



IN THE COURT OF APPEAL AT NAIROBI

CORAM: MURGOR, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 122 OF 2014

BETWEEN

DR. WILFRIDA ITOLONDO & 4 OTHERS.....APPLICANTS

AND

THE PRESIDENT & 7 OTHERS.....RESPONDENTS

(Application for stay of execution pending an appeal against the judgment of the High court of Kenya at Nairobi (Odunga, J) dated 21st March, 2014

in

H.C. JR. C. NO. 232 OF 2012)

R U L I N G

On the 5th June 2014, I declined to certify this matter as urgent having taken the view that there were no urgent circumstances to warrant the issuance of a certificate of urgency.

Briefly the facts are that by a Notice of Motion dated 24 th July 2012 the applicants herein sought for orders of mandamus compelling the respondent to institute a process for the appointment of and to appoint the Vice Chancellor of Kenyatta University; and an Order of Prohibition to prohibit the Prof. Olive

Mwihaki Mugenda from acting or purporting to act as the Vice Chancellor of the Kenyatta University unless appointed/ reappointed by law.

On 21st March 2014, the High Court dismissed the applicant's suit with costs to the respondents.

The applicants were aggrieved with judgment of the High Court and filed Notice of Appeal dated 19th May 2014. The applicant also filed Notice of Motion dated 3rd June 2014, together with an affidavit sworn by **Dr. Wilfrida Itolondo** and a Certificate of Urgency of the same date, which I declined to certify as urgent.

In their urgency application, the applicants contended that the 3rd and 4th respondents had served upon them with a Bill of Costs for an amount of Kshs. 2,245,108/-, and were also expecting the other respondents to also file their Bills of Cost at any time; that the Bill of Costs was due to be taxed on 10th June 2014, and if taxed, they were apprehensive that if the application for stay of execution was

not certified urgent, the order for costs would be executed to their detriment.

The application was referred back to me under **rule 55** of this Court's rules for hearing inter partes. **Dr. Itolondo**, who

submitted on behalf of the other applicants submitted that the case was of great public interest. He complained that the 3rd, 4th and 6th respondents had served the applicants with Bills of Costs that were due for taxation on 10th July, 2014, and that the actions of the 3rd, 4th and 6th respondents was in bad faith and intended to frustrate, debilitate and scare off the applicants from pursuing social and public rights as guaranteed by the Constitution; that the suit was not frivolous, it was arguable and had a high chance of success.

On her part, **Dr. Elena Korir** the 2nd applicant submitted that the Constitution was violated by the re-appointment of the 6th respondent after her five (5) year contract had expired on 31st March 2011; that being public spirited, the applicants had filed this suit in the interest of social justice and the fundamental rights, as set out in the new Constitution 2010. Dr. Korir submitted that it was the court's discretion to award costs, but, the court did not take into account the public interest nature of the suit, and that being public servants they could ill afford to pay these costs.

Mr Wetangula learned counsel for the 3rd and 4th respondents on his part submitted that, the applicants had filed a

Certificate of Urgency dated 4th June 2014 which the Court had declined to certify as urgent. No new reasons were advanced to warrant the matter being certified urgent. Counsel was of the view that, taxation of costs did not prohibit the applicants from pursuing public interest matters, and they are entitled to pursue their appeal as they deem fit. Counsel concluded that the applicants had not demonstrated what prejudice they would suffer if the costs were taxed.

Mr. Mwihuri learned counsel for the 6th respondent on his part stated that, he had filed a replying affidavit sworn by the **Prof. Olive Mwihaki Mugenda**. Counsel contended that the applicants have not given any reasons for issuance of an urgency certificate. The applicants have not shown that the respondents are unable to refund the taxed costs in the event their appeal is successful. Counsel concluded that costs cannot be stayed as

they can be refunded and cited **KENYA OIL COMPANY LIMITED**

VS. JAYANTILAL DHARAMSHI GOSRANI [2010] eKLR in support of this contention.

Ms. Shamallah learned counsel for the 7th respondent, associated herself with submissions of counsel for the 3rd and 4th

respondents, and submitted that no new facts have been presented to the court on the reasons for issuance of an urgency certificate; that after taxation, execution is not immediate carried out, and therefore the applicants will not suffer any prejudice.

I have considered the pleadings and heard the rival submissions of counsel, and remain unconvinced on the question of urgency of this fiercely contested application. The applicants, apprehension is that the taxation of the 3rd and 4th respondents Bill of Costs is due to be heard on 10th July 2014, and that once the costs are awarded, they will be immediately required to settle the costs. Their concern is that they are public servants who can ill afford to pay the costs of the suit. They consider that since the suit was filed in the public interest, the court should not have awarded any costs to the respondents. On the other hand, the respondents take the view that the applicants have not advanced any sufficient reasons to warrant the issuance of a certificate of urgency. The Bill of Costs have yet to be taxed, and therefore execution, if at all, is not imminent.

I agree with the respondents that no incidents or circumstances have been advanced to by the

applicants to warrant the issuance of an urgency certificate. The application is speculative in nature, as at the time of the inter partes hearing of the urgency application, the Bill of Costs had yet to be taxed before a competent court, which I have no doubt will have an opportunity to ably address the public interest aspect of the suit as advanced by the applicants. Since the Bill of costs has not yet to been taxed, I consider that there is no imminent or immediate threat of execution or prejudice to the appellants.

For these reasons, I decline to alter my decision made on 5 th June 2014. The costs of this application for urgency to be in the main application.

Dated and delivered at Nairobi this 11th day of JULY, 2014.

A.K. MURGOR

..... **JUDGE OF APPEAL**

I certify that this is a
true copy of the original

DEPUTY REGISTRAR