



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1118 OF 2003

LEMPAA VINCENT.....1ST PLAINTIFF
NYANDORO GEORGE NICODEMUS.....2ND PLAINTIFF
WAHOME ISAACK THUKU.....3RD PLAINTIFF
MAINA CHARLES.....4TH
PLAINTIFF
OTIENO GEORGE.....5TH
PLAINTIFF

VERSUS

KENYATTA UNIVERSITY.....1ST DEFENDANT
GEORGE ESHIWANI.....2ND DEFENDANT
JOHN SHIUNDU.....3RD DEFENDANT

RULING

Before the court is the Notice of Motion dated 4th May, 2011 premised under Order 8 Rules (1) and (8), Order 42 Rule 6 of Civil Procedure Rules 2010 and Sec. 3A of Civil Procedure Act.

It seeks the prayers for an order of stay of execution pending hearing and determination of the Appeal on the order issued by the Hon. Maraga J. on 6th April 2011.

The application is supported on the grounds set forth on its face and a supporting affidavit sworn by L. M. Mungai an Advocate for the Applicant sworn on 4th May, 2011.

The said affidavit makes certain averments in its paragraph 8, which are improper, as it avers, on behalf of the Applicants, as to the pecuniary status of the Respondents/Plaintiffs herein. I shall thus not rely on those averments made.

In short, the facts precedent to this application are not disputed and the Affidavit in Response sworn by Marceline S. Ligunya, an advocate for the Respondents as well as the Supporting Affidavit do disclose the same.

In short, Hon. Ojwang J. vide his Ruling delivered on 21st January, 2005 struck out the defence of the Applicants and they have filed an appeal against that Ruling, being Civil Appeal No. 188 of 2006 which is pending hearing. I shall note, however, that the application for stay of proceeding pending hearing and determination of the said Appeal had been rejected.

Accordingly, Hon. Wendoh J. heard the suit by way of formal proof and awarded damages to the Plaintiffs in the sum of shs.4,000,000/=. The stay of execution thereof was granted on 14th August, 2008 on condition of deposit of decretal sum. The said decretal sum is thereafter deposited.

The Applicants' Notice of Appeal against the said Order filed on 18th June, 2007 was invalidated on 25th February, 2010 when the Applicants failed to file the appeal within time.

The Applicants then filed an application dated 15th June, 2010 to the Court of Appeal seeking enlargement of time to file the Appeal, which was dismissed on 28th September, 2010.

Another application dated 18th October, 2010 was filed by the Applicants seeking to file their record of appeal out of time and was withdrawn on 25th January, 2011.

With these facts in the background, the Respondents had filed the application dated 30th September, 2010 to seek release of the deposited sum and the same was heard, and Hon. Maranga J. allowed the said application on 6th April, 2011. Hon. Maraga J. was aware of the appeal against the liability which is pending before the court and he found that the deposit was made as security for the appeal against the assessment of damages and not on the issue of liability. I shall add, to that observation, that the application for stay of proceedings made in the appeal which is pending was not successful or there is no such stay.

In the premises aforesaid, in my considered view, there is no appeal existing on the award of damages which was granted by the Judgment of Hon. Wendoh J. The deposit was, obviously a security for appeal against the said Judgment. What Hon. Maraga J. did was only to release the said security in absence of any Appeal. It is obvious that if there is none, there is nothing to be stayed. There is nothing remaining on record, as of today, except the decree.

Yes, it is true that as per order 42 Rule (3) of Civil Procedure Rules 2010, the court is granted unfettered discretion which as is trite, has to be exercised judiciously.

Unfortunately, I have no ground before me as a Judge to exercise my judicious discretion.

I thus order that the application dated 4th May, 2011 be dismissed with costs.

Dated, signed and delivered at Nairobi this 24th day of **May, 2011**

K. H. RAWAL

JUDGE

24.05.2011

