



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 67 OF 2018

ALISON THETHY.....PLAINTIFF/RESPONDENT

VERSUS

1. SVEN KAMPA

2. KARLA KAMPA

3. TRADEWINDS INTERNATIONAL SCHOOL LIMITED

4. CASTADENA LIMITED TRADING AS

TRADEWINDS ACADEMY.....DEFENDANTS/APPLICANTS

RULING

1. Before this court are two applications filed by the 1st - 3rd Defendants and 4th Defendant and brought by way of **Notice of Motion** dated **4th December, 2019** and **7th February, 2019**, respectively.

2. The Application dated **4th December, 2019** by the 1st -3rd Defendant/Applicants is brought under **Article 165 (5) (b)** of the **Constitution of Kenya; Sections 1A, 1B, & 3A** all of the **Civil Procedure Act and Order 42 Rule 6** of the **Civil Procedure Rules** and all the enabling provisions of the law. It seeks the following orders THAT: -

a) Spent;

b) Spent;

c) Spent;

d) Spent;

e) The orders made on 26TH November, 2019 allowing prayer 3(iv) and (v) of the Plaintiff's application dated 27th August,

2019 be suspended or stayed or put in abeyance pending the filing, hearing and determination of an intended appeal against the Ruling delivered on 26th November, 2019.

f) Costs of this Application be provided for.

3. The application is premised on the grounds set out on the face of it and it is supported by the annexed **affidavit** sworn on the **4th December, 2019** by **Sven Kampa**, the 1st Defendant/Applicant, who describes himself as a shareholder and director of the 3rd Respondent herein.

4. The 1st Defendant's Application is for stay of execution on the grounds that the intended Appeal will be rendered nugatory unless stay is granted.

5. It was stated that the matter herein is one that concerns the rights of children and the Ruling delivered on **26th November, 2019** has elements of irregularity and might be *per incuriam*.

6. The 1st Defendant has averred that the compliance of the Ruling may not be practicable and may occasion the commission of an offence which include the order that Tradewinds International School should operate, as it is a school with no registered license.

7. Further, the 1st Defendant has averred that the Appeal is on issues that the court lacked jurisdiction and the same should be determined first before any orders that it may have given without such jurisdiction are enforced.

8. It was stated that the Plaintiff is out of the country on another job at Stonar School in the United Kingdom, and the granting of this Application will not occasion her any prejudice.

9. The 1st-3rd Defendant filed a Further Affidavit sworn by **Sven Kampa**, the 1st Defendant, on the **7th February, 2020** and raised similar issues as those in the application dated **4th December, 2019**.

10. Regarding the Notice of Motion dated **7th February, 2020** by the 4th Defendant/Applicant, the same is brought under **Section 3A** of the **Civil Procedure Act** and **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** and all the enabling provisions of the law. The Application seeks the following orders: -

1. Spent;

2. Spent;

3. THAT pending the filing, hearing and determination of the intended Appeal this Honourable Court be pleased to Stay Execution of the Order issued on 28th January, 2020 as against the 4th Defendant/Applicant;

4. THAT costs be provided for.

11. The application is premised on the grounds set out on the face of it and it is supported by the annexed **affidavit** sworn on the **7th February, 2020** by **Silvia Matthiessen Kampa**, a Director of the 4th Defendant/Applicant.

12. She has deponed that she is aware that this court issued a Ruling on the **26th November, 2019** and being aggrieved by the said Ruling has preferred an Appeal before the Court of Appeal and the **Notice of Appeal** is dated **5th December, 2019**.

13. The 4th Defendant/Applicant has averred that it is apprehensive that the Plaintiff has extracted the orders of the Court herein and is on the verge of executing the same.

14. It is the 4th Defendant's averment that it will suffer irredeemably and irreparably by the execution of the said court orders issued on the **26th November, 2019** resulting into substantial loss for the reasons that the 4th Defendant's school is in operation with eighty (80) pupils and its closure will affect the students enrolled and force the 4th Defendant to refund to the parents the said school fees; that the 4th Defendant has invested heavily on the infrastructure; that the 4th Defendant has a total of eighteen (18) employees who will be rendered jobless and destitute and that the execution will interfere with the academic year midway which will prejudice and cause substantial loss to the pupils and employees.

15. It was the 4th Defendant's case that the Plaintiff has not been in the country since the filing of the suit and thus a stay of execution order will not prejudice her in any manner as she is gainfully employed in the United Kingdom by Stonor School as a tutor.

16. The 4th Defendant averred that the Application herein has been brought without unreasonable delay and thus this court should allow the application as prayed.

