REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PETITION NO. 4 OF 2015

TIMOTHY OTUYA AFUBWA …..............................1ST PETITIONER

FRED MARUTI MURUNGA ….............................2ND PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF

TRANS NZOIA...1ST RESPONDENT

RETILAL GOSAR DODHIA ….........................2ND RESPONDENT

VIPUL TATILAL …...3RD RESPONDENT

AVIR KANTI SHAH …...................................4TH RESPONDENT

R U L I N G

By its Notice of Motion dated 28/6/2016 the 1st Respondent /Applicant prays for the following reliefs;

> **(a) This honourable court be pleased to set aside its judgment delivered herein on 23/6/2016 and all the orders therein.**
>
> **(b) Upon the said judgment and orders being set aside then Petitioners petition and notice of motion dated 3/3/2015 therein as well as the preliminary objection thereto dated 8/4/2015 be reinstated to hearing and determination on merit.**
>
> **(c) The honourable court further make any other orders or direction.**
>
> **(d) Cost to the Petitioner.**

The application is supported by the affidavit of Prof. Nixon Sifuna sworn on 28/6/2016 together with the attached annextures. The Applicants complaints basically centre on the fact that the entire petition was argued prematurely and thus the judgement was *“exparte”*.

The consequences of the said judgment are far reaching, namely that the 1st Respondent has subsequently invested in a Multi million County Referral Hospital after purchasing the suit property from the 2nd and 3rd Respondents.

That the court failed to look into the Applicants replying affidavit when arriving at its judgment despite

the same being on record. That there was a preliminary point of law regarding the jurisdiction of the court which ought to have been determined as of first instance.

He concluded that if the said judgment is sustained then the provision of Article 50 of the Constitution would have been breached as the applicant would not have been accorded a fair hearing.

On their part the Petitioners/Respondents have filed their reply vide the replying affidavit of the 1st Respondent dated 27/7/2016 in which among other issues they have raised a fundamental question of jurisdiction. They depone that the court in such a constitutional petition cannot set aside its judgment .

They have further attacked the supporting affidavit of Prof. Sifuna arguing that he has deponed to facts which he ought not to but instead its his client who ought to have done that.

Before dealing with the merit of the Notice of Motion its worthwhile to deal with the Respondents preliminary point of law dated 26/7/16 in which they have stated that

> **" The court lacks jurisdiction to entertain the application of order 42(2) (4) of the Civil Procedure Rules having taken effect pursuant to the applicants Notice of Appeal dated 5/7/2016 and the application should accordingly be ordered struck out with costs to the petitioners."**

The Respondents argues that having filed the Notice of Appeal, the Applicant is precluded from filing the current motion but instead it should await the outcome of the appeal. They went on to argue that under the provisions of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 there is no provision of setting aside except amendments and conservatory orders under Rule 18, 23 and 24 respectively.

They content further that the fact that it has filed a notice of Appeal, it cannot again file such an application to set aside the judgment.

I find that this issue raised by the Respondents, namely, that by virtue of the Notice of Appeal dated 5/7/2016, the Applicants are precluded from filing the motion to set aside the judgment herein being weighty and worthy of determination. It is appreciated that the applicant has not come under the provisions of Section 80 of the Civil Procedure Act or rule 45 of the Civil Procedures Rules dealing with review. It has instead come under Articles 50, 159(2) and 259(1) of the constitutional and Rules 3(3), (4) , (5), 16(2), 19 and 30 of the Constitution of Kenya protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

Is it therefore proper for the Applicant to attack the judgment on two fronts namely by appeal and the current application? Although the aforestated Provisions of the constitution are wide enough I do not respectfully think that an Applicant is granted such latitude to appeal against a decision at the same time apply for it to be set aside. Such process in my respectful view would be *"betting"* so to speak. In other words an aggrieved party would be chancing either way. I belief that the framers of the rules and procedure expected that an aggrieved party would take one predictable route in ventilating its complain.

By filing a Notice of Appeal, the Applicant clearly demonstrated that it was aggrieved by the judgment herein and that the best way was to appeal.

I find that allowing the collateral attack of the judgment by the applicant is not right since presuming that it is not allowed then it still has a chance to proceed on appeal. At the same time if allowed, then it shall be at liberty as expected to withdraw the said notice. To show its seriousness on appealing against the judgment the notice of appeal was served upon the respondence.

Although the practice rules are not coached in a way that one detects a review I find the spirit behind the applicants application to be a review of the impugned judgment.

Either way the Applicant ought to determine which way to go. Having decided to take the appeal route it would be unfair for this court to make a finding on whether to set aside its judgment. In effect this court is *functus officio.* Whatever merits or demerits of the application, this court for now cannot decide. Had the Applicant decided not to appeal then this court would have made a decision on the application.

My position is buttressed by the provision of Rules 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013 which states under the heading

> **<u>“Setting aside, varying or discharge”</u>**
>
> **“An order issued under Rule 22 may be discharged, varied or set aside by the court either on its own motion or an application by a party dissatisfied with the order.”**

Rule 32 under “Stay pending appeal” provides as follows;

> **“(1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.**
>
> **(2) An application for stay of execution may be made informally following the delay of judgment or ruling and the court may issue such orders as it deems fit and just.**
>
> **(3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.”**

Clearly the drafters of the rules above expected that the aggrieved party shall choose either of the two that is either to apply to vary or set aside or discharge or an appeal. Respectfully therefore, I find it inconceivable that the Applicant expects this court to determine its motion by setting aside its judgment while turning a blind eye on the Notice of Appeal. What I expect then for the Applicant to do naturally is what rule 31 above requires if need be, namely to apply for stay pending appeal.

I find therefore that the preliminary objection ought to be sustained. This court in effect cannot determine the Notice of Motion. The Applicant must be allowed to explore the avenue of an appeal. To this extent the court is f*uctus officio*. The application is hereby dismissed with costs to the 1st and 2nd Respondents.

Orders accordingly.

Delivered this 5th day of October 2016.

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H.K. CHEMITEI

JUDGE

No appearance for Applicants

No appearance for Respondents

Court Assistant - Kirong