



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 424 OF 2014

1. BOMET COUNTY ASSEMBLY

2. THE CLERK, BOMET COUNTY ASSEMBLY

3. THE HON. ATTORNEY GENERAL.....APPLICANTS

VERSUS

WAMALWA ABDI & CO. ADVOCATES.....RESPONDENT

RULING

1. Before me is a notice of motion dated 19th September, 2014. The application is expressed to be brought under Article 159 of the Constitution, 2010, Section 65(b)(c), 3A, 3 of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 51 Rule 1 and Order 22 Rule 22(1) of the Civil Procedure Rules, 2010. The applicants are seeking for an order for stay of execution of the judgment entered on 24th July, 2014 and the subsequent decree and consequential orders pending the hearing of the intended appeal.
2. The grounds for which the application is premised are set out in the body of the application and in the supporting affidavit of Haron Ng'eno sworn on 19th September, 2014. He deponed that the applicants entered appearance through Kandie Mutai Mudeizi & Company Advocates on 7th July, 2014. The file was not available on 21st July, 2014 which was the last day the defence ought to have been filed. That their defence raise triable issues and that if execution proceeds, the operations of the Assembly could be hampered to a halt and great injustice will be occasioned to the people of Bomet. He laments that the respondents applied for decree and certificate of costs on 30th July, 2014 yet the ruling delivered on 17th August, 2014 raising concerns on whether it was predetermined. Finally, he averred that the respondents will not suffer prejudice if the matter is heard.
3. Mr. Mutai for the appellant relying on the case of *Esther Wanjiru v. Jackline Arege (2014) eKLR* submitted that two (2) days delay was not inordinate. That the appellant is a public body hence there is no need to impose an order for security. He submitted that the appeal will be rendered nugatory as the respondent may not be in a position to refund the money. On this point he relied on *Oriental Construction Company Limited v. Rift Valley Water Services Board (2014) eKLR*.
4. The respondent opposed the application vide the replying affidavit of Nick Biketi sworn on 8th October, 2014. He contends that summons to enter appearance and other accompanying documents were served on the applicants on 19th and 20th June, 2014 and appearance was entered on behalf of the 1st and 2nd appellants on 7th July, 2014 after the expiry of the requisite statutory

time. Subsequently, on 22nd July, 2014, the respondent filed an application requesting judgment in default of defence. Judgment in default was entered on 24th July, 2014. The appellants then filed a notice of motion dated 31st July, 2014 seeking to set aside the default judgment which application was dismissed. He states that although the appellants had the liberty to apply for stay before the trial court, they opted to rush to this court in an attempt to get favourable orders. He contended that this application is fatally defective since it is grounded on a non-existent provision of the law i.e. Order 21 Rule 6 which deals with judgment affecting registered title to land and alleged Order IXA of the Civil Procedure Rules, 2010 which does not exist in law. That the process of execution ensued and this application is an afterthought. That the defence is unmeritorious. That the reasons for delay were not categorically stated.

5. Mr. Hassan Abdi for the respondent urged that the ex parte stay orders be vacated or in the event this court is inclined to extend the orders, the appellants be ordered to furnish security. He contended that the appeal has no chances of success and that the defence ought to have been filed within fourteen (14) days as stipulated in Order 7 Rule 1 of the Civil Procedure Rules. That there was no valid defence since no draft defence was attached.
6. I have considered the depositions and submissions tendered in respect of the application. This is an application for stay of execution pending an appeal. Three essentials have to be met in such an application thus:

- i. The application must be brought timeously;
- ii. It must be shown that the applicant stands to suffer substantial loss; and
- iii. Security of costs must be given.

7. The 1st applicant being a public body, it is exempted from furnishing security. It follows therefore that the first two requirements are the ones to be satisfied in this case.
8. There is no doubt that the motion was timeously filed. The short delay is excusable in my view.
9. On the issue of substantial loss, the applicants stated that the operations of the Assembly could be hampered to a halt and great injustice will be occasioned to the people of Bomet. The court in *Mukuma v. Abuoga* (1988) KLR 645 held as follows:

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

10. Other than demonstrating that execution has commenced or is likely to commence, the applicants ought to prove that the execution will irreparably affect them as the successful parties in the appeal. What is at stake is a money decree which can be recovered in the event appeal succeeds. There is an allegation that the applicants will have difficulty in recovering the decretal sum from the respondent in the event the appeal succeeds. It follows that this application has merit. It is hereby allowed with costs abiding the outcome of the intended appeal.

Dated, Signed and Delivered in open court this 21st day of November, 2014.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicants

.....for the Respondent