



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NUMBER 406 OF 2019**

**THE BOARD OF MANAGEMENT OF PUMWANI GIRLS**

**SECONDARY SCHOOL.....APPELLANT**

**VERSUS**

**JOSEPH MBULULA MUTWIKE T/A LATHEMACS**

**ENGINEERING WORKS.....RESPONDENT**

**(BEING AN APPEAL AGAINST THE RULING AND ORDER OF HON G.A MMASI, (MRS) SENIOR PRINCIPAL  
MAGISTRATE DELIVERED ON 1<sup>ST</sup> JULY 2019 IN NAIROBI CMCC NO 1964 OF 2015 BETWEEN**

**JOSEPH MBULULA MUTWIKE T/A LATHEMACS**

**ENGINEERING WORKS.....PLAINTIFF**

**AND**

**THE BOARD OF MANAGEMENT OF PUMWANI**

**GIRLS SECONDARY SCHOOL.....DEFENDANT**

**JUDGMENT**

The Respondent herein who was the Plaintiff in the case before the Trial Court filed the Plaintiff dated the 13<sup>th</sup> day of April 2015, claiming a sum of Kshs. 3,804,800, damages for breach of Contract and interest against the Appellant. His cause of action is based on a contract he entered into with the Appellant, for supply of building materials for the renovation work at the Appellant's school.

Though the Appellant filed a defence in the matter, the Respondent moved the Court vide an application dated the 13<sup>th</sup> February, 2017 to strike out the said defence and the same was allowed by the trial Court, on the 1<sup>st</sup> February, 2018 and consequently judgement was entered against the Appellant as prayed in the Plaintiff.

By way of an application dated the 24<sup>th</sup> May, 2019, the Appellant moved the trial Court seeking orders to stay execution of the Decree and to be allowed to liquidate the decretal sum by way of instalments as follows;

- 1) *To pay a sum of Kshs. 200,000 to the Respondent in each of the remaining school terms of 2019 payable at the end of the second month of each term thereof with an offer to make the first instalment on or before the end of June 2019.*
- 2) *The Appellant would make a further proposal on how to pay the balance of the decretal sum in February 2020.*

The Respondent opposed the said application and upon hearing the Parties, the trial Court in its ruling delivered on the 1<sup>st</sup> July, 2019, made the following orders;

- 1) *The Appellant to pay a sum of Kshs. 2,099,814, being half of the decretal sum by 30<sup>th</sup> July, 2019*
- 2) *Kshs. 400,000 on every subsequent month with effect from the 30<sup>th</sup> August, 2019 until payment in full.*

The Appellant being dissatisfied with the said orders filed the Appeal herein and in Its Memorandum of Appeal dated the 15<sup>th</sup> July, 2019, has listed three grounds of appeal as hereunder;

1. *The learned magistrate erred in law by not exercising her discretion judiciously and fairly when she issued the orders in question without considering the financial position and sources of funds of the appellant school.*
2. *The learned magistrate erred in law by failing to uphold the best interest of the child and public interest in condemning the defendant school to pay highly excessive amounts of money which it is unable to pay.*
3. *The learned magistrate erred in law and in fact by granting the orders contrary to the dictates of justice.*

Parties agreed to dispose of the Appeal by filing submissions whereby the Appellant filed its submissions on 23<sup>rd</sup> of March, 2020 in which he has submitted that the learned Magistrate erred in Law in not exercising her discretion judiciously and fairly when she issued the orders that are being challenged in this Appeal as she failed to consider the financial position and sources of funds of the appellant school.

It was further submitted that following the orders that the Court issued on the 4<sup>th</sup> March, 2019, in which it granted a Garnishee order absolute attaching Kshs. 1000,000 in the appellant's account, the School was struggling from the loss due to the said attachment. The appellant stated that the Court had further been informed that the School had only received a sum of Kshs. 1,400,000 in the second term of 2019 and its only source of funds is what is disbursed by the Ministry of Education for free education and thus by failing to consider those facts, the Learned Magistrate failed to exercise her discretion judiciously as the amounts she ordered clearly exceeded the total funds the appellant school had received for the second term of 2019.

