



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 455 OF 2008

ALBERT EKIRAPA.....1ST
PLAINTIFF/RESPONDENT

AHMED SHEIKH TAKOY.....2ND
PLAINTIFF/RESPONDENT

ROSE MUTHONI.....3RD
PLAINTIFF/RESPONDENT

ANTONY MORAGWA.....4TH
PLAINTIFF/RESPONDENT

HENRY NJAGE.....5TH
PLAINTIFF/RESPONDENT

PATRICK LUMUMBA.....6TH
PLAINTIFF/RESPONDENT

JANE OMARI.....7TH
PLAINTIFF/RESPONDENT

MARY APOLA.....8TH
PLAINTIFF/RESPONDENT

JULIUS KIITI.....9TH
PLAINTIFF/RESPONDENT

MWANG SALIM.....10TH
PLAINTIFF/RESPONDENT
(suing on behalf of themselves and Parents Association
(School Committee) of Aga Khan Primary School Nairobi)

V E R S U S

THE AGA KHAN FOUNDATION.....1ST
DEFENDANT/RESPONDENT

AGA KHAN EDUCATION SERVICE KENYA.....2ND
DEFENDANT/APPLICANT

R U L I N G

On 16th December 2010 this court found the Applicant guilty of contempt of the orders of the court that were issued on 29th October 2009 by Justice Abida Ali – Aroni. On 31st January 2011 it was ordered that the Applicant serves 4 months in jail. On the same day the Applicant filed the present motion seeking that the sentence be stayed pending the filing, hearing and determination of intended appeal to the Court of Appeal. There is a Notice of Appeal that was filed on 31st January 2011. The motion was expressed to be brought under sections 3A and 80 of the Civil Procedure Act, section 5 of the Judicature Act (Cap. 8) and Order 39 of the Civil Procedure Rules. The application was opposed by the 1st and 2nd Defendants. The Applicant was represented by Mr. Kibe Mungai, the 1st Defendant by Mr. Rimui and the 2nd Defendant by Mr. Regeru. The court received submissions from them.

Mr. Rimui opposed the application on the basis that it was incompetent, having been brought under the wrong provisions of the law. He submitted that such application ought to have been brought under Order 42 rule 5 of the Civil Procedure Rules. The submission on the point was supported by Mr. Regeru. The response of Mr. Kibe Mungai was that the Applicant was found guilty of contempt under the Judicature Act, Order 39 of the Civil Procedure Rules and the inherent jurisdiction of the Court and that was why the application has been made under the same provisions. He asked the court to rely on Article 159 (2) (b) of the Constitution if it is found that the cited provisions were not applicable.

Although the application to cite the Applicant for contempt was expressed to be brought under Order 39 rules 2A (2) and 9 of the Civil Procedure Rules, sections 3A and 63 (c) of the Civil Procedure Act and section 5 of the Judicature Act, the court, while agreeing with a previous decision in **William Mark Shipiri –Vs- James Ngengi Muigai And Another, HCCC No. 2906 of 1981 at Nairobi**, found that Order 39 rule 2A (2) conferred on the court that has issued an injunction under Order 39 the jurisdiction to punish in case of disobedience or breach without having to resort to the Judicature Act or the English Rules of the Supreme Court. The court therefore proceeded under Order 39.

Now that the Applicant seeks stay of execution of the sentence that he is serving, the appropriate provision for the application should have been Order 42 rule 6(2). The inherent powers of the court under section 3A cannot be invoked so as to override other rules unless it can be shown that special circumstances exist or that injustice would be occasioned by the application of the other rules, which was not the case here (**Kibutha –Vs- Kibutha [1984] KLR 243**).

Section 80 of the Civil Procedure Act deals with the review of a decree or order from which no appeal has been preferred or from which no appeal is allowed under the Act.

The consequence is that the application is incompetent. However, the court will nonetheless, seek to do substantial justice without being fettered by procedural technicalities. This approach is commanded by Article 159(2) (d) of the Constitution. I will proceed to deal with the merits of the application.

Under Order 42 rule 6 (2) the discretion of the court to grant stay is fettered by three conditions. The Applicant has to show that he will suffer substantial loss or injury; the application has been brought without undue delay; and he has provided security for the due performance of the decree or order that may ultimately be binding on him (**Halai & Another –Vs- Thornton & Turpin (1963) Ltd [1990] KLR 365**). In **Scott & Another –Vs- Kago & 2 Others [1987] 503**, the Court of Appeal held that:-

“It is important to bear in mind that the purpose of an application such as the present one is to preserve the subject-matter in dispute so that the rights of the appellant, who is exercising his undoubted right of

appeal, are safeguarded pending the hearing of the appeal.”

Mr. Kibe Mungai spent a lot of time seeking to show the intended appeal has high chances of success. At the same time Mr. Regeru, relying on criminal law decisions relating to bail pending appeal, argued that the Applicant should demonstrate that the intended appeal has overwhelming chances of success. Both were wrong. It is not for this court to speculate on the chances the appeal will have. That is for the Court of Appeal. Secondly, the court is essentially dealing with a civil application that is governed by the provisions of the Civil Procedure Act and Rules.

The Applicant is serving a short sentence of 4 months. I agree with Mr. Kibe Mungai that by the time the appeal is filed, processed, heard and determined, the 4 months may be over. If the appeal ultimately succeeds, the Applicant will have served the term. To refuse the application would render the intended appeal nugatory. In **Stanislaus Nyagaka Ondimu –Vs- Kalyaso Farmers Co-operative Society And Others Civil Application No. Nai.337 of 2005**, the Court of Appeal was dealing with application under rule 5(2) (b) of its Rules to stay the orders of the High Court which had sentenced the Applicant therein to 6 months for contempt. The Court found the intended appeal arguable and noted that if the application is refused that would render the appeal nugatory as the 6 months would have been served.

The conduct of the Applicant in the instant case was reprehensible, to say the least. Court orders are issued to be obeyed by all, however mighty or lowly. Any party who undermines or disobeys court orders or impedes the course of justice strikes at the heart of the administration of justice and has to be dealt with swiftly and effectively. The Applicant, however, wants to appeal and his liberty is already compromised by the detention. Mr. Regeru asked the court to consider his past conduct and refuse to grant the orders sought. I consider that the Applicant, in paragraph 8 of the supporting affidavit, has undertaken not to violate the orders of the court and has asked his employer, the Teachers Service Commission, to transfer him to another school. In the meantime, he has requested to be given compassionate leave so that he is not at the school in question. I will hold him to this commitment and any reported action or omission in non-compliance will be dealt with accordingly.

The result is that I allow the application. The Applicant will be released from prison when he signs a bond of KShs. 2,000,000/= and has provided a surety in similar amount to be approved by the Deputy Registrar. He has to file his appeal within 30 days from today and, in any event, this stay shall last for only 90 days. Costs of the application shall be paid by the Applicant

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2011

A. O. MUCHELULE

J U D G E