



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 607 OF 2014

IN THE MATTER OF ARTICLES 2, 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS UNDER ARTICLES 27, 28, 47 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 41, AND 63 OF THE UNIVERSITIES ACT NO. 42 OF 2012

AND

**IN THE MATTER OF SECTION 6(1) (V) (W) (X), (2) (3) AND 9(1) A OF THE CHARTER FOR THE TECHNICAL
UNIVERSITY OF KENYA**

BETWEEN

CHARLES KAINDO KURIA & 20 OTHERS.....PETITIONERS/APPLICANTS

VERSUS

TECHNICAL UNIVERSITY OF KENYA.....RESPONDENT

RULING

APPLICATION

1. The Petitioners/Applicants through a Notice of Motion dated 14^h February 2020 seek the following orders:-

a) That this Honourable Court be pleased to set aside the Orders issued on 23rd January 2020 holding the taxation proceedings in abeyance pending Appeal.

b) That the costs of this Application be provided for.

2. The Applicants application is premise on the ground on the face of the application and further supported by Supporting Affidavit of Eve Vivian Ouko sown on 14th February 2020.

3. The Petitioners/Applicants filed a Petition dated 10th December 2014. The Petition upon being heard judgment was delivered on 2nd May 2019 in the following terms:-

a) Declaratory Orders be and are hereby issued that the rights and freedoms of the Petitioners under Articles 28 and 47 of the Constitution have been violated.

b) An Order be and is hereby issued granting each Petitioner herein an award of Kshs.148,764/- as compensation for violation of their bill of rights under Articles 28 and 47 of the Constitution.

c) Costs of the Petition to the Petitioners to be paid by the Respondents.

4. The Petitioners subsequently served a Notice of entry of Judgment on the Respondents and therefore proceeded to extract a decree which was issued on 6th August 2019 for purposes of execution. The Petitioners/ Applicants proceeded to file Bill of Costs dated 1st October 2019 and mater went for taxation before the Deputy Registrar on 20th January 2020 whereupon the Deputy Registrar made the following orders: -

a) That the taxation proceedings be held in abeyance in the meantime pending Appeal.

b) That the Parties shall be at liberty to take a date subsequent to the decision of the Court of Appeal.

5. The Petitioners/Applicants being aggrieved by the Deputy Registrar's decision as therein there was no stay of execution at the Court of Appeal, filed this application to set aside the Honourable Deputy Registrar's orders.

RESPONDENT'S RESPONSE

6. The Respondent is opposed to the Petitioners/Applicants Application and in doing so rely on the Replying Affidavit sworn by Okinyo Byron Barrack on 14th October 2020.

7. The Respondent contend that it filed a Notice of Appeal, record of Appeal and an Application for Stay of Execution; annexure O.B.B.1, O.B.B.2 and O.B.B.3. O.B.B.1 is a notice of Appeal, O.B.B.2 is an application for Stay of Execution of the Judgment delivered and dated 2nd May 2019 and 6th August 2019 respectively pending the hearing and determination of Appeal and O.B.B.3 is Record of Appeal dated 23rd September 2019.

8. The Respondent urge that when the matter came up before the Deputy Registrar, the Respondent Advocate informed the Court of the filing of the aforesaid documents and never mislead the Court.

9. The Respondent Counsel contend that the setting aside of the orders is an afterthought as the orders granted were made in the presence of the Petitioners Applicants' Counsel who did not oppose the same.

ANALYSIS AND DETERMINATION

10. I have carefully considered the Petitioners/Applicants' Application, the Respondents Replying Affidavit, Counsel rival submissions as well as the Deputy Registrar's order dated 20/1/2020 and from the same the issues arising for consideration can be summed as follows:-

a) Whether there was an order of stay of execution pending Appeal?

b) Whether Taxation should still be held in abeyance without orders of stay of the execution?

A. WHETHER THERE WAS AN ORDER OF STAY OF EXECUTION PENDING APPEAL?

11. The proceedings of 20/1/2020 before Hon. C. Kithinji Deputy Registrar show that the matter was coming up for taxation on the said date, when the Respondent's Counsel informed the Court the matter was pending at Court of Appeal and he requested that Petitioners do file response as they had been served and that the matter do proceed by way of written submissions. The Petitioners Counsel acknowledged service with record of Appeal and agreed the taxation proceed by way of written submissions. The record do not reflect there being an application for stay of the taxation pending hearing of the appeal or pending execution, nor is there mention of any stay orders having been sought and issued as per the Court record.

12. ***Order 42 Rule 6 of the Civil Procedure Rules*** that deals with stay of the execution is explicit and provides that:-

“6(1). No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

13. ***Order 42(6)(5)*** clearly provides that application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

14. In the instant Petition Judgment date was set down for 2nd May 2019 in presence of all counsel for respective parties. The Judgement was delivered on 2nd May 2020 in the presence of the Advocates of the petitioners and in the absence of the Advocates of the Respondents. This was the first opportunity that the Respondent had to informally apply for stay of execution but that was not the case since there was no appearance on their behalf.

15. It is not in dispute that Notice of entry of Judgment and drafting of decree were subsequently duly served upon Respondent and its Advocates but the Respondent still did not file an Application for stay of execution at the high Court or at the Court of Appeal. The Respondent instead proceeded to serve the Petitioners with the Notice of Appeal which was lodged on 24th May 2019 (marked as Exhibit

“TUK 4” in the Petitioners’ Supporting Affidavit) and the Record of Appeal which was filed on 3rd December 2019 (Marked as Exhibit “O.BB3” in the Respondent’s Replying Affidavit).

