



Board of Governors Dr. Aloo Gumbi Mixed Secondary School v Otieno (Miscellaneous Application 115 of 2020) [2022] KEHC 12229 (KLR) (25 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION 115 OF 2020**

JN KAMAU, J

JULY 25, 2022

BETWEEN

THE BOARD OF GOVERNORS DR. ALOO GUMBI MIXED SECONDARY SCHOOL APPLICANT

AND

ELVINA AILA OTIENO RESPONDENT

RULING

1. In its Notice of Motion dated and filed on September 16, 2021, the Applicant herein sought an order for stay of execution of the order delivered on June 17, 2021 in which it was ordered to pay a sum of Kshs 23,685/= pending the hearing and determination of its intended appeal. In the alternative, it sought that it be ordered to pay half the costs and the rest be held in abeyance.
2. The said application was supported by the affidavit of Lawrence Siro Machuka that was sworn and filed on September 16, 2021. The Applicant contended that it was aggrieved by the entire Ruling that was delivered by Cherere J on October 23, 2020 dismissing its application Miscellaneous Application No 115 (sic) of 2020 for extension of time to file an appeal with costs to the Respondent herein. It pointed out that the Respondent had taxed her bill of costs and obtained a Certificate of Costs which gave her the power to execute to its detriment.
3. It stated that it had instructed its advocates to appeal against the said Ruling and that it had an arguable appeal based on good and reasonable grounds of appeal.
4. In opposition to the said Application, on November 11, 2021 the Respondent swore a Replying Affidavit. The same was filed on November 16, 2021. She averred that the Applicant had not demonstrated the conditions set out under Order 42 Rule 6 (2) of the *Civil Procedure Rules* 2010 and that she had never enjoyed the fruits of her judgment delivered on October 24, 2019 in Maseno SRMCC No 143 of 2013 inclusive of costs, in the total sum of Kshs 148,440/=, due to the appeals



and applications that had been pursued by the Applicant in the superior courts. It was her contention that Cherere J was justified in having dismissed the Applicant's application as the delay in filing the same was inordinate.

5. She, however, contended that in the event this court was persuaded to allow the present application, then the same ought to be allowed on condition that the Applicant be ordered to deposit all of the award on costs in relation to the Respondent's Bill of Costs a sum of Kshs 23, 685/= in a joint interest earning account in the names of both counsels within twenty-one (21) days from the date of such order, failure to which, execution would issue for the whole amount and/or in the alternative that the Applicant be ordered to deposit half of the award on costs a sum of Kshs 11,842/= in a joint interest bearing account in the names of the advocates with the remaining half of the award on costs being Kshs 11,842/= being paid to her within twenty one (21) days failing which execution would issue.
6. The Applicant's Written Submissions were dated 17th January 2022 and filed on 14th February 2022 while those of the Respondent were dated 16th February 2022 and filed on 22nd February 2022.
7. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

8. The present application was brought under Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#) which empowers a court to stay execution of its own orders or an appeal court to stay orders from the court whose decision was being appealed from.
9. Under the said Order 42 Rule 6 of the [Civil Procedure Rules](#), an applicant had to demonstrate the following:-
 - a. That substantial loss may result unless the order is made.
 - b. That the application has been made without unreasonable delay.
 - c. Such security as the court orders for the due performance of the decree has been given by the applicant.
10. 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.
11. The Applicant relied on several cases amongst them [J. M. Mathenge t/a Builecon Associates vs Kenya Tea Development Agency](#) [2009] eKLR where the court considered payment of the decretal sum in instalments and in others to explain what constituted substantial loss. On the other hand, the Respondent placed reliance on several cases amongst them [Machira t/a Machira & Co Advocates vs East African Standard](#) (No 2) [2002] KLR 63 to argue that the Applicant had not met the conditions for being granted an order for stay of execution.
12. This court did not find it necessary to analyse the parties' respective Written Submissions as they both were in agreement on the conditions that an applicant had to meet before being granted an order for stay of execution pending appeal. In addition, it noted that the Respondent was not principally opposed to the Applicant's application in principle provided that the Applicant was directed to deposit the costs as she had proposed.
13. The question of whether there was inordinate delay in filing the application seeking extension to file an appeal out of time and/or if Cherere J who was seized of this matter exercised her discretion judiciously



in dismissing the Applicant's application seeking leave to file an appeal out of time were matters that were within the purview of the Court of Appeal.

14. As the Applicant had since filed a Notice of Appeal, it was in the interest of justice that this court balanced the Applicant's right of being heard on appeal and the Respondent's right to enjoy her fruits of judgment by granting an order stay of execution of the decision of the Taxing Master of June 17, 2021 so that the Applicant's Appeal could be heard on merit.
15. As there was no evidence to show that the Respondent would be able to refund half of the costs in the event the Applicant paid her the said amount and it was successful on appeal, it would be prudent that the entire costs be deposited in a joint interest account in the joint names of advocates of both parties.
16. Notably, although the amount of the decretal sum was not colossal and the Respondent may very well be able to refund it if the Applicant was successful on appeal, the rigours of recovering the said amount could amount to substantial loss. This very court made a similar finding in the case of *Dr. G. N. Muema t/a Mt. View Maternity & Nursing Home vs Miriam Maalim Bisbar & Another* (2018) eKLR.

Disposition

17. For the foregoing reasons, the upshot of this court's ruling was that the Applicant's Notice of Motion application dated and filed on September 16, 2021 was merited and the same be and is hereby allowed in terms of Prayer No (3) therein on the following conditions:-
 1. That there shall be a stay of execution of the order that was delivered by Hon Lina Akoth (RM) on 17th June 2021 in Kisumu High Court Miscellaneous Civil Application 115 of 2020 The Board of Governors Dr Aloo Gumbi Mixed Secondary School vs Elvina Aila Otieno pending the hearing and determination of the Applicant's intended appeal on condition that the Applicant shall deposit in a joint interest earning account the sum of Kshs 23,685/= within thirty (30) days from the date of this Ruling.
 2. For the avoidance of doubt, in the event the Applicant shall default on Paragraph 17(1), the conditional stay of execution shall automatically lapse.
 3. Costs of the application herein shall be in the cause.
18. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JULY 2022

J. KAMAU
JUDGE

