**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L PETITION NO. 18 OF 2016**

**SIOKWET TARITA LIMITED.....PETITIONER**

**VERSUS**

**THE COMMISSION FOR UNIVERSITY EDUCATION....1ST RESPONDENT**

**KISII UNIVERSITY.....2ND RESPONDENT**

**AND**

**PROF. JOHN S. AKAMA.....1ST CONTEMNOR**

**DR. KIBIYEGON KIRUI.....2ND CONTEMNOR**

**RULING**

**Kisii University , Prof. John S. Akama** and **Dr. Kibiyegon Kirui** hereinafter referred to as the applicants have come to court vide application dated 1st November, 2017 seeking for an order that there be stay of proceedings and/or further proceedings and or orders issued on 14.12.2016, 26.9.2017 and the hearing of the application dated 31.08.2017 and any other action pending hearing and determination of the appeal to the Court of Appeal. The application is based on the grounds that the Petitioner obtained ex-parte injunctive orders in the matter on 14/12/2016 and that the court was misled into issuing injunctive orders without first ascertaining that service had actually been effected upon the 2nd Respondent. The finding of this court on the Petitioners' application dated 30/11/2016 for contempt of court is a subject on appeal to the Court of Appeal. The applicants are desirous of being heard on appeal before any further orders are made in this matter hence the need to grant stay of proceedings pending appeal.

The applicants contend that the decision of this court that held the 1st and 2nd contemnors/Applicants to be in contempt of a court order is being challenged on appeal and therefore further action on account of the said finding will render nugatory the matter in the Court of Appeal. That if stay is not granted the appeal to the Court of Appeal risks being rendered nugatory and the 1st and 2nd contemnors and Kisii University risks suffering substantial loss. That this court has power to grant the orders sought in the spirit of Article 47 and 50 of the Constitution of Kenya, 2010. That there was no finding by the court that the 2nd Respondent was duly served to warrant the sustenance of the orders issued on the 14/12/2016. The court found the 1st and 2nd contemnors to be in contempt on account of the fact that on 14/12/2016, the 2nd Respondent, Kisii University was represented in court and the counsel in court then on 14/12/2016 ought to have informed the 2nd Respondent of the court orders when in fact the court record bears witness that the 2nd Respondent, Kisii University was not represented in court. The applicants are ready and willing to abide by any reasonable condition for grant of the orders sought for stay of proceedings

pending appeal. The applicants further contend that every party has a right to be heard and the right to defend is cherished.

The 2nd Respondent in the petition filed an application dated 24/03/2017 seeking to discharge the orders of the injunction issued on 14/12/2016 and the orders requiring it to continue paying rent to the Petitioner/Respondent when the tenancy had been terminated by factors beyond its control which application is still pending and yet to be considered. The tenancy contract between the petitioner and the 2nd Respondent was brought to an end due inter-alia to frustration. The issue of rent payment and/or termination of the lease is the main subject in this petition and the petitioner ought not to be allowed to use the application to obtain final reliefs without the petition being heard. The appeal to the Court of Appeal ought to be given room to be ventilated fully. In any event, the petitioners claim is pecuniary and can be handled at the end of the appeal. The Petitioner/Respondent already has its premises back and is at liberty to mitigate any loss that may occur as a result of the frustrated contract.

It is believed that the applicant is a reputable learning institution within the Republic of Kenya with campuses in several parts of the country and if found culpable or liable at the end of the Appeal to the Court of Appeal, the applicant will be able to pay any amount that would have been found to be due. That this court has the power to entertain and grant the orders sought in the interest of justice. The application is supported by the affidavits of Dr. Kibiyegon Kirui and Professor John S Akama who reiterate the grounds of opposition.

The petitioner filed grounds of opposition stating that the Contemnors have no audience before this Honourable Court in the present matter unless and until they purge their contempt by obeying the Court Order issued by this Court on 14th December 2016: The Court Orders of 14th December 2016, particularly and especially that Kisii University and Kisii University Eldoret Campus pays rent to the Petitioner continue to be disobeyed. The Law is that a party in contempt has no audience before the Court until the contempt is purged. The respondent states that where an application for committal for contempt of court orders is made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that is purged or both.

The petitioner gave the instance of an alleged contemnor being prohibited from prosecuting any application to set aside orders or take any other step until the application for contempt is heard and determined. The reasons for this approach are that a contemnor would have no right of audience in any court of law unless he is punished or purges the contempt. The respondent believes that the application is an abuse of Court process: Directions for hearing the Preliminary Objection and application for contempt were issued in court on 17th October 2017, in full hearing and consent of the advocates for the Contemnors, and the matter was fixed for 23rd November 2017, by consent of the Contemnors Advocates.

The petitioner contends further that the present application is mischievous as It is intended to undo a Consent Order/direction of Court duly consented to by the Contemnors' advocates on record, absent any lawful ground for setting aside a Consent Order and is intended to preemptively hinder the Court from hearing and punishing the Contemnors for contempt of court. This is a gross abuse of court process.

According to the respondent, the application is grossly misconceived as to the proceedings before the Court, particularly the application dated 31st August 2017, vis a vis the intended appeal. The two have no correlation as the appeal to the Court of Appeal is against the Ruling of Court of 26th July 2017 that was the initial contempt. The application dated 31st August, 2017 is for a continuing contempt, it is yet to be decided and there is no appeal whatsoever against the application.

***Mr. Mukhabane learned counsel for applicants submits*** that the applicant, Kisii University, Professor John S. Akama and Dr. Kipyegon Kirui have come to court in the application dated 1.11.2017 seeking stay of proceedings in this matter pending hearing and determination of the appeal lodged in the Court of Appeal. The background of the application is that Kisii University is a public University of Higher learning. The applicants are public branches. It is within public domain that the building that they are

habiting was not conducive for learning environment. They vacated the building and got a conducive place for learning. The petitioner has not been willing to prosecute the petition herein and that there is another contempt application seeking such orders like the ones they obtained. The applicants have filed this application praying that the proceedings herein be stayed pending the hearing and determination of the appeal.

The grounds for the application are that the appeal is arguable as the order for contempt made was based on the proceedings of 14.12.2014 and that the 2nd respondent was not aware of the order whereas the application coming up on 23.11.2017 is for continuing contempt. The intention of the applicant is to arm-twist the applicants to pay rent. Kisii University is not occupying the premises but they are being forced to pay rent. The petitioners are not fixing petition for hearing and therefore these proceedings should be stayed and the appeal to be heard on merit. The main petition is doomed to fail because it is hinged on an agreement that is not registered. They have challenged the ruling of the court finding their client in contempt. His clients are not in contempt of any court order.

The application for contempt coming for hearing on 23.11.2017 is for a continuing contempt and therefore, it is based on the earlier finding and therefore, if stay is not granted, the applicant will suffer prejudice. There is a likelihood of the 2nd respondent in the petition being denied audience until he purges the contempt and therefore, it is a necessary to stay these proceedings because this is a continuing contempt

***M/s Odwa learned counsel for the applicants assisting Mukhabane*** submits that the applicant stands to suffer substantial loss if the proceedings are not stayed and the application for contempt is prosecuted and determined before the appeal is heard and determined. The orders complained of have all along been challenged by the 2nd respondent. The 2nd respondent filed an application dated 24.3.2017 seeking to challenge the orders issued in favor of the petitioner in its absence and before the 2nd respondent was given an opportunity. The application was never heard because of the contempt application. If the petitioner is given a freehold to present the application for contempt on the basis that the 2nd respondent was represented it will clearly fly in the face of the justice system of our country. The petitioner is seeking to enforce a lease that was unregistered.

***Mr. Githaiga learned counsel for the petitioner*** submits the applicants do not have audience before the court. There is an order issued by the court on 26.7.2017 which the applicants have disobeyed and were found to be in contempt. The contempt arose from orders issued on 14.12.2016 that Kisii University pays rent to the petitioners. On the 17.10.2017, the court made orders for the hearing of the preliminary objection. When a consent order is made in presence of counsel for all litigants, the same must be obeyed. .