17. In response to both applications and the 1st Defendant's Further Affidavit, the Plaintiff/Respondent filed a Replying Affidavit sworn on **3rd March, 2020** by **Alison Thethy**. She has averred that the court made a finding that the actions of the 1st, 2nd and 4th Defendant/Applicants to transfer Tradewinds International School without her approval bordered on an illegality and thus Tradewinds Academy (TA) is operating illegally and thus stay should not be granted to allow the Defendants continue operating an illegal entity.

18. It has been averred by the Plaintiff that contrary to the 1st Defendant's claim, the court did not order the presence of police at the school, but the police were only to maintain law and order, which is a legal duty of the police.

19. The Plaintiff's case is that the alleged errors on the Ruling as mentioned by the Defendants cannot be addressed by the court at a stay of execution application but the same can only be determined on Appeal.

20. It has been averred that the accounts of the 3rd Defendant are still operational and there is no order that prevents the Board of the 3rd Defendant from holding meetings, but the said meeting should be done with the inclusion of the Plaintiff.

21. The Plaintiff has averred that she was indeed working as a Deputy Head at Stonar School in the United Kingdom, a temporary position that ended in **August, 2020** and thus cannot be barred from coming back to Kenya and to continue running the school. The Plaintiff has stated that she lost her lucrative job after she was lured by the 1st and 2nd Defendant to start a school in Kenya and will be highly prejudiced if stay of execution is granted as she is ready to travel back to Kenya and continue running the school.

22. The Plaintiff contends that there is no order of the court issued on the **28th January, 2020** as the Ruling of the court was made on the **26th November, 2019** and thus the order sought by the 4th Defendant cannot be granted as it seeks to stay a non-existent order.

23. According to the Plaintiff, the claim by the 4th Defendant that it has eighty (80) pupils enrolled is not true, as the said students have been transferred from the 3rd Defendant which is an illegality that should not be allowed by this court after the finding that the 4th Defendant was started and was being operated illegally. Further, the eighteen employees mentioned were illegally and procedurally stolen and transferred from the 3rd Defendant and thus are still legally employed and will not suffer any loss.

24. It has been averred by the Plaintiff that the calendar year of the 4th Defendant should not be considered by court as the school is operating illegally.

25. It is the Plaintiff's case that the Application by the Defendants has not met the threshold for grant of stay of execution and no reasons thereof have been cited as required by law, but instead the Applicants have dealt mostly with points that can only be raised on Appeal. The Plaintiff/Respondent has urged this court to dismiss the two applications with costs.

26. In response to the Plaintiff/Respondent's Reply, the 4th Defendant filed a **Further Affidavit** sworn on **13th October, 2020** by **Sylvia Matthiessen Kampa**. She has averred that the 4th Defendant has a right to prefer an Appeal before the Court of Appeal and in that regard this court has the discretion to consider the application for stay of execution.

27. The 4th Defendant has averred that the indication that the order was dated **28th January, 2020** is a technicality and requests the court to disregard the same.

28. It has been averred that the Plaintiff has proved that she was not in the country and thus will not suffer any prejudice and that its application dated **7th February, 2020** has met the requisite threshold for a grant of stay of execution.

Directions of the Court

29. Directions were taken that both applications be canvassed by way of written submissions and all parties indicated that they would be relying on the said written submissions. The 1st -3rd Defendant/Applicants' submissions are dated the **25th November, 2020** and filed on **1st February, 2021**; the 4th Defendant's submissions are dated the **15th October, 2020** and filed on **27th October, 2020** while those of the Plaintiff/Respondent are dated **1st February, 2021** and filed on an even date.

30. I have had the benefit of reading through the respective written submissions

by the parties. They all replicate on most of the grounds in support and opposition of the application as captured above that I need not to duplicate the same herein.

Analysis and determination

31. After perusing both applications by the 1st -4th Defendant/Applicants, all Affidavits on record and the written submissions filed by the parties in this case, I find that the main issue for determination is *whether this court can issue stay of execution of the **Ruling delivered and orders issued on the 26th November, 2019**, pending the hearing and determination of the Appeal*

32. Stay of Execution is provided for under **Order 42 Rule 6(2)** of the **Civil Procedure Rules, 2010**, which states that: -

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

33. The above Rule thus provides that before a court can grant an order of stay of execution pending the hearing and determination of an Appeal, it must be satisfied that *there is proof of substantial loss to be suffered by the Applicant; the application was made without unreasonable delay and that the*

Applicant is ready to provide such security as the court may impose.

34. It is noteworthy to point out that the 1st -3rd Defendant's application has raised issues of jurisdiction on the case herein being an employment matter; the ruling being *per incuriam*; **Section 5** of the **Oaths and Declarations Act**, which issues were already dealt with in the Ruling delivered on the **26th November, 2019**. This court therefore cannot seat on Appeal of its own decision and thus will not make any determination on the said issues.

