



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 9 OF 2016

ZEDKA TECHNICAL SERVICES LIMITED..... PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....1ST DEFENDANT

COUNTY SECRETARY UASIN GISHU.....2ND DEFENDANT

COUNTY PUBLIC SERVICE BOARD UASIN GISHU.....3RD DEFENDANT

MINISTRY OF ROADS TRANSPORT AND

PUBLIC WORKS (UASIN GISHU COUNTY)4TH DEFENDANT

RULING

The applicant filed an application dated 5th November 2019 seeking orders for stay of execution of the ruling delivered on 23rd October 2019 directing the applicant to deposit security to the sum of kshs. 26,447,700/- as a requirement of stay of execution pending appeal. He also sought that the court amend the ruling issued on 23rd October 2019 so that the requirement of the applicant to deposit security be set aside.

APPLICANT'S CASE

The applicant filed submissions on 11th December 2019.

He submitted that there was a mistake apparent on the face of the record. The applicant cited order 42 rule 8 and submitted that as much as the respondent gave an undertaking in his affidavit for the deposit of security, the court should have made orders to avert issuance of an unlawful order.

The error is one that is so apparent that it does not require extraneous matter to show its incorrectness. It may be an error of law but must be capable of ascertainment. He cited the case of *Civil Appeal No. 2111 of 1996, National Bank of Kenya v Ndungu Njau* on the issue of review.

The applicant submitted that failure to set aside the decision and correct the error would infringe a party's due process rights and damage the integrity of the judicial process. He also cited the case of *Mombasa County Government v Pauline Wanjiku Kageni (2017) eKLR* and urged the court to allow the application.

RESPONDENT'S CASE

The respondents filed submissions on 17th December 2019.

The respondents submitted that it is a deliberate abuse of the court process and that the applicants consented to the court orders in the first place. They submitted that the county government is a corporate body capable of suing and getting sued and it can therefore be compelled to pay security. They cited the case of *National Transport and Safety Authority v Elisha Z Ongoya & 2 others (2019) EKLR* and the case of *Kaimba Mangaara v Tharaka Nithi County*

Government (2018) EKLR. They also cited the case of **Nice Rice Millers Limited v Meru County Government (2019) EKLR** and submitted that under order 45 a party that pursues a review process cannot at the same time appeal.

The respondents cited the case of Equity Bank Limited vs Taiga Adams Company Limited and submitted that the application lacks merit and ought to be dismissed with costs.

ISSUES FOR DETERMINATION

- a) Whether the court should grant orders of stay
- b) Whether the court should set aside the ruling delivered on 23rd October 2019

WHETHER THE COURT SHOULD GRANT ORDERS OF STAY

The present application does not present the typical situation within which the court would grant a stay. The application is still pending and the court had already granted interim orders for stay. The effect of setting aside the ruling delivered on 23rd October 2019 would be that the sum that is security will not be deposited as security and there will be no execution possible as the terms of conditional stay would have been revoked.

As it stands this prayer is spent.

WHETHER THE COURT SHOULD SET ASIDE THE RULING DELIVERED ON 23RD OCTOBER 2019

The ruling delivered on 23rd October 2019 directed the applicants to deposit kshs. 26,447,700/- as a requirement of stay of execution pending appeal. The applicants have sought review of the order on the grounds that there was a mistake or error apparent on the face of the record.

Order 42 rule 8 of the Civil Procedure Rules provides;

No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.

In **Mombasa County Government v Pauline Wanjiku Kageni [2017] eKLR** the court held;

20. The last point of argument was on the requirement for the applicant to deposit security in this matter. Counsel for the respondent referred the court to the supporting affidavit of the applicant's deponent, Mr. Jimmy Waliaula in paragraph 10 where he states the applicant is ready and willing to furnish security as shall be directed by the honourable court pending the hearing of this appeal. As such, Mr. Gikandi sought the deposit of the entire decretal amount either in court or in a joint bank account opened in the names of the law firms on record. The provisions of Order 42 rule 8 of the Civil Procedure Rules states: -

"No such security as is mentioned in rules 6 and 7

shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to have been done by him in his official capacity."

21. The above provisions are self-explanatory. Much as Mr. Jimmy Waliaula gave an undertaking in his affidavit for the deposit of security, this court cannot order the applicant to deposit the same in court as that would be issuance of an unlawful order. I therefore make no orders requiring the deposit of security by the applicant.

In **County Government of Kilifi v Robinson Onyango Malombo t/a O.M. Robinson Advocates [2018] eKLR** the court held;

9. This brings into question whether, therefore, a County Government is protected from the requirements of Order 42 Rules 6 and 7 of the Civil Procedure Rules thereof. Order 42 rule 8 of the Civil Procedure Rules provides as follows;

"No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity".

The upshot of the discussion is that the requirement for the deposit of security does not apply to County Government.

It is evident from the various authorities that the position in law is that no orders for deposit of security shall issue against the government and this includes the county government. I do agree with the applicants that the error is an error of law, capable of ascertainment. It is ascertainable that the error on record is that of requiring the government deposit security.

In the premises the ruling of 23rd October 2019 requiring deposit of security by the applicant is hereby set aside. No order is made as to costs.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th day of March, 2020.

In the absence of:-

Mr. Too for the applicant

Mr. Wamalwa for the Respondent

Mr. Eululo - Court clerk