MATTER OF THE ENFORCEMENT OF BILL OF RIGHTS UNDER
ARTICLE 22(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ARTICLES 22(2) (A) AND (C), 23 (1) (3), 165 (3)
(B), 258 AND 260 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLES
2(1), 2(5), 2(6), 10(1), (2) (B), 19 (1), (2) (3) (A), 20 (1), (2), 21 (1)
(2)(3)(4), 25(A), 26(1), 28, 29(A)(C)(D)(F), 43(1)(A)(F) AND 54 (1)
(A) OF THE CONSTITUTION**

AND

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLES
10,14,15,17,19,22,24 AND 25 OF THE CONVENTION OF THE
RIGHTS OF PERSONS WITH DISABILITIES (CRPD)**

AND

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLES 4,
5, 16(1) AND 28 OF THE AFRICAN CHARTER ON HUMAN AND
PEOPLE'S RIGHTS (BANJUL CHARTER)**

AND

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLES 16
OF THE INTERNATIONAL CONVENTION AGAINST TORTURE AND**



**OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR
PUNISHMENT (CAT)**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2
(1), 6(1) AND 7 OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS (ICCPR)**

AND

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLES
2(1) AND 12 (1) & (2)(D) OF THE INTERNATIONAL COVENANT ON
ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR)**

AND

**IN THE MATTER OF THE MENTAL HEALTH ACT CAP 248 LAWS OF
KENYA**

PETITION NO 23 OF 2018 1

AND

**IN THE MATTER OF SECTIONS 2, 3(A)(B)(D), 4(A)(C)(D), 5(1)(2),
15(1)(A)(C)(F)(P)(Q), 20 (A)(B)(D)(G)(M) & (N), 22 AND 73 OF THE
HEALTH ACT NO 21 OF 2017**

BETWEEN

BETWEEN

RA (SUING AS MOTHER AND NEXT FRIEND OF SOO) 1ST PETITIONER
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS 2ND PETITIONER

AND

HOLY GHOST COPTIC CHURCH OF AFRICA 1ST RESPONDENT
JOHN PESA 2ND RESPONDENT
WILLY OJWANG' 3RD RESPONDENT
COUNTY GOVERNMENT OF KISUMU 4TH RESPONDENT
**KISUMU COUNTY EXECUTIVE COMMITTEE MEMBER FOR HEALTH &
SANITATION 5TH RESPONDENT**
CABINET SECRETARY, MINISTRY OF HEALTH 6TH RESPONDENT
ATTORNEY GENERAL 7TH RESPONDENT

AND

NATIONAL GENDER AND EQUALITY COMMISSION INTERESTED PARTY



NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES INTERESTED PARTY

RULING

Introduction

1. In their Notice of Motion dated 16th March 2022 and filed on 4th April 2022, the 1st and 2nd Respondents herein sought an order for stay of execution of the decree herein pending the hearing and determination of the intended appeal.
2. The 2nd Respondent swore an Affidavit on 16th March 2022 in support of the said application. The Respondents averred that this matter was heard and finally determined *vide* a Judgment delivered on 22nd October 2020. They asserted that being aggrieved by the aforesaid Judgment, they had timeously filed and served a Notice of Appeal.
3. It was their contention that they had written to their former advocate to cease acting from the matter and have the file and pleadings transferred to their current advocate but the said advocate took a whole year to respond. They blamed their former advocates for the inordinate delay in bringing this application and filing of the Memorandum of Appeal which mistake they contended should not be visited upon them.
4. They further averred that it was in the interest of justice that the orders sought herein be granted to avert the possibility of exposing them to a costly and disruptive execution process. They pointed out that they had an arguable appeal that raised serious triable issues thus the need to allow the determination of the appeal on merit. They added that their application herein had been made timeously and in good faith and that the Petitioners and other Respondents would not suffer prejudice for which costs cannot compensate.
5. On 13th April 2022, the Petitioners filed Grounds of Opposition dated 12th April 2022. They contended that the 1st and 2nd Respondents' application did not meet the threshold for grant of the orders sought and that it was premature as no decree had been extracted or issued. They asserted that there existed no appeal that was capable of being stayed and that the said application had been brought under the wrong provisions of the law. It was their case that the application herein was wholly unmerited.
6. The 1st and 2nd Respondents' Written Submissions were dated and filed on 18th November 2022 while those of the Petitioners were dated and filed on 29th November 2022. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