I have read and considered the application, the affidavits on record, the written and oral submissions made by Counsel for both parties as well as the authorities cited. The application is premised on ***Order 42 rule 6*** of the ***Rules*** which specifies the circumstances under which either the trial court or an appellate court may order stay of execution of a decree or order pending an appeal. ***Rule 6(2)*** lays down the conditions which an applicant must satisfy in order to deserve orders of stay of execution pending appeal. I must hasten to add here that the conditions set out in ***Rule 6(2)*** only serve as guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case. The applicant must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application had been filed without unreasonable delay. The applicant must also show that he was willing to offer such security as may be ordered by the court.

Having analyzed the provisions of ***Order 42 rule 6*** of the ***Rules***, it is clear to me that the said provisions only apply to applications for stay of execution of a decree or order issued by a court pending hearing of an appeal but the same do not apply to applications for stay of proceedings such as the application now before me. It is apparent from the face of the application and from the submissions made by the parties that counsel for both parties were operating on the mistaken belief that the conditions prescribed in ***Order***

***42 rule 6(2)*** were also applicable to applications for stay of proceedings which is not the case. Having made that finding, it is obvious that ***Order 42 rule 6(2)*** cannot come to the aid of the applicant. The court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations? In the case of Global ***Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 the judge held: -***

> ***"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously" (emphasis added)***

In this matter before me, the applicant has an arguable appeal in the court of appeal on the issue of service and whether the 2nd respondent was in court when the order was issued to be liable in contempt.

***In Rose Detho V Ratilal Automobiles Ltd & 6 Others [2007] eKLR,*** the Court of Appeal held by majority that both the applicant and the respondents agreed that the decision as to whether a contemnor should be heard by the court or not is a matter within the discretion of the relevant court.

In the case ***of Joseph Schilling and two others vs. Stardust Investments Limited and another – Civil Appeal No. 134 of 1997*** the court of appeal stated that it was a matter of the discretion of the court whether or not to refuse to hear a party who is in defiance of a court order until such party has purged his contempt."

However, even though the court's power when deciding whether to hear a contemnor or not is discretionary, the general rule has been not to hear a contemnor until he purges the contempt. This is because as Kwach, J.A (as he then was) stated in the case of Commercial Bank of Africa Limited vs. Isaac Kamau Ndirangu – Civil Appeal No. 157 of 1991 that It is a fundamental tenet of the rule of law that court orders must be obeyed.

There is, however, exception to that general position and this is readily seen in the case of Hadkinson vs. Hadkinson [1952] 2 ALL ER 567 particularly at pages 569 – 570 where Denning LJ., in a well-researched judgment came to what is now known as the "modern rule". He stated:

> ***"I am of the opinion that the fact that a party to a case has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the order which it may make, then the court may on its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."***

Much as I have discretion to hear or not to hear the applicants, that discretion, like any other judicial discretion, must be exercised judicially and not capriciously. It must be exercised upon reasons and not on the whims of the court or on sympathy or sentimental aspects such as that the court must show that it has teeth when faced with a case such as before me. Courts have teeth but must only bite in appropriate circumstances. Courts act on reason and not on emotion. In the exercise of the discretion, the legal principles I have reproduced hereinabove must guide my approach. The main application before me is seeking stay of proceedings.

The applicants intend to appeal against the order of the superior court finding them guilty of contempt on the grounds of both facts and law. The applicants deny that they disobeyed the court orders. It is apparent therefore, that having regard to the law and circumstances of this case, the applicants are entitled

to be heard on appeal against the orders of committal.

This court finds that the issue of contempt should be determined first in the court of appeal as the continuing contempt is based on the first act of contempt and therefore it will be prejudicial to the applicant to proceed in this matter when the appeal is pending in the court of appeal. Denying the applicants audience due to the fact that they were found in contempt initially will be denying them the right to be heard contrary to the law. It is important to add that the issue as to whether a contemnor should be heard or not is the discretion of the court.

The application is merited and therefore I do order that there be stay of proceedings and/or further proceedings and or orders issued on 14.12.2016, 26.9.2017 and the hearing of the application dated 31.08.2017 and any other action pending hearing and determination of the appeal to the Court of Appeal. However, the stay is limited to 60 days only subject to review. Costs in the cause.

**Dated and delivered at Eldoret this 22nd day of November, 2017.**

**A. OMBWAYO**

**JUDGE**