



**BOM Thuura Boys Secondary School v Gitonga (Judicial Review
E008 of 2023) [2023] KEHC 23000 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
JUDICIAL REVIEW E008 OF 2023
TW CHERERE, J
SEPTEMBER 28, 2023**

BETWEEN

BOM THUURA BOYS SECONDARY SCHOOL APPLICANT

AND

PETER GITONGA RESPONDENT

RULING

1. By a notice of motion dated June 30, 2023, applicant sought orders among other for:
 1. Stay of execution of judgment in Meru CMCC NO. E370 OF 2021 dated September 21, 2022
 2. Stay of warrants of attachment of moveable property dated March 10, 2022 and the decree in respect of judgment dated September 21, 2022
 3. Leave to appeal out of time
2. On July 3, 2023, this court granted an ex parte order for stay of execution upon the applicant depositing KES. 300,000/- with the court within 14 days
3. applicant filed yet another notice of motion dated July 18, 2023 seeking review of the order dated July 3, 2023 that granted an order of stay of execution upon the applicant depositing KES. 300,000/- with the court within 14 days.
4. The application is based on grounds on its face and is supported by an affidavit sworn by Genelious Wahome, the Secretary to the applicant. He avers that:
 - a. The sum of KES. 300,000/- is not available for the reason that it was not budgeted for
 - b. KES. 100,000/- has already deposited with the court
 - c. applicant is indebted to creditors in the sum of over 6 million



5. Opposing the application, respondent through counsel filed grounds of opposition dated July 24, 2023 in which it argues that under the provisions of the [Basic Education Act](#) No. 14 of 2013, applicant is a body corporate with perpetual succession and a common seal and has capacity to sue and be sued. It is respondent's case that applicant as an independent institution is capable of making its own financial decisions without any reference to any other government institution or Ministry of Education officials. It was also argued that this application is an attempt to frustrate the execution process.
6. The application was canvassed by way of written submissions which both parties dutifully filed. In determining this application, I shall in the spirit of optimum utilization of judicial time also consider the prayers in notice of motion dated June 30, 2023
7. The first issue for consideration is whether applicant has made out a case for leave to appeal out of time.
8. The impugned judgment was delivered on September 21, 2022 and the instant application dated June 30, 2023 was filed on July 3, 2023 about 10 months after delivery of the impugned judgment.
9. Under section 79G of [Civil Procedure Act](#), an appeal from a subordinate court to the high court should be filed within a period of 30 days from the date of the decree or order appealed against provided that an appeal shall be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
10. Having approached about 10 months after the impugned judgment was delivered, the onus is on the applicant to demonstrate that the delay was reasonable, justified and that the respondent will not suffer any prejudice if the order is not granted.
11. The principles that govern the exercise of discretion in an application for extension of time are well known. In [Githuaka v Nduriri](#) [2004] 2 KLR at page 68 and in the oft-cited case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231 which was a decision of the Court of Appeal in which the judge stated as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.
12. In [Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet](#) [2018] eKLR, the Court of Appeal stated that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
13. Although the applicant in this matter has not demonstrated any reasonable cause for not filing the appeal on time, driving a party from the seat of justice without giving them a chance to ventilate their case is a draconian measure which should be exercised cautiously.
14. Consequently, I find that no prejudice will be occasioned if applicant is granted leave to appeal out of time.



15. In *Antoine Ndiaye v African Virtual University* [2015] eKLR, the court reiterated that a party seeking an order of stay pending appeal must not only be met the conditions set out under order 42 Rule 6 of the *Civil Procedure Rules* but that proof of substantial loss occurring to the applicant is the cornerstone of the jurisdiction of granting stay of execution. The court in granting an order of stay of execution must also balance the rights of the parties to an application for stay pending appeal. (See *Absalom Dova v Tarbo Transporters* (2013) eKLR).
16. I have considered the application in the light of the grounds thereof, affidavits on record and submissions together with case law cited by counsel and the main issue for determination is whether the Appellant/applicants have demonstrated that the orders of stay of execution pending appeal are merited.
17. In *RWW v EKW* [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the respondent.”
18. It is trite that substantial loss is the cornerstone of an application for stay of execution pending appeal. (See *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR).
19. That the sum of KES. 300,000/- was not budgeted for and that applicant is indebted to creditors in the sum of over 6 million are not sufficient grounds for stay of execution for the reason that payment of debts is not conditioned on budgetary allocations or reference to any other government institution or Ministry of Education officials since applicant is an independent institution capable of making its own financial decisions.
20. I have considered that applicant has as a sign of good faith already deposited KES. 100,000/- of the KES. 300,000/- ordered by court.
21. In the end, the notices of motion dated June 30, 2023 and July 18, 2023 are allowed in the following terms:
 1. applicant is granted leave to file an appeal the judgment in MERU CMCC NO. E370 OF 2021 out of time
 2. The time for the deposit of the balance of KES. 200,000/- of the KES. 300,000/- ordered by court on July 3, 2023 is extended for 30 days from today's date
 3. The record of appeal be filed and served within 45 days from today's date
 4. Mention November 16, 2023 to confirm compliance and for further orders
 5. Costs shall abide the outcome of the intended appeal

DATED IN MERU THIS 28TH DAY OF SEPTEMBER 2023



WAMAE. T.W. CHERERE
JUDGE

