



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CONSTITUTIONAL PETITION NO. 3 OF 2016**

**MIGORI COUNTY TRANSPORT SACCO.....PETITIONER/RESPONDENT**

**=versus=**

**MIGORI COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**MOSES CHAMWADA.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**RULING**

1. On 28/03/2017 this Court delivered judgment in this Petition and made the following orders: -

*a) A declaration be and is hereby issued that the unilateral decision taken by the Respondents to ‘permanently’ close the Posta Bus park without giving the Petitioner an opportunity to be heard and the failure by the Respondents to justly relocate the Petitioner to another operational base prior to closing the Posta Bus park is unconstitutional, null and void ab initio;*

*b) The Petitioner and its members shall, in the meantime, continue to operate from their traditional bay at the former Posta bus park pending any possible relocation to a designated bus park by the County Government of Migori;*

*c) The County Government of Migori shall in coming up with the decision to possibly relocate the Petitioner and its members adhere to the Constitution of Kenya and to any other attendant law.*

*d) The County Government of Migori shall accordingly compensate the Petitioner in the sum of Kshs. 2,000,000/= (Read: Kenya Shillings Two Million only);*

*e) The County Government of Migori shall bear the costs of the Petition.*

2. Being dissatisfied with the judgment the Respondents timeously appealed to the Court of Appeal and on 19/04/2017 filed a Notice of Motion evened dated in this Court seeking the following orders: -

*a) This application be certified urgent and it be heard ex- parte at this first instance.*

*b) There be an interim stay of execution of the judgment and decree of this court in this cause, pending the hearing and determination of this application, inter partes.*

*c) There be a stay of execution of the judgment and decree of this court in this suit, pending the hearing and determination of the 1<sup>st</sup> Respondent’s intended appeal from the judgment and decree of this Court in this cause to the Court of Appeal.*

*d) The costs of this application do abide the outcome of the intended appeal.*

3. The application is premised on the grounds appearing on its face and is supported by the Affidavit of **Christopher Odhiambo Rusana** sworn on 19/04/2017.

4. The application is opposed by the Petitioner/Respondent through the Affidavit of **Peter Njanga** sworn on 05/05/2017. The application was heard by way of oral submissions.

5. Briefly, the Applicants contend that having filed an appeal before the Court of Appeal challenging the judgment of this Court the intended execution ought to be stayed pending the outcome of the appeal. It is argued that the pendency of the orders infringes on other people’s rights and that the Petitioner/Respondent’s possessions are not known such that in the event the appeal succeeds it will not be possible to get a

refund of the Kshs. 2,000,000/= now payable under the judgment to the Petitioner/Respondent. The Applicants further contend that the application was filed without any delay and that, although the first Applicant is not supposed to offer any security being a government under the law, is ready to offer any such security as this Court will deem fit and just. It is their position that unless the orders sought are granted the appeal will be rendered nugatory.

6. The Respondent in opposing the application argues that the Applicants are out to delay the matter having stated from the word go that they will appeal the decision of this Court up to the Supreme Court and that the Petitioner continues to suffer colossal losses because of the impugned decision of the Applicants.

7. The conditions to be considered in dealing with an application seeking a stay of execution pending appeal are clearly provided for under **Order 42 Rule 6** of the **Civil Procedure Rules 2010**. They are: -

*a) The Applicant should demonstrate substantial loss that may result if stay is not granted;*

*b) There should be no delay in the making of the application; and,*

*c) The Applicant must provide security for the due performance of such decree or order which the court may ultimately grant.*

8. I have carefully considered the above conditions in light of this matter. The Petitioner came to this Court challenging *inter alia* attempts by the Applicants to close the Posta Bus Park which is where the Petitioner used to operate from long before the birth of the first Respondent. The Petition was opposed. On full hearing, this Court found for the Petitioner and made the foregone orders. If the said orders are to be stayed then it will mean that the Applicants will be at liberty to do what they intended to do which this Court found to be in contravention of the Constitution. The effect of such stay orders will be tantamount to a case where the Petition was disallowed, which is not the position herein.

9. On the issue of the award of Kshs. 2,000,000/= to the Petitioner and the contention that it will not be possible to get a refund of the money in the event the appeal succeeds, the Applicants have not demonstrated that the Petitioner will not be able to do so. The Petitioner is a going-concern and has membership and engages in lawful business. I find that this is a case where the Petitioner ought to be allowed to enjoy the fruits of the judgment.

10. The upshot is that the Notice of Motion dated 19/04/2017 is hereby dismissed with costs.

Those are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 31<sup>st</sup> day of July 2017.**

**A. C. MRIMA**

**JUDGE**