



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 30 OF 2016

JANEFER CHEBII KIMETO (suing as the personal

representative of the estate of

JONAH KIPKOSKE ARAP CHUMO.....PLAINTIFF/APPLICANT

VERSUS

BOARD OF GOVERNORS

CHEBWAGAN YOUTH POLYTECHNIC.....DEFENDANT/RESPONDENT

RULING

1. Pursuant to a ruling delivered by the Court on the 6th day of May 2021, the Applicant has now filed the present Application by way of a Notice of Motion dated 21st May 2021 brought under the provisions of Order 42 and Order 51(1) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Article 159 of the Constitution as well as all enabling provisions of the law, the firm of Rodi, Orege & Company Advocates seek leave to come on record for the Plaintiff/Applicant in place of the firm of Motanya & Company Advocates pursuant to a consent by both firms and a Notice of Change of Advocates filed on 13th May 2021. The Applicant further seeks for orders of stay of execution of the order of 6th May 2021 directing her to deposit in court the taxed costs of Kshs. 794,557/= as a condition for reinstatement of the suit as well as stay of any consequential orders pending the hearing and determination of an intended Appeal.

2. The Application is supported by the grounds set on its face as well as on the supporting affidavit of Jenefer Chebii Kimetto the Applicant herein dated the 21st May 2021.

3. The Application was opposed vide the Respondent Counsel's Replying Affidavit dated the 25th May 2021 for reasons that the application was lacking in merit, was full of falsehoods and was brought in bad faith.

4. That pursuant to the court's ruling of 6th May 2021 reinstating the Plaintiff/Applicant's suit on certain conditions, the Applicant complied with only one condition and paid Ksh. 25,000/= as thrown costs but chose to Appeal against the requirement of the deposit of the taxed costs.

5. That the application having been made under Order 42 rule 6(2) of the Civil Procedure Rules, the Applicant ought to have demonstrated that she would suffer substantial loss if she was to deposit the taxed costs in court, that further, she ought also to present to court such security as the court orders for due performance of the order, and lastly that the Applicant also had to satisfy the court that the intended Appeal was arguable and not frivolous and therefore if the prayers sought were not granted, the Appeal would be rendered nugatory. The Respondent's position was that the Applicant had failed to demonstrate that she had satisfied these conditions and further that there was no draft Memorandum of Appeal annexed to the application which the court would discern whether she has any arguable ground of Appeal.

6. By consent, the application was disposed of through written submissions to which the Applicant herein submitted that being dissatisfied with the condition set by the court to deposit the taxed costs in court within 21 days of the ruling, they had launched an Appeal before the Court of Appeal, and therefore they sought for the stay of execution of the court's ruling pending hearing and determination of their intended Appeal.

7. The Applicant's issue for determination as framed was whether she was entitled to the orders as sought to which she submitted that having filed a Notice of Change of Advocates on 13th May 2021, the same ought to be deemed as duly filed and should be allowed.

8. That secondly, the conditions for a stay of execution pending Appeal in the Court of Appeal and the High Court were different. That rule 5(2) of the Court of Appeal rules referred to requirements to be met when an application had been preferred before the said Court but in the current case, the application had been preferred before this court and therefore the operating provision of the law was Order 42 rule 6 of the

Civil Procedure Rules.

9. That the Applicant had been ordered to pay throw away costs and deposit the Defendant's taxed costs but being dissatisfied with the order requiring her to deposit the taxed costs, she had preferred an Appeal before the Court of Appeal as was clearly demonstrated by her Notice of Appeal annexed to the application and marked as JCK2. That Order 42 rule 6(4) (sic) clearly provided that an Appeal to the Court of Appeal shall be deemed to have been filed when a Notice of Appeal has been given. That as a sign of good faith, the Applicant had already paid the throw away costs as demonstrated by the copy of the banker's cheque marked as JCK 6. That although the Respondent received the said sum, they had threatened to execute for purpose of recovering the taxed costs in the event that the same was not deposited in court within the stipulated the timeline.

10. That since the Applicant had appealed against the issue of depositing the taxed costs and in the event that the orders for stay of execution pending Appeal were not granted, the Applicant stood to suffer irreparably as her Appeal would be rendered nugatory in the event that the same succeeded.

11. That the Respondent would not suffer any prejudice if the orders were granted since their throw away costs had already been paid within the required timeline. The Applicant further submitted that the present application had been filed without undue delay and that she was willing to abide by the court's orders pertaining the provisions of security, she sought for her application to be allowed.

12. The Respondent's submissions in opposition of the application was that since the same had been made under the provisions of Order 42 rule 6 of the Civil Procedure Rules, it was incumbent upon the Applicant to demonstrate that she and satisfied the conditions therein stipulated to wit that she had established a sufficient cause, that she would suffer substantial loss if she was to deposit the taxed costs in court and lastly that she would furnish to court such security as the court orders, for due performance of the order. Reliance was placed on the decided case in **Godfrey Wainaina Kinyanjui & Another vs. Joseph Mwikya Musaa [2020] eKLR**.

13. It was the Respondent's submission that the Applicant had not explained what loss, if any, she stood to suffer if stay was not granted and in any case she would not suffer any substantial loss if she was to comply with the order directing her to deposit the taxed costs in court as the amount would be returned to her if she succeeded in her Appeal.

