



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 574 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS..2ND RESPONDENT

AND

AGNES KAGURE KARIUKI.....INTERESTED PARTY

EX PARTE APPLICANTS:

1. GUY SPENCER ELMS

2. RAFFMAN DHANJI ELMS & VIRDEE ADVOCATES

RULING

1. This ruling is on a Notice of Motion application dated 16th July, 2020 filed by the *ex parte* Applicants herein, Guy Spencer Elms and Raffman Dhanji Elms & Virdee Advocates (hereinafter referred to as “the Applicants”). The said Applicants are seeking orders that pending the hearing and determination of the Appeal in Nairobi Court of Appeal Civil Appeal No. 226/2017 against the judgment and decree of this Court (Odunga J.) issued on 6th July 2017 and 20th July 2017 respectively, there be an order of stay of taxation proceedings pursuant or in execution of the said judgment and decree awarding costs of the *ex parte* Applicants’ Notice of Motion dated 1st December 2016, and all consequential proceedings arising therefrom.

2. The application is supported by an affidavit sworn on 16th July, 2020 by the 1st Applicant. The Applicants aver that on 6th June, 2017, a judgment and decree dismissing their application for judicial review orders against the 1st and 2nd Respondents with costs to the Respondents was delivered herein. Further, that on 14th June, 2017 and 12th July, 2017 respectively, the Applicants successfully lodged a Notice of Appeal and an Appeal respectively against the said entire judgment and decree of in the Court of Appeal in Civil Appeal No. 226/2017 at Nairobi. The Applicants annexed a copy of the Notice of Appeal and the Amended Memorandum of Appeal amended and filed on 16th June 2017 and 9th October 2017 respectively.

3. According to the Applicants, on 20th September, 2017, the Court of Appeal issued an Order directing that the Appeal herein be fast-tracked following a Consent Order of parties, and that on 7/12/2017 and 30/07/2018, the said Appeal was fixed for hearing but taken out of the cause list due to absence of a bench or Judges on said dates. Further, that they had been following up on hearing dates at the Court of Appeal but was advised that there’s shortage of Judges which fact has delayed hearing of the appeal. The Applicants also contended that on 20th March, 2019, the 1st and 2nd Respondents successfully applied for the termination/withdrawal of criminal charges against the 1st Applicant in **Nbi, Criminal Case No. 1537/2017 - R vs Guy Spencer Elms** for lack of evidence to sustain the charges, and they annexed a copy of the ruling dated 20th March, 2019. However, that despite the pending Appeal, the Interested Party has filed a Bill of Costs against the Applicants in execution of the subject judgment and decree under appeal.

4. It is averred by the Applicants that if their application is not granted, the pending Appeal will be rendered nugatory and they will suffer

irreparable loss and miscarriage of justice in the event that the appeal is successful as may not recover the costs from the Interested Party whose means and assets are unknown. Further, that following the withdrawal of the criminal charges against the 1st Applicant, the only pending executable issue in the impugned judgment and decree is costs which is now subject of appeal. It was further averred that the instant application intends to save judicial time and resources which may be wasted on taxation proceedings yet the judgment and decree forming basis thereof may be set aside. In addition, that there is no prejudice in granting stay of taxation proceedings and consequential proceedings as the same may resume if the appeal is unsuccessful.

5. Lastly, the Applicants contended that this Court has jurisdiction to stay any further proceedings relating to or arising from the impugned judgment under appeal at any time, and prayed that the application filed herewith be granted in the interest of justice. It was also stated that the application is not culpable of unreasonable delay and that the Applicants filed a similar application in the Court of Appeal in 6th May, 2020 but have to date not obtained a date due to shortage of Judges.

6. The Respondents and Interested Party did not file any responses to the application.

The Determination

7. The Applicants subsequently filed submissions dated 10th August, 2020 in support of the instant application. They submitted that the application is premised upon Order 42 Rule 6(1) of the Civil Procedure Rules that deals with stay in case of appeal. Reliance was placed on the High Court decision in **Ezekiel Mule Musembi vs H. Young & Company (E.A) Limited [2019] eKLR**, which confirmed that by virtue of Order 42 Rule 6 of the Civil Procedure Rules, this Court had jurisdiction to stay proceedings pending appeal.

