



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E104 OF 2021

MAKINI SCHOOL LIMITED.....1ST APPLICANT

JAMES OBIERO.....2ND APPLICANT

VERSUS

BENEDETTAH MOSE KYENGO.....RESPONDENT

RULING

- 1) Makini School Ltd and James Obiero, the 1st and 2nd appellants/ applicants herein took out the motion dated 2nd June 2021 whereof they applied to be issued with an order for stay of execution of the decree of the trial court pending appeal.
- 2) The applicants filed the affidavit sworn by Faith Ndonga in support of the motion. Benedettah Mose Kyengo, the respondent herein filed the replying affidavit she swore to oppose the applicants application.
- 3) It is the submission of the applicants that the instant motion was filed without inordinate delay. They also averred that if they are denied the order they would suffer substantial loss in that the respondent would proceed to execute the judgment thus render their appeal nugatory.
- 4) The applicants further averred that they are ready and willing to comply with the conditions imposed for the due performance of the decree.
- 5) In response, the respondent urged this court to dismiss the application arguing that the applicants' application does not meet the applicable principles needed to determine such applications. The applicants urged this court that if it is inclined to grant the stay order the applicants should be ordered to pay her half the decretal sum to enable her receive immediate medical attention as future medical expenses and to have the balance deposited in an interest earning account.
- 6) Under Order 42 rule 6 of the Civil Procedure Rules the principles to be considered in determining an application for stay are set out. First, the application must be filed without unreasonable delay. The parties did not address this court over this principle.
- 7) However, it is clear from the material placed before this court that on 4th February 2021, the trial court delivered its judgment awarding the respondent a sum of ksh.1.200,000/= as general damages for pain and suffering for the injuries she sustained in a road traffic accident involving the 1st appellant's motor vehicle.
- 8) This appeal was filed on 4th March 2021. However, the instant application for stay of execution was filed on 4th June 2021. It is apparent that the application was filed after the lapse of four months from the date of judgment.
- 9) It is also clear that the instant application was filed after the lapse of 3 months from the date of filing of this appeal. There is no explanation for the delay on the part of the applicants. In the absence of any explanation, I find a delay of there (3) months to be unreasonable.
- 10) The second principle is that an applicant must show the substantial loss he would suffer if the order for stay is denied. The applicants have stated that they would suffer substantial loss if the order is denied because the respondent will execute the decree.
- 11) I find that the grounds advanced by the applicants does not establish substantial loss. The execution process is a lawful process which cannot be said to amount to substantial loss. The applicants have failed to establish actual substantial loss to merit a grant of the order.
- 12) The third principle is that the court should consider the appropriate provision of security for the due performance of the decree. It must be pointed out that the consideration of this principle is dependent on whether the applicant has established the substantial loss which the

applicants have failed to prove in this application. Had the applicants proved the substantial loss I would have granted the order for stay pending appeal, on condition that the applicants deposit the decretal sum in an interest earning account within a given period.

13) In the end, I find that the application was filed after unreasonable delay and that the applicants have failed to establish the substantial loss they would suffer if the order for stay is denied. Consequently, the motion dated 2nd June 2021 is found to be without merit. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 26th day of August, 2021.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent