



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 6 OF 2015

CHERARGEI KIPROTICH.....PETITIONER

-VERSUS -

THE COUNCIL OF UNIVERSITY OF ELDORET.....1ST RESPONDENT

PROF. TERESA AYUKO ODUOR AKENGA.....2ND RESPONDENT

PROF. JAMES OLE KIYAPI.....APPLICANT/INTERESTED PARTY

Coram: Hon. Justice R. Nyakundi

M/S Chemoiyai & CO. Advocates

M/S Wanjiku Karuga & CO. Advocates

M/S Gumbo & Associates Advocates

R U L I N G

What is before the court is an application dated 6th July 2021 expressed to be brought under order 42 rule 6 of the Civil Procedure Rules. The applicant seeks the following orders in a nutshell;

That there be stay of execution of ruling delivered on 11/6/2021 pending the hearing and determination of this appeal.

Costs.

The application is supported by an affidavit and based on the grounds that there is a judgment on record delivered on 5th December 2019 in this petition where the costs were awarded to the respondents. There was a bill of costs dated 3/11/2020 and the 3rd respondent instituted a bill of costs dated 7/2/2020. The ruling was delivered on 11/6/2021.

The applicant is in the process of appealing the same and filed an application in the court of appeal seeking orders for stay. The applicant raises the issue of costs having been wrongly awarded to the respondents in a public interest money as a ground of appeal. The appeal is meritorious and has high chances of success.

The applicant also filed submissions on 27th September 2021 reiterating the contents of the supporting affidavit and submitted that the application meets the threshold of order 42 rule 6. Further that there is a sufficient ground of appeal. The applicant is ready to furnish security as the court may direct.

The 1st respondent opposed the application vide a replying affidavit filed on 12th August 2021. The 3rd respondent replied vide a replying affidavit filed on 22nd July 2021. They also filed submissions on 8th October 2021 and 28th September 2021 respectively.

The application is opposed on the basis that the applicant has not met the threshold for grant of stay pending appeal as per the provisions of Order 42 Rule 6. The 3rd respondent contends that the applicant has delayed as the judgment was made a year and a half before the application was filed.

Upon perusing the pleadings and the submissions by both parties I have identified the following issues for determination;

1. Whether orders for stay of execution should be granted

WHETHER THE ORDERS FOR STAY OF EXECUTION SHOULD BE GRANTED

Order 42 Rule 6 of the Civil Procedure Rules provides;

(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 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.

Whether the Applicant will suffer Substantial Loss

The burden of proof on whether the respondent will be able to reimburse the decretal sum falls on him upon any concerns raised by the Applicant that he is unable to do the same.

The court should be guided by **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where the court held;

Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

The costs awarded to the Respondents amount to kshs. 1,287,810/- before interest. This is a colossal amount that would cause substantial loss if the applicant is to pay the same. However, the applicant has not demonstrated that there will be substantial loss if the decretal sum is paid to the respondents. To merely state that the loss will be substantial is not adequate.

Whether the Application was made without unreasonable delay

The question of unreasonable delay was dealt with in the case of Jaber *Mohsen Ali & another v Priscillah Boit & another E&L NO. 200 OF 2012[2014] eKLR* where it was stated:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

The application was brought 5 days before the 30 days stay on the ruling on taxation expired. The application has been brought without unreasonable delay.

Security

The court in *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR* was of the view that -

‘... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.’

The applicant has submitted that he is willing to give security as the court may direct. He has not made any specific proposals on the security.

The essence of an appeal is not always equated to the appellant suffering substantial loss. The court’s exercise of discretion is depended upon the unique circumstances and facts of each case. That is the principle in the case of **James Wangalwa & Another –v- Agnes Naliaka Cheseto (2012)eKLR** that **“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. The issue of**

substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

In the instant case the court is satisfied that in the event the appeal succeeds the appellant would be in a position to recover any money paid out to the respondent. The court takes the view that no evidence has been adduced as to the impecunious nature of the respondents. In the premises, the applicant has not met the threshold for grant of orders for stay of execution, more specifically the requirement to prove that substantial loss will be occasioned in the absence of stay of execution.

In the premises I find that the application is unmerited.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 15TH DAY OF FEBRUARY, 2022

.....

R. NYAKUNDI

JUDGE

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