16. When the Petitioners set the matter down for taxation there was no order for stay of execution, even when the Deputy Registrar purported to put taxation proceedings in abeyance pending the appeal nor had the Respondent served the petitioners with an application for stay of execution filed at the Court of Appeal. The application for stay at Court of Appeal was filed subsequently thus on 21st February 2020, a month after the Taxation proceedings before the Deputy Registrar, which application the Petitioners contend was not served upon them till 26th October 2020.

17. In the instant application, there is no dispute that the Respondent lodged an Appeal before the Court of Appeal and it is to this fact that the Petitioners’ Advocate assented to when the matter came up for taxation and not to the fact that there was a stay of execution pending Appeal at the Court of Appeal because the same had not yet been filed. The same has been admitted by the Respondent in paragraph 10 of its Replying Affidavit.

18. From clear pleadings and submissions by both counsel, it is not in dispute that there was no order staying execution pending appeal. **Order 42(6) of the Civil Procedure Rules** explicitly provides no Appeal or Second appeal shall operate as a stay of execution or proceedings under 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. In the instant Petition I find that the Respondent has not demonstrated or shown that there were orders for stay of execution either at the High Court or the Court of Appeal. I find that there having no order for stay of the execution, the taxation of the petitioners/Applicants’ Bill of Costs should have proceeded before the Deputy Registrar and the Deputy Registrar ought not have held the taxation proceedings in abeyance in absence of an application by any of the Parties and in absence of Court’s Order staying execution or taxation pending the appeal.

B. WHETHER TAXATION SHOULD STILL BE HELD IN ABEYANCE WITHOUT ORDERS OF STAY OF THE EXECUTION?

19. On the above issue this Court has to draw guidance from various Sections of the Civil Procedure Act. **Section 1A of the Civil Procedure Act** provides that the Court shall, in the exercise of its powers seek to give effect to the overriding objective and that for purpose of furthering the overriding objective, the Court shall handle all matters presented before it for the purpose of attaining the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and the use of suitable technology. Under **Section 1B of Civil Procedure Act**.

20. Further **Section 3A of the Act** vests the Court with the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It is on this basis that the Petitioners appeal to this Honourable Court to exercise its inherent jurisdiction to set aside the orders holding taxation in abeyance for the ends of justice to be met since there is no stay of execution to warrant the same.

21. The Petitioners/Applicants to buttress the above proposition seek to rely in the case of **Colombus Opio Adeti v Alexander Oyiolo Ondongo [2019] eKLR** wherein the Court relied on the following principles to set aside Orders:-

“i) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just.

ii) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who had deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

iii) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some mater and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice, Mbogo vs Shah [1968] EA 93.”

22. In the proceedings set for 20th January 2020 before the Deputy Registrar, parties clearly informed the Deputy Registrar that the matter was coming up for taxation on 20th January 2020 and both parties were ready to proceed with the same. The Respondent notified the Deputy Registrar that the matter was before the Court of Appeal, not to object to the taxation but to clarify the position of the suit which was, that they had lodged an Appeal. It is noted from the proceedings that the Deputy Registrar was not moved to grant orders of stay of the proceedings. However the Deputy Registrar on her own motion proceeded to issue orders not sought by any party and in so doing arrived at a wrong decision and as a result, there has been an injustice to the Petitioners which should be remedied. The petitioners further rely on the case of **GTK Advocates Baringo county Government [2017] eKLR** wherein the Court determined as follows: **the general principles governing interference with the exercise of the taxing master’s discretion were authoritatively stated by the South African Court in Visser vs Gubb [3]** as follows:-

“The Court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue... The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a

review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

23. Having been established that there was no order of stay of execution when the Deputy Registrar granted an order directing that taxation proceedings be held in abeyance pending the appeal, I find that it is improper for the Respondent to be allowed to continue to unfairly benefit from erroneous direction by the Deputy Registrar. I find that the role of an Advocate as an officer of the Court is clearly spelt out which is to help guide the courts in making their determination by presenting the right facts before it. The Respondent failed the Honourable Registrar in this aspect but this Honourable Court has the discretion, and rightfully so, to ensure that justice is done to all parties especially where there is an apparent error which can be rectified.

24. It is interesting to note that the Respondent contention that the application should be dismissed since it believes that the appeal will succeed and that the Petitioners will not be able to refund the money paid as damages, is presumptuous. This Honourable Court should not dismiss the Application on an assumption and / or speculation which is contrary to the procedure laid down in determination of applications. Furthermore, the Respondent is asking this Honourable Court to venture into the merits of the appeal at this stage which is premature since the Court of Appeal will determine the same and grant the stay of execution if necessary. I find that the Respondent will not suffer harm or prejudice if the orders are set aside since there is nothing stopping the Respondent from recovering its costs if the Appeal is successful. The Respondent is questioning the financial position of the Petitioners when it is duty bound to furnish the Court with security of costs to even obtain orders for the stay of execution. I note as of now there is no application for stay of execution for consideration by this Court. Let the issue of the application for stay of execution be determined where it is still pending by that Court. Let the issue of the application of stay be canvassed before the Court before which the application is pending rather than dragging this Court to a matter not before it.

25. In view of the conclusion that I have come to on the issues set herein above for determination, I find that the Petitioners/Applicants application dated 14th February 2020 meritorious and I proceed to make the following orders:-

a) The orders issued on 20th January 2020 holding the taxation proceedings in abeyance pending the appeal be and are hereby set aside. The Petitioners /Applicants Bill of Costs do proceed to taxation by another Deputy Registrar of this Court.

b) Costs of the application to the Petitioners/Applicants.

Dated and Signed at Nairobi on this 18th day of February, 2021.

Delivered electronically at Nairobi on this 25th day of February, 2021.

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J. A. MAKAU

JUDGE