



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 589 OF 2011

AKSELI LAMECK & 121 OTHERS..... PLAINTIFFS

VERSUS

METHODIST CHURCH IN KENYA TRUSTEES & 7 OTHERS....DEFENDANTS

RULING

(Application for review of orders made on deposit of security on an application for stay of execution pending appeal; court having made an order for deposit of security in the aggregate sum of Kshs. 100,000/= per applicant; applicants wishing to have that reviewed to Kshs. 10,000/= per applicant; requirements for review; no new evidence nor claim that there is an error or mistake apparent on the face of record; security to be deposited not being pegged on capacity of applicant but on the circumstances of the case and is meant to cover the respondent; no grounds to review the amount of security; if aggrieved, applicants ought to have approached the Court of Appeal; application dismissed)

1. The application before me is that dated 5 June 2020 filed by the plaintiffs. The applicants are seeking an order of review and/or setting aside of the orders made on 23 April 2020 touching on the security directed to be deposited as a condition for stay pending appeal. In that ruling, I ordered deposit of security in the sum of Kshs. 12, 200,000/= being an aggregate of Kshs. 100,000/= per applicant, as security. In this application, the applicants wish that reviewed, so that the security is reduced to the sum of Kshs. 10,000/= per applicant. The applicants basically state that because of their low financial means they have been unable to raise the amount of Kshs. 100,000/= each, as security. The application is opposed.

2. I have considered the application. I made the orders of 23 April 2020 based on the requirements for stay pending appeal set out in Order 42 Rule 6 (2). Order 42 Rule 6 (2) provides as follows :-

(2) No order for stay of execution shall be made under subrule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

3. In my ruling of 23 April 2020, I was satisfied that the applicants stood to suffer substantial loss but I was of the opinion that due security needed to be deposited. It was my view that security in the sum of Kshs. 12, 200,000/= , an aggregate sum of Kshs. 100,000/= per applicant, would cover the respondents in the event that the applicants lost on appeal. It will be observed that now, the applicants want that reviewed to Kshs. 10,000/= per applicant.

4. The grounds upon which one may seek review are set out in Order 45 Rule 1 which provides as follows :-

Order 45 Rule 1 - Application for review of decree or order

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the

record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

5. From the above, it will be seen that one may apply for review on the following grounds :-

- i. Discovery of new and important matter or evidence;
- ii. Mistake or error apparent on the face of record; or
- iii. Other sufficient reason.

6. In this application, the applicants are not stating that there is any discovery of new evidence, and neither do they claim any mistake or error apparent on the face of record. Their application must therefore be construed as coming under the ground of "other sufficient reason" for review. The only reason that the applicants seek review is that they are unable to raise the amount of security.

7. It should be understood that the level or amount of security is not pegged on the capacity of the applicants, but is pegged on the nature of the appeal, and the loss that the respondents stand to suffer in the event that the appeal fails. The value of security is thus objective, based on the circumstances of the case, and is not subject to the capacity of the applicant. If it was pegged on the capacity of the applicant, then it would fail the test of being security in favour of the respondent, for it may end up being too low to be of any worth to the respondent as security. My assessment of the value of Kshs. 12,200,000/= was thus objective based on what I thought would cover the respondents in the event that the applicants lost the appeal.

8. In my opinion, the claim that the applicants are not able to raise the amount of security ordered is not a sufficient reason to review the order of 23 April 2020. In fact, I do not think that the applicants ought to have come before court for review at all unless they were pointing out to an apparent mistake or error apparent on the face of record, or unless they were bringing forth some new evidence which would have assisted the court in arriving at a different figure in assessing the security to be deposited. If they were simply not happy with the orders of 23 April 2020, they ought to have moved to the Court of Appeal for a reconsideration of the terms of stay pending appeal, for that is what is provided for in Order 42 Rule 6 (1) which is drawn as follows :-

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

9. It will be seen from the above, that there is liberty for the Court of Appeal to reconsider an application for stay pending appeal, irrespective of any order that may have been made by this Court, and indeed, the Court of Appeal has power to set aside any order of stay made by this court. That to me ought to have been the best avenue open to the applicants.

10. For the above reasons, I am not persuaded to allow this application and the same is hereby dismissed with costs. The result is that the orders of 23 April 2020 remain in force.

11. Orders accordingly.

DATED AND DELIVERED THIS 18TH DAY OF MAY, 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA