



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL CASE 15 NO. OF 2015**

MT. ELGON CONSTITUENCY DEVELOPMENT FUND..... APPELLANT

VERSUS

MANDANI KIRUI KISACH T/A FELISHA AGENCIES.....1<sup>ST</sup> RESPONDENT

BOM MASA EK PRIMARY SCHOOL.....2<sup>ND</sup> RESPONDENT

**RULING**

1. Before this court is an application dated 7<sup>th</sup> April 2015 by way of Certificate of Urgency. It is brought by way of a Notice of Motion pursuant to Order 21 Rule 8 (5), 42 Rule 6, 50 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B, 3,3A & 95 of the Civil Procedure Act.

It seeks for two substantive orders; the first prayer having been taken over by events. Left for the courts consideration is prayer number 3 seeks for stay of the Garnishee orders pending hearing and determination of the appeal.

2. The grounds in support of the application are that; the decision of the court amounted to denial of the applicants right to a fair hearing in that the application for Garnishee order absolute had not been heard; the lower court had no jurisdiction to entertain the matter in the first instance; the applicant being a public institution is likely to suffer substantial loss; no prejudice will be suffered by the respondent; and the applicant is ready to abide by reasonable conditions including provision of security for due performance.

3. In an affidavit in support of the application, Eric Ojuro advocate, deposes that the application for Garnishee absolute had not been heard inter parte, the same was made absolute when the application to set aside was declined; the order was read without notice to the applicant; the order extracted without approval; further the pending appeal has a high chance of success,

4. The application was objected through grounds of opposition as follows; the application is misconceived and bad in law; it does not meet the threshold for grant of stay; money decree cannot be rendered nugatory, and the lower court's decision was merited.

5. Both parties filed written submission. The appellant's contention is that in the event the appeal succeeds it may not recover the sums; the order issued was unlawful as the trial court had no jurisdiction. The respondent is unlikely to refund the same. The application was filed within reasonable time, and the applicant is ready to deposit security, further no adequate material including the lower court proceedings and the ruling have been placed before court.

6. The issue before court is whether or not to grant stay pending appeal. The questions to be considered are whether or not the appellant is likely to suffer substantial loss, secondly whether the application was made timeously and if security has been offered.

I have noted that the appellant has offered security based on court's term; secondly the

application was made timeously. The next question is whether any loss likely to be suffered. The applicant is a public body charged with administration of public funds. The sum in question is Kshs. 3,156,950.95/=. This no doubt is a substantial amount in the circumstances of this case. The appellant being a public body may suffer loss in the event the appeal is successful and the money not recovered promptly, in this regard I will grant the order of stay pending hearing and determination of the appeal on condition that a sum of Kshs. 1.5 million is deposited in an interest earning account in the names of counsel on record for the parties within 10 days, and the appeal set down for hearing within 45 days.

Costs in the cause.

Dated at Bungoma this 6<sup>TH</sup> day of OCTOBER 2015.

**ALI-ARONI**

**JUDGE.**