14. That the Respondent, being a school, had cash flow and was therefore financially solid and would be in a position to refund the tax costs to the Applicant should she succeed in the Appellate Court.

15. That by virtue of the fact that the Respondent intended to proceed with execution was not reason enough to grant stay since being a successful litigant, it was lawfully entitled to enjoy the fruits of its success and therefore by proceeding with the execution process, the Respondent was simply exercising a right which had been bestowed upon him by law.

16. That the Applicant had not complied with the second requisite condition for granting stay of execution in that she had not offered any security for due performance of the court's order.

17. That further, the Applicant had not demonstrated by annexing a draft Memorandum of Appeal that the intended Appeal was arguable and not frivolous and therefore if stay was not granted, the intended Appeal would be rendered nugatory. Reliance was placed on the decided case in **Abercombie & Kent Limited vs John Wanjau Maina [2020] eKLR**.

18. The Respondent further submitted that litigation must come to an end at a certain point regardless of what parties think of the decision which has been handed down. That the court had exercised its discretion in favour of the Applicant by reopening her case and therefore by the court ordering her to deposit the taxed costs in court, it was not punishing the Applicant, but balancing the interest of the parties and also testing the seriousness of the Plaintiff. The Respondent thus sought for the dismissal of the application with costs.

Determination.

19. I have considered the Applicant's application on their Notice of Motion dated the 21st May 2021 herein, the Respondent's replying affidavit, and the written submissions by learned Counsel for the parties as well as the applicable law. I find that the Applicant herein seeks orders on two issues which I shall deal with separately.

20. It is not in dispute that the Applicant/Plaintiff's suit was dismissed on the 28th January 2019 for non-attendance wherein the Respondent's Bill of Costs was taxed at Kshs 794,557/= via a ruling of 28th October 2020. Pursuant to an application dated the 4th November 2020 and a ruling thereafter dated the 6th May 2021, the Applicant/Plaintiff's suit was reinstated for hearing on condition that the Applicant deposits in court the taxed costs of Kshs 794,557/= within 21 days of the ruling and secondly that the Plaintiff/Applicant pays throw away costs of Kshs. 25,000/= within 15 days from the date of that ruling failure to which the order of dismissal of the suit would automatically stand and the Defendant/Respondent would be at liberty to execute.

21. The Applicant/Plaintiff complied with the second condition but being dissatisfied with the first condition, seeks to appeal against the court's order.

22. In her application thereof the Applicant firstly seeks orders that the firm of Rodi, Orege & Company Advocates comes on record for the Plaintiff/Applicant in place of the firm of Motanya & Company Advocates and pursuant to a consent by both firms dated the 13th May 2021 and a Notice of change of Advocates filed on an equal date.

23. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides for change of Advocates to be effected by order of Court or consent of parties to wit:

When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —

a. upon an application with notice to all the parties; or

b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”

24. There having been a Consent recorded and filed, between the Applicant/Plaintiff’s outgoing Advocate and the proposed incoming Advocate in compliance to the provisions of the law, the first limb of the Applicant’s application *need not to have sought an order of the Court, however for purposes of the record, the firm of Rodi, Orege & Company Advocates shall now come on record for the Applicant/Plaintiff.*

25. On the second limb of the Application, I find the issues arising for determination as being whether or not the orders of stay of execution of the order of 6th May 2021 directing the Applicant to deposit in court the taxed costs of Kshs. 794,557/= as a condition for reinstatement of the suit pending hearing and determination of an intended Appeal should issue.

26. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

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.

(2)No order for stay of execution shall be made under sub rule (1) unless—

(a)the Court is satisfied that substantial loss may result to the 1st 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 1st Applicant.

27. There are three conditions for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

ii. The application is brought without undue delay and

iii. 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 Applicants.

28. On the first condition of proving that substantial loss may result unless stay order is made. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma v Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

29. From the above holding, it was incumbent upon the Applicant to demonstrate the kind of substantial loss she would suffer if the stay order was not made in her favour and not merely stating that she would suffer loss if the order of stay of execution was not issued. The Applicant not having satisfied this condition, her application on this limb must fail.

30. On the second condition, I find that it is not contested that the Application was brought without undue delay. There is nothing to add.

31. On the third condition, I find that the Respondent has intimated her willingness to avail security for due performance of the decree. In the case of **Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 Others [2014] eKLR Justice F. Gikonyo** had held that;

‘The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.’

32. The orders sought to be stayed were conditional and they have since lapsed. I have considered the application herein and having done so, I have asked myself what will happen if the Applicant’s application is declined? The conditional order will be confirmed, the Applicant’s

application will stand dismissed paving way for execution of the decree herein. If the Applicant eventually succeeds on appeal, the execution and proceedings leading to the same will be set aside wherein proceeds of execution will be ordered to be refunded to the Applicant there having been no allegation that the Respondent will not be in a position to make the refund should the Applicant succeed on appeal. I do not therefore see how the Applicants's appeal will be rendered nugatory if this application is declined.

33. It was stated by Kuloba, J in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending Appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.

34. The Application before me lacks merit and is hereby dismissed with costs to the Respondent.

i. *The Appellant/Applicant shall lodge her Appeal against the decree of the Court within 14 days from the date of this ruling.*

ii. *That upon filing of the memorandum of Appeal in (i) above, the Applicant shall prepare, file and serve her record of appeal within 45 days.*

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF OCTOBER 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE