



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**PETITION NO. 18 OF 2016**

**DAVID KIPSANG KIPYEGO & ABRAHAM KIPTARUS KIPTOO**

**THE REGISTERED TRUSTEES OF THE SERVE IN LOVE AFRICA (SILA) TRUST..... PETITIONERS**

**VERSUS**

**THE REGISTRAR OF DOCUMENTS.....1<sup>ST</sup> RESPONDENT**

**AMBROSE KIPROP ..... 2<sup>ND</sup> RESPONDENT**

**DAVID K. CHEMWOREM ..... 3<sup>RD</sup> RESPONDENT**

**MOSES KIPNGETUNY KIPKULEI ..... 4<sup>TH</sup> RESPONDENT**

**SAMSON KIPNGETICH KIBII ..... 5<sup>TH</sup> RESPONDENT**

**ERIC KIPTUM TEIMUGE ..... INTERESTED PARTY**

**RULING**

1. The applicant filed this application under a Notice of Motion dated 12<sup>th</sup> November, 2019 seeking for orders that:-
  - i. Pending the hearing interparties of the application there be an order staying the execution of the decree of the honourable court.
  - ii. Pending the hearing and determination of the appeal there be an order staying execution of the decree of the Honourable court.
2. The application is based on the ground that the Honourable court delivered a judgment removing the interested parties from being the trustees and thus the interested parties are aggrieved by the Honourable court's decision.
3. There is a danger of all assets of the trust being dealt with adversely to the detriment of the trust, where the trust and the interested parties will suffer substantial loss.
4. The interested parties are ready to provide security for the due performance of the decree.
5. The application is supported by a supporting affidavit sworn by PROFESSOR AMBROSE KIPROP and the grounds that the trust has several properties which the petitioners had sought to dispose during the pendency of the petition and if allowed to dispose, the trust will suffer substantial loss.
6. That in the event that stay of the enforcement of the Honourable court's decision is denied, the intended appeal will be rendered nugatory as the trust property will be dealt with adversely.
7. The application has been made expeditiously and that the interested parties are ready to provide security for the due performance of the decree.
8. The application is opposed through a replying affidavit sworn by DAVID KIPYEGO KIPSANG and the grounds that the court having found that the respondent and the interested parties perpetuated an illegality in as far as change of trustees is concerned, the interested parties are inviting the court to perpetrate an illegality which in essence the court will be extending a violation of the petitioners right to association.

9. The assets being offered to by the interested parties were acquired by the trust when petitioners were in office and as such it is a fallacy for the interested parties to purport what they did not acquire.
10. The illegal change of trusteeship was done in 2015 when they had already acquired all the assets and in the circumstances the respondents will not suffer any loss nor prejudice if the orders sought are declined.
11. The applicant in their submission stated that under article 159 of the constitution, procedural technicalities should not inhibit justice. The court is not functus officio as it delivered a judgement in the matter. Rule 32 allows the court to grant stay.
12. Section 33(3) allows court upon an application to grant stay of execution. If the order is not granted, the appeal will be rendered nugatory.
13. The replying affidavit shows that an order has been imposed. There is no indication of what was presented to the Registrar. The decree is not annexed to the application for registration and there is no indication as to whether is accessed upon by registrar of documents.
14. There is real danger that the petitioner may adversely deal with properties as trustees.
15. In response, the respondent submitted that the court lacks jurisdiction to grant rules of stay on proceedings touching on bill of rights.
16. There is no express provision of law giving the court jurisdiction, and should down the tools. Civil Procedure Act and Civil Procedure Rules does not apply to constitutional applications.
17. Mutunga rules guides the court in proceedings herein. Order 32 relates to a scenario where the court has not pronounced itself on the issue. It applies where a petition is pending.
18. Order 32 of the Mutunga Rules is not applicable in this matter. If the order is granted the court will suspend rights of the petitioners where it is well spelt. The replying affidavit on record shows that the decree has already been executed. There is no evidence on record to rebut the same.
19. Interested parties will not suffer any prejudice if the orders are not granted even if the finding of this court is reversed by the court of appeal. They will be reinstated. The court did not make any pronouncement on properties. It cannot stay what it did not pronounce itself on.
20. In response, the applicant's counsel submitted that Rule 32 of the Mutunga Rules does not deal with interrogatory application but stay applications. They allow the court to make orders pending appeal. Interpretation section gives high court authority to effect the rules.
21. The interested parties do not request for suspension of rights but preservation of the property, a matter is in dispute as to who should be the trustees. That the status quo be maintained not to render the appeal nugatory.
22. The affairs of a trust are conducted by trustees. And that they may get back from the court of appeal and get a trust without properties.