35. However, the 1st - 3rd Defendants have submitted that the interruption of learning at the 4th Defendant's school will cause substantial loss as the 1st and 2nd Defendants do not intend to spend a dime on the 3rd Defendant. The 1st Defendant has stated that substantial loss will be occasioned if the direction that the 4th Defendant's school, should not collect school fees as that will mean that the school is of no useful purpose and it ought to be closed.

36. The 1st - 3rd Defendants further state they will suffer substantial loss as there is evidence before the court that the Plaintiff has been barred from entering the property where the school was and the grant of stay of execution might embarrass the court and the land/lord.

37. Thus the Defendants' concerns are that the 4th Defendant school will be crippled to bankruptcy; the student denied their right to education and employees denied the right to be employed by an employer of their choice.

38. On the issue of substantial loss, the 4th Defendant has stated that it has 80

pupils whose education will be disrupted contrary to the provisions of **Article 43 (1) (f)** of the **Constitution of Kenya** that safeguards the right to education, and stopping the affairs and operations of the 4th Defendant will invariably affect the welfare of these children.

39. Further, the 4th Defendant has stated that it had 18 employees who solely depend on it to earn a living and its closure will cause untold suffering to the said 18 employees. Just like the 1st -3rd Defendants, the 4th Defendant has also stated that Plaintiff/Respondent is not in the country and thus will not be prejudiced if stay of execution is not granted.

40. The Court has not found any grounds raised by the 1st -4th Defendants that would amount or cause them suffer substantial loss, as the Ruling delivered on **26th November, 2019** was very clear that the actions of the 1st, 2nd and 4th Defendants in transferring the 3rd Defendant's facilities to Tradewinds Academy without the Plaintiff's approval was an illegality and thus this court cannot grant stay of execution to enable the Defendants benefit from their illegality.

41. Further, the concerns of the pupils right to education, the same were considered by the court's Ruling of **26th November, 2019**, where it was stated: -

“[53] On a balance of convenience, it appears on a preliminary basis that the students were admitted to TIS, the parents signed contracts with TIS, the students had adopted and acclimatized to the learning environment of TIS before they were transferred to the 4th Defendant's school. There appears to have been a breach of the contracts that the parents had with TIS when their children were moved to a different school that they had not signed contracts with. The children had learnt in TIS far much longer than two weeks they were at TA. The balance of convenience tilts in favor of granting the orders sought in the Plaintiff's application so that the children can continue learning in the school which they knew and which their parents signed contracts with. I do not think that there will be violation of the student's rights if they are allowed to learn at TIS which is the school known to them and to their parents.”

42. On the issue of 18 employees losing their source of livelihood, from the Ruling of the court delivered on **26th November 2019**, they are still the legal employees of the 3rd Defendant. I therefore find that Defendants have not demonstrated or shown the substantial loss they are likely to suffer if stay of execution is denied.

43. Were the applications filed without unreasonable delay? The Ruling of the court was delivered on **26th November, 2019**. The 1st -3rd Defendants filed their application on **4th December, 2019** and admitted it was filed 8 days after the delivery of the Ruling. The 4th Defendant on the other hand filed its application on the **7th February, 2020** and submitted the same was filed after the Plaintiff extracted the orders of the court on the **28th January, 2020**, and the said extraction was a real life and actual threat by the Plaintiff of her intention to execute and thus the application was filed on **7th February, 2020**.

44. The court in the case of **Jaber Mohsen Ali & Another –vs- Priscillah Boit & Another [2014] eKLR** held that: -

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

45. In this case, the Defendants were granted by the court seven (7) days stay within which to file a formal application seeking stay of execution on **27th November, 2019**, thus making the last day to file the said application to be on the **3rd December, 2019**. I therefore find that there has been a delay that has not been explained by the 1st -3rd and 4th Defendants' in filing their applications on the **4th December, 2019** and **7th February, 2020** respectively.

46. On the requirement for security for costs, the Ruling of the court made on **26th November, 2019** had no money decree, therefore there was no need to fulfill this requirement.

47. In view of the findings on the requirements for stay of execution pending hearing and determination of an appeal, I find the Defendant/Applicants herein have not complied with the requirements as set under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** which required them to prove substantial loss and that their applications were brought without undue delay to warrant grant of such Stay of Execution pending Appeal.

48. The upshot is that the Applications by the 1st -3rd and 4th Defendants dated **4th December, 2019** and **7th February, 2020** lack merit and are hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 15TH DAY OCTOBER , 2021

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Muyaa counsel for 1st, 2nd and 3rd Defendants

No appearance for and by 4th Defendant

No appearance for and by the Plaintiff

Court Assistant - Turuki