REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CONSTITUTIONAL PETITION NO. 8 OF 2015

KITALE SHUTTLE LTD.....1ST PETITIONER

KANGAROO SHUTTLE SERVICES.....2ND PETITIONER

MAHOGANY MWANAKE CO. LTD.....3RD PETITIONER

NORTH RIFT LUXURY SHUTTLE LTD.....4TH PETITIONER

GREENLINE CO. LTD..... 5TH PETITIONER

GREAT RIFT EXPRESS SHUTTLE SERVICES LTD.... 6TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF TRANS-NZOIA.....DEFENDANT

R U L I N G

1. The application dated 11th June, 2015, by the respondent/applicant is brought under Rule 33(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, seeking orders that there be stay of the judgment in Kitale High Court Constitutional Petition No. 8 of 2015 and further proceedings in the same matter pending the hearing and determination of intended appeal. The grounds for the application are in the body of the appropriate notice of motion and are supported by the averments contained in the supporting affidavit dated 11th June, 2015 deponed by the applicant's County Secretary.

The petitioners/respondents filed grounds of opposition dated 3rd July, 2015, in which they contend that the application is fatally defective and an abuse of the court process and that it does not meet the principles set down for exercise of discretion in favour of the applicants.

2. Written submissions were filed by both sides. They more or less reiterated and emphasize the grounds in support of the application and those in opposition thereto and were given due consideration by this court. Apparently, the issue arising is whether the application is competent and proper before the court and if so, whether the applicant has given or shown satisfactory grounds for exercise of discretion in its favour.

Unless the court is referring to different rules, Rule 33 (3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, otherwise known as **The Mutunga Rules**, is non existent even though it has herein been invoked by the respondent to bring this application.

Rule 32(3) of the said Rules is the correct provision as it provides for the filing of a formal application for stay pending appeal. The present application is such application. It may therefore be said that the inclusion of Rule 33(3) as an enabling provision was most likely a typographical error which was somehow corrected at the filing of the written submissions.

3. Rule 32(3) of the Mutunga Rules only provides for the procedure in filing of a formal application for stay. It does not set out the condition or threshold for the grant of stay pending appeal and cannot therefore apply in seeking stay. But looking at Rule 32(2), which provides for informal application for stay, a court may grant stay as it deems fit and just. This notion may also be imported in dealing with a formal application as long as there are proper and satisfactory grounds for grant of stay. It is however, instructive to note that under Rule 32(1) of the said Mutunga Rules, an appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed from.

4. The grounds in support of the application allude to monetary expenses which have been or may be incurred by the respondent in the attempt to provide an alternative site to the respondents or in having them restored at the previous site. Logistics and security problems which may arise as a result of the material judgment of the court are also alluded to by the applicant. However, the applicant is itself to blame for the consequences of its unconstitutional and unlawful action against the respondents and cannot now be heard to say that it will suffer major financial loss and experience challenges in maintaining peace and enforcing security within the county if the effects of the judgment are not put on hold. In any event security functions are the domain of the national government.

Notwithstanding all the foregoing, the judgment of the court delivered and dated on 11th June, 2015, merely restored the "*status quo*" existing between the applicant and the respondents prior to the issuance of the unlawful notice dated 23rd March, 2015. One wonders whether there is anything to be stayed at this juncture. The applicant must therefore accept to live with the consequences of its unlawful action until such time that the intended appeal shall be heard and determined and although this application is proper before the court, proper and satisfactory grounds have not been shown and established for the court to deem it fit and just to grant a stay pending appeal.

In the upshot, the application is dismissed with costs to the respondents.

Ordered accordingly.

J.R. KARANJA

JUDGE

[Read and signed this **10th** day of **July, 2015**]