



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO E048 OF 2021

THE BOARD OF MANAGEMENT

KAPLETUNDO SECONDARY SCHOOL.....APPELLANT

VERSUS

LAKESIDE PRODUCTS AGENCIES.....RESPONDENT

RULING

INTRODUCTION

1. In its Notice of Motion dated 29th June 2021 and filed on 30th June 2021 the Appellant prayed for order that pending the hearing and disposal of this Appeal this Court be pleased to grant a temporary stay of further proceedings in the **Kisumu CMCC No 411 of 2018**. The said application was supported by an Affidavit that was sworn by the Appellant's Secretary, Jackson Marutegek, on 29th June 2021.
2. The Appellant averred that its advocates had filed a Notice of Preliminary Objection dated 9th November 2018 in the said suit but that the same was dismissed. The said suit was subsequently fixed for hearing on 6th July 2021. It was its contention that its appeal had a high chance of success and asserted that the Appeal herein would be prejudiced if the aforesaid case proceeded and was finally determined before the said Appeal.
3. Despite the Respondent's advocates, M/S Maua & Co Advocates having been served with the court order of 26th October 2021 indicating that the time lines within which Written Submissions were to be filed and that the matter would be mentioned on 8th December 2021 with a view to confirming compliance and/or for further orders and/or directions, they did not file any response to the Applicant's present application and/or file any Written Submissions. The said application was therefore technically unopposed. The Appellant's Written Submissions were dated 20th November 2021 and filed on 25th November 2021.
4. This Ruling is therefore based on the said Written Submissions which the Appellant relied upon in their entirety.

LEGAL ANALYSIS

5. The Appellant submitted that the Appeal herein had high chances of success and unless stay of proceedings was granted, the appeal would be useless. It was categorical that the aforesaid Notice of Preliminary Objection was on a point of law, which was pleaded in the defence and which would have disposed of the suit. In this regard, it placed reliance on the case of **Orero vs Mbaja [2005]141(sic)**.
6. It added that the said Notice of Preliminary Objection raised the issue of jurisdiction of the Trial Court and thus the Trial Court ought not to proceed until this appeal is determined.
7. It cited the case of **UAP Provincial Insurance Co. Ltd vs Michael John Beckett [2004] eKLR** where the Court of Appeal held that before an order for stay of proceedings could be granted, an applicant had to demonstrate that he had an arguable appeal and that if the stay was not granted, the hearing of the appeal would be a futile exercise. It submitted that this court had a wide discretion under Section 3A of the Civil Procedure Act and thus urged the court to grant the order it had sought.
8. Notably, the conditions under which an order for stay of execution can be granted are clearly spelt out in Order 42 Rule 6(2) of the Civil Procedure Rules Cap 21 (Laws of Kenya). However, the conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified.
9. 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.

10. The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory. Gikonyo J addressed the question of an order for stay of proceedings being an important consideration in the case of **Lucy Waihera Kimanga & 2 Others vs John Waiganjo Gichuri [2015] eKLR**.

11. This aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable on appeal and not whether the appeal will be successful. The reason for this is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. At this stage, the court should only be concerned with the question of whether or not the appeal will be rendered nugatory.

12. As the Court of Appeal also held in the case of **UAP Insurance Company Ltd vs Michael John Beckett** (Supra), all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.

13. An arguable appeal only needs to raise a single *bona fide* point worthy of consideration. That issue need not be one that must necessarily succeed as was held in the case of **Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015]eKLR**.

14. Further in the case of **Niazsons (K) Ltd. vs. China Road & Bridge Corporation (Kenya) [2001] e KLR**, Onyango-Otieno, J (as he then was) held that:-

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

15. As was held in the case of **David Morton Silverstein vs Atsango Chesoni [2002] eKLR**, the Court of Appeal citing **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another [1998] eKLR** held that it is not that a stay of proceedings cannot be granted but that each case depends on its own facts.

16. As the prayer for stay of proceedings is an equitable relief, an applicant must have come to court with clean hands. One of the considerations to be taken into account is that the application for stay of proceedings must have been filed without undue delay.

17. The court noted that the Ruling the Appellant intended to appeal against was delivered on 13th April 2021. The Memorandum of Appeal was filed on 13th May 2021 while the present application was filed on 30th June 2021. Two (2) months could not be said to have been inordinate. This court was thus satisfied that the present application was filed without any delay.

18. A perusal of the aforesaid Memorandum of Appeal led this court to the conclusion that the intended appeal was indeed arguable and not frivolous as the question before the appellate court was whether or not the lower court had territorial jurisdiction to handle the matter.

19. This court found and held that in the event it did not grant an order for stay of proceedings and the Appeal herein was heard and was successful, the proceedings in the lower court would have been rendered unnecessary, even though an appropriate order for costs could have been made to remedy that.

20. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law by the Appellant, this court came to the firm conclusion that this was a suitable case for it to grant an order of stay of proceedings so as not to render the Appeal herein nugatory. Judicial time is precious and scarce and must not be wasted in proceedings that would end up being academic exercises.

21. As was held in the case of **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR**, the Court of Appeal rendered itself as follows:-

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

DISPOSITION

22. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated 29th June 2021 and filed on 30th June 2021 was merited and the same be and is hereby granted in terms of Prayer No (3) therein on condition that:-

1. THAT the Deputy Registrar of High Court Kisumu do facilitate the expeditious typing of the proceedings of the lower court and the placing of the lower court file in the file herein.

2. THAT the Appellant shall file and serve its Record of Appeal within forty five (45) days from the date of this Ruling.
3. THAT in the event the Appellant shall default in the order given in Paragraph 22(2) hereinabove, the order of stay of proceedings will automatically lapse and the Respondent will be at liberty to move the lower court as provided by the law to proceed with Kisumu CMCC No 411 of 2021 Lakeside Products Agencies vs The Board of Governors Kapletundi Secondary School.
4. Either party is at liberty to apply.
5. Costs of the application will be in the cause.

23. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MARCH 2022

J. KAMAU

JUDGE