



REPUBLIC OF KENYA



KENYA LAW
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**Board of Governors, Friends School Kaimosi Boys v Shikoli t/a Mildred MS Stores
(Civil Appeal 22 of 2022) [2023] KEHC 24300 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL 22 OF 2022
JN KAMAU, J
OCTOBER 31, 2023**

BETWEEN

**THE BOARD OF GOVERNORS, FRIENDS SCHOOL KAIMOSI
BOYS APPELLANT**

AND

MILDRED MACHIKA SHIKOLI T/A MILDRED MS STORES RESPONDENT

RULING

INTRODUCTION

1. In its Notice of Motion application dated November 9, 2022 and filed on November 10, 2022, the Attorney General sought leave to come on record for the Appellant herein. The Appellant further sought leave an unconditional order for stay of execution of the orders of the lower court dated June 28, 2022 that were issued in Hamisi SRMCC No 51 “B” of 2019 pending the hearing and determination of the appeal herein.
2. The said application was supported by the affidavit of the Secretary of the Appellant’s Board, Kweyu Haron, that was sworn on November 9, 2022.
3. The appellant contended that it was dissatisfied with the whole decision and had appealed against the same. It asserted that its said Appeal had raised triable issues with high chances of success on appeal and that failure to grant the stay orders would render the Appeal nugatory and cause it to suffer great prejudice. It added that the respondent had already instructed Eshikoni Auctioneers to attach and sell goods that were funded by the Government of Kenya using tax payers’ money yet government property was immune from attachment.
4. It asserted that its advocate did not inform it of entry of judgment against it and that it only learnt of it after the auctioneers served it with proclamation letters whereupon it sought legal counsel from the



office of the Attorney General. It requested that the mistake of its counsel not be visited upon it. It therefore urged this court to allow its present application.

5. In opposition to the said application, on November 21, 2022, the respondent herein swore a replying affidavit. The same was filed on even date.
6. The respondent averred that she was not a party to the aforementioned case and hence she could not be affected with any proceedings in connection thereof (sic).
7. She pointed out that the Appellant was given twenty one (21) days from the date of judgment of the lower court to appeal. She stated that she filed a Bill of Costs which was assessed at Kshs 162,555/=, extracted the Decree for the sum of Kshs 1,003,289/= and then filed an application for execution of the decree whereafter warrants of attachment were issued. It was her averment that the Appellant did not respond to or show any interest in the process and only filed the present application after the aforesaid auctioneers served it with a proclamation.
8. She was categorical that the appellant had not met the conditions of being granted an order for execution pending appeal and that it was not the Government of Kenya and hence it could not rely on the Government Proceedings Act. She was also emphatic that the Appellant was a body corporate capable of suing and being sued and she was therefore entitled to her fruits of judgment.
9. She added that as the Appellant was not covered under the Government Proceedings Act but was a school governed by the Basic Education Act, the leave sought for the Attorney General to come on record for it in place of the firm of M/S A.B.L. Musiega & Co Advocates was null and void.
10. She asserted that the Appeal herein had slim chances of success as it had been proven on a balance of probabilities that she supplied the Appellant with cereals which was demonstrated by the delivery notes and invoices.
11. It was her contention that the present application was res judicata as the Appellant had filed a similar application in the lower court and therefore ought to be struck out and/or dismissed with costs in view of the foregoing.
12. The Appellant's Written Submissions were dated July 27, 2023 and filed on August 1, 2023 while those of the respondent were dated August 16, 2023 and filed on August 17, 2023. The Ruling herein is based on the said written submissions which the parties relied upon in their entirety.

Legal Analysis

13. Right at the outset, the court noted that question of whether or not the Attorney General could be granted leave to come on record in place of the firm of M/S A.B.L. Musiega & Co Advocates was rendered moot. This is because on August 1, 2023, the Attorney General and the said firm of advocates filed a duly executed consent of even date consenting on the change of advocates pursuant to Order 9 Rule 9 of the Civil Procedure Rules, 2010.
14. The said Order 9 Rule 9 of the Civil Procedure Rules that provides as follows:-
 - “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
 - a. upon an application with notice to all the parties; or



- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
15. This court further noted that the respondent did not submit on the question as to whether the Appellant had demonstrated if it had met the conditions of being granted an order for stay of execution pending appeal. A perusal of her Written Submissions showed that she only addressed herself to the merits or otherwise of the Appeal herein. This was premature as what had been placed before this court was the present application that was seeking an order for stay of execution pending appeal. This court therefore only considered the Appellant’s Written Submissions in this regard.
16. To support its case that it had met the threshold of being granted an order for stay of execution pending appeal, the appellant relied on the cases of *Butt vs Rent Tribunal* [1979] eKLR where it was held that the power of the court to grant or refuse a stay of execution was to be exercised in such a way that it did not prevent an appeal and that if there was no overwhelming hindrance, a stay ought to be granted so as not to render the appeal nugatory.
17. It further relied on the provision of Order 42 Rule 8 of the *Civil Procedure Rules* that stipulates as follows:-
- “No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.”
18. It submitted that the appellant was a public secondary school, an institution that was funded by tax payers’ money and defended by the Attorney General and was therefore protected under the aforesaid Order 42 Rule 8 of the *Civil Procedure Rules*.
19. Notably, before an order for stay of execution pending appeal can be granted under Order 42, Rule 6(2) of the *Civil Procedure Rules*, an applicant has to demonstrate the following:-
1. That substantial loss may result unless the order is made.
 2. That the application has been made without unreasonable delay.
 3. Such security as the court orders for the due performance of the decree has been given by the applicant.
20. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
21. The decretal sum herein was Kshs 1,003,289/=. Although the Appellant did not express any apprehension that the Respondent would not be able to repay decretal sum in the event it was successful in its Appeal and the money had already been released to her, she did not file an Affidavit of Means to demonstrate that she would refund the money in the event it was successful in its Appeal and she was given the money.
22. In this regard, this court had due regard to the case of *G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another* [2018] eKLR where it held that the rigmaroles of recovery of decretal sum by a successful appellant could amount to substantial loss.
23. In the absence of proof that the respondent would be able to refund the appellant the entire decretal sum without any hardship, this court was not persuaded that it should order the appellant to release the decretal sum to her pending the hearing and determination of the Appeal herein. The first condition of being granted an order for stay of execution pending appeal was thus satisfied.



24. The judgment the appellant intended to appeal against was delivered on June 28, 2022. The present application was filed on November 10, 2022. A period of about four and a half (4½) months was not inordinate. The second condition for being granted an order for stay of execution pending appeal was also met.
25. The question of what form of security the Appellant would provide was pertinent. It had argued that it was the Government and was therefore protected by Order 42 Rule 8 of the *Civil Procedure Rules*. It therefore sought that it be granted an unconditional stay.
26. Paragraph 1 of the Fourth Schedule of the *Basic Education Act* No 14 of 2013 states that:-
- “The Board of Management shall be a body corporate with perpetual succession and a common seal, and shall in their corporate names, be capable of:-
- a. suing and being sued;
 - b. taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;
 - c. borrowing, lending and granting money;
 - d. entering into contracts; and
 - e. doing or performing all other acts or things for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.”
27. It was clear from the aforesaid provision that the Appellant was not Government and could not therefore benefit from the exemptions in *Government Proceedings Act* cap 40 (Laws of Kenya) and that all the conditions under Order 42 Rule 6(2) of the *Civil Procedure Rules* without exception were inapplicable herein.
28. This court therefore determined that the appellant would furnish security in the form of money to safeguard the Respondent’s interests and/or her fruits of judgment in the event the Appeal herein was not successful.
29. The Respondents assertion that the present application was res judicata was not correct as the High Court could consider an application for stay of execution pending appeal even where such an application had been declined by the court to be appealed from as provided in order etc.
30. Order 42 Rule 6(1) of the *Civil Procedure Rules* states that:-
- “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”



Disposition

31. For the foregoing reasons, the upshot of this court's ruling was that the Appellant's Notice of Motion application dated November 9, 2022 and filed on November 10, 2022 was merited and the same be and is hereby allowed in terms of Prayers Nos (5) therein on the following conditions:-
1. THAT there shall be a stay of execution of Judgment that was delivered on June 28, 2022 in Hamisi SRMCC No 51 "B" of 2019 pending the hearing and determination of the Appeal herein on condition the appellant shall deposit the sum of Kshs 1,003,289/= into court within forty five (45) days from the date of this Ruling.
 2. For the avoidance of doubt, in the event, the appellant shall default on Paragraph 31(1) hereinabove, the conditional stay of execution shall automatically lapse
 3. The appellant be and is hereby directed to file and serve its Record of Appeal within forty five (45) days from the date of this Ruling.
 4. This matter will be mentioned on February 1, 2024 to confirm compliance and/or for further orders and/or directions.
 5. Costs of the application herein shall be in the cause.
 6. Either party is at liberty to apply.
32. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 31ST DAY OF OCTOBER 2023

J. KAMAU
JUDGE