8. The Applicants also elucidated the conditions that are required to be met by Order 42 Rule 6, as explained in **Elena Doudoladova Korir v Kenyatta University [2014] e KLR**. The conditions stated in the said case were that an application for stay of execution pending appeal is to be made timeously; the applicant must establish a sufficient cause; the court must be satisfied that substantial loss would ensue from a refusal to grant stay; and the applicant must furnish security. Further, the Applicants cited the decisions in **Amal Hauliers Limited vs Abdulnasir Abukar Hassan [2017] eKLR** and **Butt v Rent Restriction Tribunal** on the applicable principles in deciding whether or not to grant stay of execution pending appeal.

9. The Applicants submitted in great detail as regards their satisfaction of the conditions for stay of execution pending appeal. In summary the Applicants contend that they have sufficient cause before the court that meets the criteria for a grant of stay of the taxation proceedings pending appeal, as their appeal filed on 12th July, 2017 has a high chance of success as the decision by this Court will be set aside since the office of the Director of Public Prosecutions has withdrawn the cases that necessitated the appeal for lack of evidence against the Applicants. It was also submitted that the Applicants will suffer irreparable loss and miscarriage of justice in the event stay of execution is not granted and the appeal succeeds as he may not recover costs from the Interested Party whose means and assets are unknown, and the Applicants relied on the case of **Ahmed Mohammed Dagane v County Service Board Garissa County [2019] eKLR** for this position.

10. On the furnishing of security, the Applicants submitted that the Bill of Costs filed by the Interested Party is yet to be taxed as such the amount has not been ascertained. However, that in any event, the Applicants are willing to abide by any decision of this Court in terms of deposit of security for due performance of the decree. The Applicants further submitted that they are willing, if the court deems fit, to deposit reasonable amount part of the sums claimed either in Court or in joint name of the Interested Party and Claimant in a joint interest earning account.

11. Lastly, the Applicants submitted that there had been no undue delay as they received the Bill of Costs on 24th April, 2019, and filed the instant application on 16th July, 2020 when it was served with the taxation Notice fixing the said Bill of Costs on 20th July, 2020. The Applicants submitted that their application for stay in the Court of Appeal has not be given a date due to the shortage of Court of Appeal Judges and the current backlog which the Applicants invited this Court to take judicial notice of, and hence their resort to this Court for redress.

12. I have considered the arguments by the Applicants, and note that the main issue for determination is whether the Applicants merit the orders of stay sought. The Applicants have submitted that the applicable law is Order 42 Rule 6(1) of the Civil Procedure Rules, which 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.

13. The Applicants have stated that they have appealed the decree or orders arising from the judgment of Odunga J. delivered on 6th June 2017. The taxation proceedings herein are proceedings arising from the orders as regards costs given in the said judgment. Therefore, the

taxation proceedings arising from the said decree and order, and Order 42 Rule 6 of the Civil Procedure Rules and the conditions thereunder as submitted to by the Applicants apply to the said proceedings.

14. I am however not satisfied that the Applicants have satisfied the conditions set out in Order 42 Rule 6 (1) for various reasons. Firstly, the Applicants have not demonstrated the substantial loss that they may suffer if stay of the taxation proceedings is not granted. It is not contested and the Applicants also admit that the said costs awarded in the impugned judgment and decree are yet to be taxed in accordance with the Advocates Remuneration Order, and the Applicants therefore still have an opportunity to raise the issue of their pending appeal in the said taxation proceedings.

15. It is also notable in this regard that under Paragraph 13A of the Advocates Remuneration Order, the taxing officer, for the purposes of any proceedings before him or her relating to taxation, has power and authority to summon and examine witnesses, administer oaths, and direct the production of books, papers and documents and adopt all such other proceedings as may be necessary for determining any matter in dispute before him.

16. Secondly, pursuant to Paragraph 11 of the Advocates Remuneration Order the Applicants still have recourse to file a reference to the High Court once the Taxing Officer makes a determination, including seeking a stay of execution. In addition, there is no evidence provided of any process or threat of execution of the costs that are the subject of the decree and orders appealed from, which would warrant a stay at this stage.

17. Lastly and arising from the foregoing reasons, it is also not possible at this stage for this Court to determine what adequate security, if any, may be furnished by the Applicants to secure due performance of the decree as to costs in the event that their pending appeal is unsuccessful.

18. The Notice of Motion application dated 16th July, 2020 is consequently untenable for being both premature and speculative, and is hereby dismissed with no order as to costs.

19. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF MARCH 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this Ruling was delivered electronically by transmission to the email addresses of the *ex parte* Applicants', Respondents' and Interested Party's Advocates on record.

P. NYAMWEYA

JUDGE