



Oebah v Jomo Kenyatta University of Agriculture and Technology (Civil Case 340 of 2009) [2009] KEHC 224 (KLR) (Civ) (11 December 2009) (Ruling)

MUSSA EZEKIEL OEBAH V JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY [2009] eKLR

Neutral citation: [2009] KEHC 224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 340 OF 2009

MK KOOME, J

DECEMBER 11, 2009

BETWEEN

MUSSA EZEKIEL OEBAH PLAINTIFF

AND

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY DEFENDANT

RULING

1. Interlocutory judgment was entered against the Defendant on 21st April 2009. The Defendant applied to set aside that judgment and by a ruling delivered on 17th July 2009, the application was disallowed. The Applicant has now filed a Notice of Motion under Order 41 Rule 4 of the Civil Procedure Rules seeking for stay of an order of execution.
2. This application is premised on the grounds stipulated on the body thereto and the supporting affidavit of Prof. Francis Njeruhsworn on 15th September 2009. In further argument to support the application, counsel for the Defendant submitted that the Defendant has filed an appeal before the Court of Appeal which is arguable and it has high chances of success as evidenced by the draft memorandum of appeal.
3. Secondly, unless the application for stay is allowed, the appeal will be rendered nugatory, for reasons that the Plaintiff is a man of straw, who will not be able to refund the decretal sum that would have been paid to him in event that the appeal was successful. It was pointed out that the plaintiff stated in a letter and also the replying affidavit that he solely depended on the burnt motor vehicle for his livelihood.



4. In the case of Standard Chartered Bank vs. Ayaga Sangale HCC Nairobi No.247 of 2004 Visram, J (as he then was) allowed a stay of execution in circumstances similar to this application, principally on the ground that the Respondent had no sources of income. Counsel submitted that they were ready to abide by any condition imposed by the court.
5. On the part of the Plaintiff/Respondent, this application was opposed. Counsel relied on the Plaintiff's replying affidavit and submitted that in an application for stay of execution, every case is dealt with on its own merit depending on its own circumstances as there are no two similar facts.
6. It was submitted that the applicant took two months to file an application for stay of execution that was unreasonable delay. Further the only reason the application was filed is because the plaintiff was pushing for a date for formal proof of his case. Secondly, the Defendant has not been able to prove that it will suffer substantial loss. There is uncontraverted evidence on record that the Defendant collected over Kshs.60 million as a result of the rioting students who went on a rampage and destroyed the plaintiff's motor vehicle.
7. Moreover the Defendant used evidence of the damages suffered by the Plaintiff to support their claim for loss and to show that members of public suffered because of the riot. It was argued that the money collected by the Defendant is available to compensate those who suffered loss from what the Defendant surcharged the students.
8. The court should also consider the conduct of the Defendant, who has been slow to move, the fact that the Defendant has an arguable appeal is not a consideration for an application for stay of execution or proceedings before the High Court, because this is tantamount to a Judge to sitting on her own appeal.
9. Counsel urged the court to disregard the averments contained in the affidavit by Prof. Francis Njeruh. The mistakes made by this court if any can only be presented to the Court of Appeal. This court can only be asked to exercise discretion based on facts and law and that discretion should not be extended to an indolent and a deceitful applicant.
10. The Plaintiff has children pursuing parallel courses in the same University; He had a commercial vehicle which he managed to purchase and was destroyed due to the negligence by the Defendant. It is disrespectful for the Defendant to refer to the Plaintiff as a man of straw. The Plaintiff can always pay back the money if he is put back on his business.
11. The factors to bring into consideration before granting an Order 41 Rule 4(2) of the Civil Procedure Rules. These are; the applicant will suffer substantial loss, the application was made without unreasonable delay and the applicant must furnish adequate security for the due performance of the decree. The decree in favor of the plaintiff in this matter is as a result of his motor vehicle which was destroyed by the Defendant's students. The principal claim by the Plaintiff is for the loss of a commercial motor vehicle which was destroyed by the Defendant's rioting students and is for a sum of Kshs.2,230,000/=.
12. The next issue to consider is whether the Defendant will suffer substantial loss in the event that the appeal will be successful, this must be balanced with the interests of the plaintiff whose motor vehicle was destroyed and has lost a source of livelihood. If the Plaintiff's motor vehicle is replaced, I am of the opinion that he would be in a position to refund the decretal sum to the Defendant in the event that the appeal was successful. On the other hand, if the decretal sum is held, the Plaintiff will continue to suffer as his source of livelihood was destroyed.
13. The Defendant did not also file this application within reasonable time, the ruling in which the application for stay was denied was delivered on 17th July 2009, and this application was filed nearly two



months later. In my opinion the Defendant has not conducted itself in a manner deserving this court's exercise of discretion. 14. Accordingly I decline to allow the application which is dismissed with costs to the Plaintiff.

RULING READ AND SIGNED ON 11th December 2009 AT NAIROBI.

M.K. KOOME

JUDGE

