



**Board of Management St. Anne's Nzoia Secondary School v Isaac Okaka t/a Jaapfast Building Contractors (Civil Appeal E122 of 2022) [2023] KEHC 3498 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3498 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E122 OF 2022**

**DK KEMEL, J**

**APRIL 25, 2023**

**BETWEEN**

**THE BOARD OF MANAGEMENT ST. ANNE'S NZOIA SECONDARY SCHOOL ..... APPLICANT**

**AND**

**ISAAC OKAKA T/A JAAPFAST BUILDING CONTRACTORS .. RESPONDENT**

**RULING**

1. By an application dated January 27, 2023, the applicant sought the following reliefs;
  - a. There be stay of execution of decree herein plus all consequential orders pending the hearing and determination of the application.
  - b. There be stay of execution and decree plus all consequential orders in Bungoma CMCC No 179 of 2019 pending the hearing and determination of the High Court civil appeal No 122 of 2022.
  - c. There be stay of execution and decree plus all consequential orders in Bungoma CMCC No 179 of 2019 pending the hearing and determination of High Court civil appeal No 34 of 2022.
  - d. Costs of the application.
2. The application is premised on the grounds that the appellant has already lodged an appeal against the ruling of the trial court decree granted on September 1, 2022 and that the appellant/applicant is facing economic crisis as it depends on the free secondary education which has since been underfunded and can, in the circumstances, only afford the sum of Kshs 1,000,000/= which should be deposited in a joint interest earning account of the parties' counsels.
3. It is deponed that the respondent has already instructed auctioneers to execute against the applicant for the sum of Kshs 7,528,422/= which sum is out of the applicant's reach and will only serve to cripple



the applicant. That the respondent has now since changed the mode of execution to that of notice to show cause against the applicant's senior officers to the prejudice of the applicant.

4. The applicant depones that they have pending appeals being HCA No E122 of 2022 and HCA No 34 of 2022 which have extreme chances of success.
5. The respondent opposed the application through his replying affidavit sworn on February 7, 2023 whose gist is that the applicant was granted a conditional order of stay of execution pending the hearing and determination of Bungoma HCCA E034 of 2022 through a ruling delivered on September 1, 2022. He depones that the instant application is *res judicata* as a similar applications dated November 17, 2022 was filed by the appellant/applicant culminating in the ruling dated November 29, 2022 wherein this court granted a conditional stay of execution and hence the court has since become *functus officio* in the circumstances.
6. He depones that the applicant also filed an application dated November 3, 2022 seeking orders of stay in Bungoma HC Misc application No E088 of 2022 which was later withdrawn. The applicant avers that by preferring a multiplicity of applications, the applicant is hoodwinking the court to illegally grant an unconditional order of stay of execution pending the alleged appeals and that the applicant is trying to set its own conditions of stay without even offering a proposal on settlement of the decretal sums.
7. The application was disposed of by way of written submissions. The appellant/applicant's submissions are dated March 6, 2023 while the respondent opted to rely on the replying affidavit on record.
8. I have considered the application, rival affidavits and submissions filed. From the onset, it is not in dispute that the applicant owes the respondent the sum of Kshs 6, 854,174.20/- as per the decree issued on April 26, 2022 by the trial court out of which the applicant has paid the sum of Kshs 700,000/- *vide* cheques dated February 10, 2023.
9. As a precursor to the instant application, the applicant filed a notice of motion application dated November 17, 2022 which culminated in a ruling delivered by this court on November 29, 2022 allowing the application in terms of prayer 4 of the notice of motion which had sought leave to appeal against a ruling delivered by the subordinate court in Bungoma CMCC No 179 of 2019. The court also granted a conditional stay of execution pending determination of the appeal.
10. In the said ruling, the court in its ruling held *inter alia* that;

It is not in dispute that the applicant has already pursued an application for review as well as stay of execution before the lower court which is scheduled for hearing on the December 13, 2022. It would appear to me that the applicant is playing lottery with the courts with the hope that either approach could yield some relief to it. This kind of conduct can only be described as gambling as the applicant is hedging its bets on all fronts and hoping for the best outcome from each front.
11. In light of the prayers sought in the instant application, this court will first have to determine whether the instant application is *res judicata* and or that the court is *functus officio*.
12. From the prayers sought in this application, it appears that there are two appeals pending determination by this court arising from the subordinate court's CMCC No 179 of 2019 which appeals are HCCA No 122 of 2022 and 34 of 2022.
13. In the ruling earlier alluded to, the applicant indicated that it had filed HCCA No 34 of 2022 citing oppressive conditions of stay. This court in exercise of its discretion allowed the applicant 14 days



to file its memorandum of appeal from the date thereof. The ruling was informed by the fact that the applicant was already pursuing an appeal against the ruling by the subordinate court imposing conditions of stay and another application before the subordinate court seeking a review of the conditions of stay.

14. I have carefully looked at the memorandum of appeal in this matter and that the same is a challenge on the trial court's exercise of discretion in setting the conditions of stay and in HCCA 34 of 2022, the applicant is challenging the trial court's judgment.
15. Looking at the two appeals, I am of the considered view that the substantive appeal is the former which the applicant ought to pursue with zeal since it will ultimately dispose of the matter with finality.
16. It is evident that the applicant is trying to convolute the matter further by preferring multiplicity of applications at the expense of proceeding on to the main appeal considering that the court had rejected the other prayers for the reason that there is already a substantive appeal in HCCA 34 of 2022. This puts into waste the precious judicial time at the expense of dispensing justice to the needy litigants.
17. Having said as such, I am of the considered view that the applicant having partly settled the decretal amount in the sum of Kshs 700,000/-, it could have made proposals on settlement by installments rather than the instant application. I am tempted to agree with the respondent that the applicant is attempting to set its own conditions for stay which is not tenable in law because when setting conditions for stay, the court is exercising its discretion. It is noted that the applicant has not explained why it has not complied with the orders of this court dated November 29, 2022. Its failure to do so militates against the present application and hence the applicant has come to this court with unclean hands. The applicant having approached this court *vide* the application dated November 17, 2022 leading to the ruling of November 29, 2022, the court is already *functus officio*. It is clear that the applicant seeks to obtain stay orders ingenuously. That is untenable and thus I must agree with the respondent's claim that the present application is an abuse of the court process.
18. For the above-going reasons, it is my finding that the application dated January 27, 2023 lacks merit. The same is dismissed with costs to the respondent.

**DATED AND DELIVERED AT BUNGOMA THIS 25<sup>TH</sup> DAY OF APRIL 2023**

**D.KEMEI**

**JUDGE**

**In the presence of :**

No appearance Kassam for Appellant/Applicant

Okaka for Anwar for Respondent

**Kizito Court Assistant**