The Appellant also submitted that the Learned Magistrate failed to uphold the best interest of the child and public interest, in condemning it to pay highly excessive amounts of money which it's unable to pay. It argued that the Court failed to appreciate that it is a public day secondary school providing education to girls from underprivileged backgrounds in line with the Government's policy of free secondary education and 100% transition rate, and in issuing the orders appealed against, the same would adversely affect the best interest of the students to access free secondary education.

The Appellant averred that the learned Magistrate failed to take into account the reasonable explanation why it was making the said proposal to pay the decretal amount in instalments as the amount ordered by the Learned Magistrate is far higher than the sum of Kshs. 1,500,000 that the Appellant receives as School fees per term. The Appellant has urged the Court to allow the appeal and accept its proposal on how to pay the balance of the decretal sum.

In its submissions, the Appellant has made fresh proposals on how to liquidate the remaining balance in the following terms;

- 1) *To pay a single lump sum of Kshs. 200,000*
- 2) *To be paying Kshs.200,000 in each school term which was to commence on 15<sup>th</sup> April,2020 and on the same date in the subsequent years for the 1<sup>st</sup> school Term; - on 15<sup>th</sup> August,2020 and on the same date in the subsequent years for the second school term, till payment in full.*
- 3) *That the Appellant will hold annual Harambees and apply the funds raised therefrom towards the payment of the decretal amount herein.*

The Respondent filed his submissions on the 11<sup>th</sup> June 2020.

On whether the trial Court failed to exercise its discretion judiciously, he submitted that the factors an appellate Court should consider when deciding whether to interfere or otherwise with the discretion of the trial Court are not limited to the conduct of the parties in actual litigation, but also to matters which triggered the litigation, the contribution of the party against whom the order was made, and to the causation of those factors. He made reference to the case of **Mbogo & Another Vs. Shah (1968) E.A** on the principles that would guide the court in deciding whether to interfere with the discretion of the trial court.

He contended that the appeal herein is an attempt by the Appellant to force the respondent to accept a proposal for settlement that was initially rejected by the trial court for being unreasonable. He argued that the appeal amounts to an abuse of the court process as it is meant to prejudice, embarrass and delay the Respondent's enjoyment of fruits of the judgement and to frustrate his efforts to recover from the Appellant yet no appeal has been preferred against the Judgement.

On the appellant's contention that the trial court failed to take into account the source of funds of the Appellant school, the respondent submitted that the Board of Management has a mandate to borrow funds as per the Fourth Schedule of the Basic Education Act and therefore, it is not true that the Appellant only relies on disbursements from the Ministry of Education thus submitting that the trial Magistrate exercised her discretion judiciously.

On whether the trial Magistrate failed to take into account the best interest of the child, it was submitted that the pupils will not suffer any harm if the respondent was to attach movable assets such as the school bus as the same has no correlation with their right to access free Secondary education as there are hundreds of schools in Kenya without a school bus. He further submitted that this ground of appeal is only meant to whip emotions and to mislead the court and that in any event, the suit by the respondent was not founded on the interest of the pupils but on the Appellant's failure to meet its contractual obligations.

On whether the trial court granted orders against the dictates of justice, the respondent urged the court to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act. He made reference to Section 1A (2) and 1 B of the Civil Procedure Act and submitted that the court is expected to ensure that the aims and intendment of the Overriding objectives as stipulated in the aforesaid provisions are attained. He added that the court should consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the court on equal footing and see where the scales of justice lie considering that it is the business of the court, so far as possible, to ensure that any transitional motions before the court do not render nugatory the ultimate end of justice. That in exercising its discretion, the court should always opt for the lower rather than the higher risk of injustice.

The Appellant further submitted that, the Appeal seeks to stop a lawful process, and the Appellant to be granted control of how and when it should satisfy the decretal sum at the expense of the Respondent's right to enjoy fruits of his judgement yet, the respondent by executing the Decree, is undertaking a lawful process to enable him reap the fruits of his judgement. He submitted that litigation must come to an end adding that it has been five years since he obtained the Decree and it was not until the year 2019 when he was able to partially execute the same against the Appellant. He relied on the case of **Leisure Lodges Limited Vs Japhet S. Asige & Another (2018) Eklr**. The Respondent urged the court to allow it to proceed with execution to its conclusion.

