



IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 8 OF 2020

ISAYA OYOO, THE DCIO

NYERI POLICE STATION.....1ST APPELLANT

THE HON.ATTORNEY GENERAL.....2ND APPELLANT

VERSUS

JOSEPH WACHIRA GITAU.....RESPONDENT

RULING

1. The Applicants filed a Notice of Motion under a Certificate of Urgency dated 24th March, 2020; the application was brought under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1 and Order 42 Rule 6 the Civil Procedure Rules and all other enabling provisions of the Law.
2. The Applicants prayed for the following Orders.
 - (i) Spent;
 - (ii) Spent;
 - (iii) That this Honorable Court upon inter parte hearing do order that there be a Stay of Execution of the Decree of the lower court delivered on 21/02/2020 pending the hearing and final determination of the appeal;
 - (iv) Costs of the application do abide the outcome of the appeal.

3. The Applicants relied on the grounds on the face of the application and on the Supporting Affidavit made by Muthami George Nderitudated the 24/03/2020; in response to the application the respondent filed Grounds of Opposition dated the 4/05/2020;

The parties consented to canvassing the application by way of filing and exchanging written submissions; Hereunder is a summary of the rival submissions.

APPLICANTS' SUBMISSIONS

4. The applicants submitted that the impugned judgment was delivered on **21/02/2020** and immediately after delivery and the applicants being keen in obtaining stay orders filed the instant application; which they submit was brought without unreasonable delay.
5. The applicants sought an order for stay of execution on the grounds that they stood to suffer prejudice and substantial loss if the order was not granted; further the appeal would be rendered nugatory as they had an arguable appeal with a great possibility of success based on the grounds of appeal as cited therein.
6. On the issue for security for due performance of the decree at Order 42 Rule 8 specifically dictates that the applicants are exempted from this requirement; but the above notwithstanding, are willing and capable of abiding to any reasonable terms and conditions as ordered by the court, if the application is allowed.
7. In conclusion the applicants contend that they had established the required threshold and prayed that the application be allowed.

RESPONDENT'S SUBMISSIONS

8. In response the respondent submitted that the application was frivolous, vexatious and only aimed at denying the respondent the fruits of his judgment with endless delaying tactics.
9. The respondent contends that the National Police Service is an institution created by statute and should not be considered an appendage or extension of the government and therefore should not seek refuge inside the cloak of the Attorney General.
10. That the applicants were not entitled to the orders sought as there was no proof of any imminent threat of execution to warrant the orders sought; secondly, the applicants' only mention that they are likely to suffer substantial loss but there was no proof of any kind of such loss placed before the court.
11. The respondent submitted that the right to appeal ought to be balanced with the right of the decree holder to enjoy the fruits of his judgment and there was therefore need to strike a balance so that it is not only the applicants who benefit from an order for stay of execution. The applicants should therefore be ordered to pay half of the decretal sum to the respondent and the other half be placed in a joint interest earning account pending the determination of the intended appeal;
12. The respondent prayed for the dismissal of the application with costs for lack of merit.

ISSUES FOR DETERMINATION

13. Having read the forgoing written submissions this court has framed the following issues;

- (i) Whether the Attorney General is properly on record for 1st Appellant.
- (ii) Whether the orders for stay of execution are warranted;

ANALYSIS

Whether the Attorney General is properly on record for the 1st Appellant

14. It is the respondent's contention that the National Police Force is an institution created by statute and should not be considered as an appendage or extension of government and therefore should not seek refuge inside the cloak of the Attorney General; in essence the respondent's contention is that the Attorney General is wrongly enjoined and that the 1st appellant should carry his own cross for the unlawful acts committed; case law relied on **Doshi Iron Mongers Ltd vs Kenya Revenue Authority & Another** and **Attorney General vs Francis Mubweru [2019] eKLR**;

15. The National Government Co-ordination Act defines '**National Government Function**' as a function assigned by the Constitution, or the aforementioned Act or any other law touching on the executive arm of the government;

16. The National Police Force which consists of the Kenya Police Force and the Administration Police Service is indeed provided for in the Constitution at Article 243 and further it is placed under the Cabinet Secretary for the Ministry of Interior and Coordination of National Government; this ministry is charged with the responsibility of overseeing internal security and this key function is coordinated through the Kenya Police Service and the Administration Police Service; it therefore follows that the function of the National Police Force is a '**national government function**' and this qualifies the institution for representation by the Attorney General as outlined under the provisions of Article 156 of the Constitution;

17. Article 156 reads as follows;

“(4) The Attorney-General-

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings;

18. From the reading of the above provisions of the law this court is satisfied that the 1st appellant having been sued in his official capacity as the DCIO is entitled to representation by the Attorney General”

Whether the orders for stay of execution are warranted;

19. This court has perused the court record at length and finds no evidence or proof of any imminent threat of execution; secondly, the applicants are adequately protected by the law under the provisions of Section 21(4) of the Government Proceedings Act and also under the provisions of Order 29 Rule 2(2) of the Civil Procedure Rules; which provisions clearly elaborate that no person can execute against the government to satisfy or enforce a decretal amount;

20. Section 21(4) of the Government Proceedings Act provides as follows;

'21. Satisfaction of orders against the Government

(1)

(2)

(3)

(4) Save as aforesaid, **no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such of any money or costs.'**

21. It is also trite law that where an individual seeks to execute a decree against the government the only recourse they have is to file an application for Judicial Review; and needless to say the instant application is brought as a Notice of Motion under the provisions of Order 51 of the Civil Procedure Code; again this court reiterates that there is no proof on record of any eminent threat faced by the applicant as no copy of the decree or proclamation was annexed to the application to demonstrate the reality of the threat or imminent threat of execution;

22. This court also makes reference to the provisions of **Order 29 Rule 2(2)** of the Civil Procedure Rules which provides;

(2) No order against the Government may be made under-

(a) Order 14 Rule 4 (Impounding of documents)

(b) Order 22 (Execution of decrees and orders)

(c) Order 23 (Attachment of debts)

(d) Order 40 (Injunctions) and

(e) Order 41 (Appointment of receiver)

23. All the above provisions demonstrate that the law prohibits any form of execution against the government; for those reasons the application is found to be frivolous as there clearly no justification for bringing this application as the appellant/applicants are protected by the law against any form of execution that may be carried out by the respondent related to the payment of the decretal sum;

24. This court finds that this is not a suitable case for it to exercise its discretion in granting an order for stay of execution.

FINDINGS AND DETERMINATION

25. For the forgoing reasons this court makes the following findings and determinations;

(i) The court finds that the Attorney General is properly enjoined to the suit;

(ii) This court finds that the application for stay of execution is unwarranted and the same is hereby dismissed; the costs shall abide the outcome of the appeal;

(iii) The applicants are hereby directed to file and serve their Record of Appeal within 60 days from the date hereof; in default the appeal stands dismissed with costs to the respondent.

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 27th day of May, 2021

HON.A. MSHILA

JUDGE