



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC APPLICATION 263 OF 2019**

**B.O.M BABA DOGO SEC. SCHOOL.....APPLICANT**

**VERSUS**

**E.K. MAINA T/A CHEM EQUIPMENT ENTERPRISES LIMITED.....RESPONDENT**

**RULING**

The applicant brought this application by way of Notice of Motion for two substantive orders; that time be extended for the filing and serving of Memorandum of Appeal and the record of appeal from the ruling of the lower court made on 16<sup>th</sup> November, 2018. The 2<sup>nd</sup> prayer is for stay of execution pending the hearing and determination of the intended appeal against the said ruling.

The grounds upon which the said orders are sought have been set out on the face of the application, alongside an affidavit sworn by Ann W. Kiragu, the Principal of the applicant. The application is opposed and there is a replying affidavit sworn by the respondent.

Both counsel appearing for the parties made oral submissions in addition to the averments set out in the affidavits. This application was filed on 18<sup>th</sup> March, 2019 while the ruling complained of was delivered on 16<sup>th</sup> November, 2018. There is sufficient explanation for the late filing of the application in that, the applicant was served with warrants of attachment on 14<sup>th</sup> March, 2019 following the dismissal of the application for stay of execution made in the lower court. In effect, the application was filed 4 days after the applicant was made aware of the ruling of the lower court.

There is evidence also that the firm of Oyata & Co. Advocates had been instructed to act for the applicant, until the applicant informed the said firm that the Attorney General will take over the brief because the applicant is a public entity. What is lacking however, is the notice of change of advocates to entrench the capacity of the Attorney General as acting for the applicant. That notwithstanding, it would appear notices were not delivered in time to facilitate the proper defence of the claim made by the respondent against the applicant.

It is true that the applicant delayed in lodging the application from the date judgment was entered, but in my assessment of the sequence of events, the delay has been sufficiently explained. There is no serious dispute that the applicant is a public institution, to wit a secondary school. The taking over by the Attorney General in this matter is *prima facie* evidence to that effect.

I have looked at the draft Memorandum of Appeal. Without delving into the merits thereof, I am persuaded there is an arguable appeal. There is also another aspect in this case which calls for some mention. The procedure to attach government property is different from that of private property.

Notice to show cause has to be served upon the accounting officer before the court determines whether or not attachment should follow. Even before then, the judgment creditor must have obtained an order of mandamus to facilitate the said execution. These steps were not taken in the instant case.

The respondent has observed that no security has been furnished by the applicant. However, Order 42 Rule 8 of the Civil Procedure Rules exempts the Government and its institutions from that requirement. I am persuaded that the applicant is entitled to the orders sought.

Time to file the memorandum of appeal and the record of appeal is extended by 30 days from the date of this ruling. There shall be a stay of execution of the lower court judgment until the appeal is heard and determined.

The costs shall abide the outcome of the appeal.

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> Day of July, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**