The court has carefully considered the grounds of appeal, the submissions by the learned Counsel and the authorities relied on by the parties.

The Appeal herein is against the decision by the trial court delivered on the 24<sup>th</sup> June 2019, pursuant to the Notice of Motion dated 24<sup>th</sup> May, 2019, by the Appellant herein in which it had sought a stay of execution of the Decree and for the court to allow it to liquidate the Decretal sum in termly instalments as set out on the body of the application. The trial court in dismissing the application stated inter alia, that justice is two way and allowing the proposal by the Appellant, it will take 8 years for the decretal sum to be paid in full. The Learned Magistrate ordered the Appellant to pay Kshs. 2,099,814 being half of the decretal amount by 30<sup>th</sup> July, 2019 and the balance to be liquidated in instalments of Kshs. 400,000 on every 30<sup>th</sup> of the subsequent month with effect from 30<sup>th</sup> August, 2019 until payment in full and in default of any one payment, execution to issue for the remainder of the amount.

The Appellant has contended that the Learned Magistrate failed to exercise her discretion judiciously as she failed to consider the financial position and sources of funds of the Appellant school in that, the Appellant school only relies on funds disbursed by the Ministry of Education for free Secondary education. The Appellant also faults the trial court for failing to uphold the best interest of the child and public interest in condemning the Appellant to pay highly excessive amounts.

It is not in dispute that the Appeal herein only relates to the payment of the decretal sum in instalments but not to the judgement in favour of the respondent. The orders that the Appellant sought in the application which are the subject of this appeal are discretionary in nature and is guided by sufficient cause to be shown by the Appellant. The onus was on the Appellant to show sufficient cause as emphasized by the court in the case of **Lavington Security Limited Vs Nairobi City Water and Sewerage Company Limited (2014)** where the court held;

***“The power to order payment by instalments of the decretal amount is purely a matter of discretion by the court. Except, the exercise of discretion is circumscribed; sufficient cause must be shown and the indulgence to pay by instalments may be on such terms that the court thinks fit”.***

In determining this Appeal, this court is also required to consider various other factors which were listed in the case of **Abdisalan Abdi Ali Ismael Vs Guhart Abdi Ali & 2 others (2019) Eklr** and with reference to the Authority of **A. Rajabali Alidina Vs. Remtulla Alidina & Another (1961) EA 565** as follows;

***“The circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and his bona fides in offering to pay a fair proportion of the debt at once”.***

This court has noted the proposal that had been made by the Appellant before the trial court and its indication that its unable to pay the whole decretal sum at once due to financial constraints, it being a public day school that only relies on the funds that it receives from the Ministry of Education. It has also noted the conduct of the respondent and the bonafides in offering to pay the debt. The court notes with a lot of concern that since judgement was delivered in this matter, the respondent has not shown any good faith in payment of the decretal sum. The only instalment that it paid was by way of Garnishee proceedings and not voluntarily. Thereafter, the respondent made no effort to pay and even after it was granted a conditional stay of execution by this court, still it did show any effort to pay. In addition, the offer made by the respondent is unreasonable and if the court was to allow the Appeal, it would take quite a long time for the Appellant to liquidate the decretal sum in full.

Whereas the court is sympathetic to the Appellant, it cannot not ignore the fact that justice should look both ways. As earlier stated, the orders that the Appellant sought before the trial court and which are the subject of this Appeal, are discretionary in nature. In the case of **Mbogo & another Vs Shah (supra)** the court held that;-

***“ An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in so doing arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice “.***

Having perused the impugned ruling delivered by the trial court, I find no reason why this court should interfere with its decision. As rightly submitted by the respondent, his cause of action is based on failure by the Appellant to meet its contractual obligations and it has nothing to do with the public interest or the best interest of the child. The respondent supplied the required building materials as requested by the Appellant and he has a lawfully obtained decree against the Appellant. This court should not deny him the fruits of his judgement.

In the end, I find that the Appeal has no merits and the same is dismissed with costs to the respondent.

**Dated, Signed and Delivered at Nairobi this 25<sup>TH</sup> day of JUNE, 2020.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the Applicant

..... For the Respondent