**Issues for determination.**

23. The main issues for determination are:-

- i. Whether Mutunga Rules, Rules 32 and order 42 rule 6(1) of the Civil Procedure Rules applies in this matter.
- ii. Whether the decree of the court is already effected and the stay will be of no consequence.

24. Rule 32(3) of the Mutunga Rules only provides for the procedure in filing of a formal application for stay. It does not set out the condition or threshold for the grant of stay pending appeal and cannot therefore apply in that regard.

25. But looking at Rule 32(2), which provides for informal application for stay, a court may grant stay as it deems fit and just. This notion may also be imported in dealing with a formal application as long as there are proper and satisfactory grounds for grant of stay.

26. It is however, instructive to note that under Rule 32(1) of the said Mutunga Rules, an appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed from.

27. Rule 32(2) states that an application for stay of execution may be made informally immediately following the delivery of judgment or ruling and that the court may issue such orders as it deems fit and just. Sub rule (3) is to the effect that a formal application for stay may be filed within 14 days of the decision appealed from or within such time as the Court may direct.

28. The rule requires that an application for stay be filed timeously. The present application was filed on 29<sup>th</sup> November 2018 while the judgment was delivered on 23<sup>rd</sup> November. That was indeed within the contemplated timelines under the rule.

29. There are, however, other considerations that the Court should take into account when considering such an application. Complementary to rule 32, is the Civil Procedure Rules. Order 42 rule 6(1) and (2) which provides that:

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 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 of stay shall be made under sub rule (1) unless-*

*a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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*

30. Just like rule 32 of the **Mutunga rules**, Order 42 rule 6 requires timely filing of the application. The Order, however also requires the applicant to show to the satisfaction of the court, that it will suffer substantial loss and that it has offered security for the due performance of the decree as the court may deem fit. The rules therefore jointly apply in this matter.

31. Considering the grounds for granting stay pending appeal the Court of Appeal stated in the case of **Butt v Rent Restriction Tribunal** (Civil App No. NAI 6 of 1979) **that;**

*i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

*ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's decision.*

*iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*

*iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

32..What is clear from Order 42 rule 6 as well as the above decision is that the Court exercises judicial discretion and like in any other exercise of its discretion, it should act judiciously. Further, whether or not to grant stay, the Court will have to consider the circumstances of the case.

33. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

34. The judgment in which the applicant intends to appeal against was delivered on 22<sup>nd</sup> day of October, while the application for stay of execution was filed on 12<sup>th</sup> November and thus it was filed without undue delay.

35. The applicant stated that they are ready and willing to provide for security for costs and lastly that they will suffer irreparable loss if the orders are not granted rendering the appeal nugatory. That they may get back from the court of appeal and get a trust without property.

36. However, a look at the petitioners replying affidavit, annexure **d.k 1 is a copy of the registration of documents of the decree** and the petitioner's content that the orders sought have been overtaken by event as the decree was executed on 6<sup>th</sup> November, 2019.

37. It is evident that *the decree has been extracted and executed and therefore, there would be nothing to stay.*

38. The interested parties in bringing up this application expressed mistrust of the respondents as trustees and their ability to safeguard the properties of the trust pending hearing and determination of the appeal. However, they availed no evidence in support of the allegation and in favour of the assumption that they are better suited than the respondents in that regard.

39. The bottom line is that the application herein lacks merit and is dismissed with costs to the respondents.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 28<sup>th</sup> day of November 2019**

In the presence of:

Mr. Korir for the petitioner

Mr. Momanyi for the interested party is absent

Ms. Abigael – Court Assistant