7. The 1st and 2nd Respondents placed reliance on the case of *Mbaki & Others vs Macharia & Another* [2005] 2 EA 206 where it was held that the right to a hearing was not only constitutionally entrenched but that it was also the cornerstone of the rule of law. They invoked Order 42 Rule 6 of the [Civil Procedure Rules](#) 2010 and further relied on the case of *Butt vs Rent Restriction Tribunal* (1982) KLR 417 where it was held that the power of the court to grant or refuse an application for stay of execution was a discretionary power and that it should be exercised in such a way so as not to prevent an appeal.



8. They asserted that their intended appeal raised pertinent issues of both law and fact and had overwhelming chances of success. They pointed out that unless this court granted them the orders they had sought, their appeal would be rendered nugatory.
9. They sought the court to grant leave to file appeal out of time and argued that the delay was not inordinate. In this regard, they relied on Sections 3A and 3B of the *Appellate Jurisdiction Act* and Rule 4 of the *Court of Appeal Rules*, 2022 and cited the case of *Edith Gichungu Koine vs Stephen Njagi Thoitbi* [2014]eKLR where it was held that whenever an application for extension of time was before a court, the court ought to be guided by consideration of factors including but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application was granted and whether the matter raised issues of public importance amongst others.
10. They were categorical that the duty imposed on courts was to ensure the just, expeditious, proportionate and affordable resolution of disputes. In this regard, they relied on the case of *Kamlesh Masukhalal Damki Patni vs Director of Public Prosecution & 3 Others* [2015] eKLR where it was held that courts exist for the purpose of dispensing justice. They added that courts should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint.
11. They placed reliance on Articles 48 and 50(1) of the *Constitution* of Kenya, 2010 and argued that every person had a right to have any dispute that could be resolved by the application of law decided in a fair and public hearing before a court or another independent and impartial body or tribunal. They urged the court to extend the time for them to file their appeal out of time as stipulated in Section 79 G of the *Civil Procedure Act*.
12. They further invoked Section 27 of the *Civil Procedure Act* and urged the court to order that the costs herein be in the cause.
13. On their part, the Petitioners submitted that after the Judgment herein was delivered, the 1st and 2nd Respondents filed a Notice of Appeal on 5th November 2020 pursuant to Rule 74 of the *Court of Appeal Rules*. They asserted that on 23rd February 2022, they presented their party and party Bill of Costs for taxation. They pointed out that on 25th February 2022, they effected service of Taxation Notice upon the 1st and 2nd Respondents' Advocates showing that the taxation of the said Bill was going to be on 12th April 2022. It was their contention that it was the aforesaid Taxation Notice that provoked the present application.
14. It was their submission that there was no appeal capable of being stayed for the reasons that once the 1st and 2nd Respondents filed their Notice of Appeal on 6th November 2020, it was incumbent that a record of appeal be filed within sixty (60) days but that to date, none had been filed. They added that there was also no evidence to show that a request for typed proceedings had been sought.
15. They asserted that they had not extracted the Decree that could trigger the provisions of Order 21 Rule 8 of the *Civil Procedure Rules* as they were awaiting the Party & Party Costs to be taxed. They thus termed the present application was premature and misconceived. They further contended that there was no memorandum of appeal to guide this court on where there existed an arguable appeal and that more importantly such a memorandum of appeal could only be presented to the *Court of Appeal Rules* and not this court.
16. It was their case that the delay of fourteen (14) months was inordinate in the circumstances of this case, the 1st and 2nd Respondents would not suffer any prejudice if taxation was allowed. In this respect, they relied on the case of *Deposit Protection Fund vs Rosaline Njeri Macharia* [2006] eKLR where it was held that the taxation of a bill of costs could not occasion any loss to the person against whom it was



