



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. 2 OF 2014**

**ESTHER KANYUA MUKIRA & 2 OTHERS.....APPELLANT**

**VERSUS**

**CID OFFICE MERU & 2 OTHERS.....RESPONDENTS**

**RULING**

1. The applicants through a notice of motion dated 3<sup>rd</sup> February, 2014 brought pursuant to section 1A, 2A, 3A of Civil Procedure Act and Order 41 Rule 6 and 8 of Civil Procedure Rules sought orders for stay of further proceedings and/or execution of the ruling dated 22<sup>nd</sup> January, 2014 and any consequential proceedings thereto pending the hearing and determination of the applicants' appeal filed on 3<sup>rd</sup> February, 2014.
2. The applicant's application is supported by annexed affidavit sworn by Mr. Justin M. Kiongo, a state counsel. The main grounds of the application are inter alia; that the appellants are aggrieved by court's ruling dated 22<sup>nd</sup> January, 2014, that they have lodged an appeal against dismissal of their application; that the trial court erred in failing to appreciate that there was an error in her judgment dated 9<sup>th</sup> January, 2013, that if stay is not granted the impugned judgment may be executed. That the appeal has high chance of success. The Appellants in their supplementary affidavit further averred; that the appeal was filed within time and that the merits of the appeal cannot be conclusively canvassed at the interlocutory stage as is being urged by the respondents.
3. The 1<sup>st</sup> Respondent filed Replying Affidavit whereas the others did not in spite of court having given them an opportunity to do so and/or having been served with the application. The 1<sup>st</sup> respondent took issue with the heading of the appeal and averred that the same is defective as the respondents are not appellants. The respondent further pointed out that the application should not be allowed as the appeal has no chance of success. She urges that the appeal is not dated nor signed hence it is defective and further no ruling on order appealed against has been annexed. The respondent argued the applicants have not deposited at least half of the decretal amount and argues that the applicants should not be spared because they are state organ.
4. When the matter came up for hearing on 9<sup>th</sup> October, 2014 the respondents though being aware of the hearing of the matter which had been fixed by court, in their presence on 17/07/2014 did not attend. The state counsel made his submissions in absence of the respondents. I have carefully considered the application and affidavit in support, all annexures, the replying affidavit, supplementary affidavit and the memorandum of appeal. The issue for consideration is whether the applicants have satisfied the conditions for granting of the orders sought.

5. The application is purportedly premised under Order 41 Rule 6 and 8 of Civil Procedure Rules which Order 41 do not have Rule 6 and 8 needless to say the application is based on none existing order. Further the formatting of memorandum of appeal is wanting as the Appellants are still named as defendants and put below the Respondents who are also referred to as Plaintiffs. In an appeal the description of parties changes from “Plaintiff” and “Defendant” to “Appellant” and Respondent”.

Article 159 (2) (d) of the constitution provides:-

***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(d) justice shall be administered without undue regard to procedural technicalities; and***

Further under Order 51 Rule 10(1) and (2) of Civil Procedure Rules Provides:

***10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.***

6. In view of the above quoted provisions the objection by the respondents is untenable as no objection should be entertained nor application should be refused merely by reason of failure to state the order or rules of statutory provision under which the application is premised. Further no application should be defeated on a technicality or for want of form, that do not affect the substance of the application. So the want of form in this application I find and hold is not fatal to the application as it does not affect the substance of the application. The memorandum of appeal contrary to the assertion by the respondents, dated 31<sup>st</sup> January, 2014 and is duly signed for the Hon Attorney General.

Order 42 Rule 6(2) of Civil Procedure Rules provides:-

***6(1).....***

***(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.***

The applicants did not in their application state that substantial loss may result to them unless the order sought is made. This court has gone out of its way to consider the nature of the claim and the consequences of the court's ruling. The applicants at the lower court were seeking review of court's order so as to enable them defend themselves for they were condemned unheard. The court found the applicants though given chance to file defence they did not file their defence within 7 days. Indeed defence was not filed as the trial court found but the question is wont the applicant's constitutional rights not be violated by denying them their application and won't they suffer substantial loss if their application is denied against them and made to pay the damages awarded without being heard and cant the Respondent's be compensated by way of costs if the applicants application is allowed?.

Article 50(1) of the Constitution Provides:-

***“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another***

***independent and impartial tribunal or body.***

I find that if applicants application is denied they though they had failed to file their defence within 7 days period given by consent they would suffer substantial loss for they shall be condemned to pay damages without having their day in court and their appeal shall be rendered nugatory. The application on the other hand was brought to court on 3<sup>rd</sup> February, 2014 same day the appeal was filed. The application was therefore brought without undue delay. The appellants/Applicants being state I find there is no need of requiring there be security.

7. On the issues raised by the respondents about the competency of the appeal and lacking merits, the same cannot be properly canvassed at the Interlocutory stage and in this application for stay of execution. The same have to wait at the appropriate stage.
8. The upshot is that the application is merited and is allowed. There shall be stay of further proceedings and/or execution of the ruling dated 22/01/2014 and all subsequential proceedings thereto pending hearing and determination of this Appeal.
9. Costs shall be in the cause.

**DATED AT MERU THIS 6TH NOVEMBER, 2014**

**J. A. MAKAU**

**JUDGE**

**Delivered in open court in presence of:-**

Mr. J. Kiongo for Applicants – present

Respondents in person – absent

**J. A. MAKAU**

**JUDGE**