



REPUBLIC OF KENYA
IN THE HIGH COURT KENYA AT MERU

CIVIL CASE NO.7 OF 2019

JOEL MUTUMA KIRIMI.....1ST PLAINTIFF/1ST RESPONDENT

SHARON CHEPKORIR KOSKEI.....2ND PLAINTIFF/2ND RESPONDENT

VERSUS

NATIONAL HOSPITAL INSURANCE FUND.....DEFENDANT/APPLICANT

RULING

1. This court in its judgement delivered on 6th February 2020 entered judgement in favour of the Plaintiffs/Respondents against the Defendants for violation of the Plaintiff's fundamental rights to privacy and human dignity and ordered the Defendants to pull down the images of the Plaintiff on their social media pages to wit Facebook, Instagram, Twitter and any other website forthwith and not later than 7 days of the date of the judgement. The Defendants were also restrained from publishing and/or using the Plaintiffs' images in any way for its advertisements or postings in its social media without the Plaintiff's consent. General damages of Ksh. 5,000,000 was awarded to each of the Plaintiffs for breach of their right to human dignity and privacy. Cost of the suit as well as interest from the date of judgement was also awarded.
2. Upon application by Ms.Mugo holding brief for Mr.Migos-Ogamba Advocate for the Defendants they were granted 14 days stay of execution to enable them notify the Defendants of the judgement.
3. Being dissatisfied with the judgement of the court the Defendants by a notice of motion under certificate of urgency dated 26th February 2020 sought orders staying the execution of the decree herein pending hearing and determination of the application interpartes as well as hearing and determination of an appeal whose notice had already been lodged .The Notice of Motion was brought pursuant to Order 42 Rule 6(2) of the Civil Procedure Rules 2010 and Order 50 Rule 1 of the Civil Procedure Rules .The application is supported by the grounds on the face of the notice of motion and supporting affidavit of Nichodemous .O .Odongo, the Acting Chief Executive Officer of the Defendant sworn on 26th of February 2020.
4. The Plaintiffs/Respondents opposed the application through the replying affidavit of the 1st Plaintiff sworn on 5th March 2020.
5. The application was canvassed by oral submissions made by the advocates in open court and in consideration of the supporting affidavit and the replying affidavit as well as the oral submissions by respective counsel the issues for consideration are whether;

1.This court is functus officio

2.The ingredients provided for under Order 42 Rule 6 (2) and Order 50 Rule 1 have been proved by the applicant

6. As to whether the court is functus officio and whether the Applicants ought to have applied for review and/or extension of the orders of stay, when judgement was rendered on 6th of February 2020 stay orders were issued for 14 days to enable Ms. Mugo Advocate who was holding brief for the Defendant's advocate to relay to the instructing advocate the verdict of the court and in turn the Defendant's advocate to inform the Defendants of the verdict of the court. The stay of execution was specifically to enable the advocate inform their clients of the verdict of the court and not for purposes of enabling the Defendant to lodge an appeal. By the time the formal application for stay of execution was made by the Defendants the orders made on 6th of February 2020 had lapsed and therefore they were no orders in existence to be extended. In the circumstances the Defendant/Applicants could not have been expected to seek for extension of non-existent orders. The principle of functus officio refers to a situation where the court is asked to revoke or vary its decision. In **Raila Odinga and 2 Others Vs IEBC and 3 Others[2013]eKLR**, the Supreme Court of Kenya quoted with approval the holding in **Jersey Post Limited Vs A1 Thani [2002] JLR 542 at 550** where it was held :

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available” [emphasis supplied].”

7. Similarly, in **Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR** the Supreme Court of Kenya held that:

“It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

8. In view of the above I find that the application by the Defendants cannot be termed as seeking the court to sit on appeal on its judgement rather it's an application to enable the Defendants exercise a right that is provided for both in statute and in the Constitution.

9. Whether the Applicant/Defendant has satisfied the grounds upon which an order for stay of execution can be granted it is not in doubt that the application for stay of execution was filed without undue delay. The Applicants have also offered to deposit security as deemed fit by the court pending the hearing and determination of the appeal. To balance the rights of the Applicants to appeal and the right of the Respondents to enjoy the fruits of their judgement herein, this court hereby grants an order for stay of execution on the following terms and conditions;

1.The Applicant/Defendants shall deposit Kshs. 5,000,000 in a joint interest earning account in the name of the advocates on record for the parties within 30 days of the ruling herein

2.The Applicants/Defendants shall pay to each of the Respondents/Plaintiffs Kshs. 2,500,000 within 30 days of the ruling herein.

3.The Applicants/Defendants shall also pay agreed and/or taxed costs of the application herein to the Respondents/Plaintiffs.

HON.ANNE ADWERA ONG'INJO

JUDGE

DATED AND DELIVERED AT NAIROBI VIA EMAIL THIS 27TH DAY OF APRIL 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.ANNE ADWERA ONG'INJO

JUDGE