- taxed as the only effect of taxing a bill of costs was the ascertainment of the quantum of costs payable by one person to another.
17. They were emphatic that the 1st and 2nd Respondents had not demonstrated the substantial loss they would suffer if taxation was allowed to go on. They also contended that this court was functus officio and had no jurisdiction to entertain the instant application as such jurisdiction was vested in the Court of Appeal Rule 5 (2)(b) of the Court of Appeal Rules. They urged the court to dismiss the same with costs.
 18. Right from the onset, this court noted that although the 1st and 2nd Respondents sought for the extension of time to file their appeal in their submissions, they did not plead for the same in their application herein. It is trite law that parties are bound by their pleadings. The only prayer they sought was the orders for stay pending their intended appeal.
 19. Be that as it may, the question of whether there was inordinate delay in filing the appeal and/or application seeking leave to file an appeal out of time were matters that were within the purview of the Court of Appeal. This court therefore restricted its determination on the said prayer for orders of stay of execution pending hearing and determination of the intended appeal.
 20. Order 42 Rule 6 of the Civil Procedure Rules, 2010 empowers a court to stay execution of its own orders or an appeal court to stay orders from the court whose decision was being appealed from.
 21. Under the said Order 42 Rule 6 of the Civil Procedure Rules, an applicant had to demonstrate the following:-
 - a. That substantial loss may result unless the order is made.
 - a. That the application has been made without unreasonable delay.
 - b. Such security as the court orders for the due performance of the decree has been given by the applicant.
 22. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
 23. As the 1st and 2nd Respondent had since filed a Notice of Appeal, it was in the interest of justice that this court balanced their right of being heard on appeal and the Petitioners' right to enjoy her fruits of judgment by granting an order for stay of execution so that the 1st and 2nd Respondents' Appeal could be heard on merit.
 24. Notably, on 22nd October 2020, Cherere J entered Judgment in favour of the Petitioners in the sum of Kshs 500,000/= by way of general damages payable by the 1st, 2nd and 3rd Respondents jointly and severally together with costs of the Petition to the 1st Petitioner plus interest at court rates.
 25. None of the parties submitted on whether or not the 1st and 2nd Respondents were a people of means. The decretal sum of Kshs 500,000/= was colossal. In the case of Dr G. N. Muema t/a Mt. View Maternity & Nursing Home vs Miriam Maalim Bisbar & Another (2018) eKLR, this very court held that the rigours of recovering sums of money could amount to substantial loss because of the resources that would be put in recovering the same.
 26. It was for that reason that this court found and held that the 1st and 2nd Respondents had satisfied the first condition of being granted an order for stay of execution pending appeal.
 27. The Judgment the 1st and 2nd Respondent wished to appeal against was delivered on 22nd October 2020. The present application was filed on 4th April 2022. This court found and held that a period of one (1)



year and six (6) months was not inordinate. There was therefore no delay in filing the said application. The court hence found and held that the 1st and 2nd Respondents had satisfied the second condition for being granted an order of stay of execution pending appeal.

28. As there was no evidence to show that the Petitioners would be able to refund the decretal amount and costs in the event the 1st and 2nd Respondents paid them the said amount and they were successful on appeal, it would be prudent that the entire costs be deposited in a joint interest account in the joint names of advocates of both parties.
29. Having said so, as the judgment was delivered by a court of equal and competent jurisdiction such as this one and there was likelihood of execution, this court took the view that it was more prudent that the Court of Appeal considers whether or not the 1st and 2nd Respondents had demonstrated that they had met the threshold for being granted an order for stay of execution pending appeal under Rule 5(2) (b) of the *Court of Appeal Rules*, 2010 that provides as follows:-

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

Disposition

30. For the foregoing reasons, the upshot of this court’s Ruling was that the 1st and 2nd Respondents’ Notice of Motion application dated 16th March 2022 and filed on 4th April 2022 was merited and the same be and is hereby allowed in terms of Prayer No (b) therein on the following conditions:-
1. That there shall be a stay of execution of the Judgment that was delivered by Cherere J on 22nd October 2022 in Kisumu Constitutional Petition No 23 of 2018 for fourteen (14) days from the date of this Ruling pending a formal application to the Court of Appeal for stay of execution pending the hearing and determination of the 1st and 2nd Respondents’ intended appeal.
 2. Costs of the application herein shall be in the cause.
31. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF APRIL 2023

M.S SHARIFF

JUDGE

