



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 622 OF 2018**

**BOARD OF GOVERNORS(P.C.E.A. NGONG**

**HILLS SECONDARY SCHOOL).....APPELLANT**

**VERSUS**

**MARTIN MUDEMBEI KEYA T/A WE-TEC**

**BUILDING CONTRACTORS.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Appellant's Notice of Motion application dated and filed on 28<sup>th</sup> February 2019 was brought pursuant to the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, the inherent jurisdiction of the court and all enabling provisions of the Law. Prayers Nos (1) and (4) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. This Honourable Court be pleased to order that there be a Stay of Execution for a period of 14 days only of the Judgment/ Decree given by this Honourable Court on 9<sup>th</sup> February 2018 pending the hearing and determination of the Defendant's Appeal in HCC Appeal no 622 of 2018 filed on 31<sup>st</sup> December 2018.**

**3. This Honourable Court be pleased to order that there be a Stay of Execution of the Judgment/ Decree given by this Honourable Court on 9<sup>th</sup> February 2018 pending the hearing and determination of the Defendant's Appeal in HCC Appeal no 622 of 2018 filed on 31<sup>st</sup> December 2018.**

**4. Spent.**

**5. Costs of the application be in the Cause.**

2. The Appellant's Written Submissions were dated 13<sup>th</sup> May 2019 and filed on 14<sup>th</sup> May 2019 while those of the Respondent were dated 7<sup>th</sup> June 2019 and filed on 11<sup>th</sup> June 2019.

3. The parties requested the court to deliver its decision based on its Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPELLANT'S CASE**

4. The Appellant's present application was supported by the Affidavit of its Principal, Esther Gakuu on 27<sup>th</sup> February 2019.

5. Through the deponent, the Appellant stated that on 13<sup>th</sup> December 2018, goons visited the school, which was government owned, to remove school furniture and computers pursuant to the Proclamation that was served upon them on 12<sup>th</sup> April 2018. The same was demanding Kshs 585,098.50 and their fees of Kshs 98,900/= . To avoid the said goods from being carted away, the deponent paid them a sum of Kshs 22,000/=.

6. It was its contention that it filed an Appeal against the Ruling of the Chief Magistrate Milimani Commercial Court Hon E.A. Nyaloti that was delivered on 28<sup>th</sup> November 2018 in which she dismissed its application for review as the suit proceeded due to non-attendance because of the mistakes of its counsel.

7. It averred that it had good chances of success as judgment was delivered herein without its evidence having been taken and sought to be given an opportunity to have its Appeal heard on merit. It was apprehensive that if the orders it had sought were not granted, the attachment would affect the learning.

8. It thus urged this court to allow its said application as prayed.

### **THE RESPONDENT'S CASE**

9. In response to the said application, on 29<sup>th</sup> March 2019, the Respondents swore a Replying Affidavit. The same was filed on 1<sup>st</sup> April 2019.

10. He denied that he despatched goons to the Appellant and was emphatic that he sent auctioneers to carry out execution to non-payment. It was his contention that it was not necessary for a second proclamation once the first one had been done. He stated that the Appellant was trying to deny him his fruits of judgment and sought that it makes the payment. It was his contention that there would therefore be no harassment from the auctioneers.

11. He averred that the failure to attend court for the hearing of the case was due to the mistake of the Appellant and its counsel. He was categorical that its Appeal had no merit as it did not participate in the hearing and it had failed to demonstrate what made them not attend court.

12. In admitting that it was a government owned school, he said that it failed to notify the Attorney General once it was served with the Summons to Enter Appearance and that in any event, it never raised the issue that it was a government school in the lower court proceedings as a result of which the said issue cannot be subject to this Appeal.

13. He thus urged this court to dismiss the present application.

### **LEGAL ANALYSIS**

14. The Appellant submitted that if its application was not granted, it would be driven away from the seat of justice. It was reiterated that its appeal had high chances of success. It relied on several cases which it had not attached to its Bundle of Documents. Many of the decisions it relied upon dealt with how the court should exercise its discretion in applications which had sought setting aside an *ex parte* judgment. It also annexed several decisions that were not analysed in its Written Submissions.

15. On the other hand, the Respondent submitted on the question of whether or not the Appellant was a government-owned school, where there was a judgment in his favour, whether it had been properly represented and whether it had demonstrated a *prima facie* case to warrant the issuance of the orders it had sought. It also relied on several cases which set down the guidelines of when mistakes of an advocate should not be visited on his client.

16. It was evident from the aforesaid submissions that both parties submitted on the merits or otherwise of the Appellant's case. There was a danger of the court also delving into the merits or otherwise of the Appellant's Appeal herein if it analysed the said Written Submissions. This court therefore restrained itself from considering the said submissions and case law as that was not the concern of this court at this particular stage.

17. Going further, it appeared to this court that there was contradiction in Prayers Nos (2) and (3) of the said application. In Prayer No (2) therein, the Appellant had sought a stay of execution for fourteen (14) days only pending the hearing and determination of the Appeal herein. In Prayer No (3), the Appellant had sought the same prayer but not indicated the period the order for stay of execution pending hearing and determination of the Appeal should be granted. There was a contradiction of the orders making it difficult for this court to determine exactly which order the Appellant wanted to be granted pending the hearing and determination of the Appeal herein.

18. Assuming that Prayer No (2) was pending the hearing and determination of the present application, this court was at a loss as to why the Appellant would want to give themselves a time limitation of the order for stay of execution pending the hearing and determination of the Appeal herein.

19. The above notwithstanding, purely to do justice to the Appellant, this court found it prudent to ascertain whether or not it had demonstrated that it was entitled to the orders for stay of execution pending appeal.

20. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:-

**“No order for stay of execution shall be made under subrule (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.”**

21. This means that an applicant has to demonstrate:-

- a. That he will suffer substantive loss if the order of stay was not granted;**
- b. That he had filed his application for a stay of execution timeously; and**
- c. That he was willing to provide security.**

22. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

23. A perusal of the Appellant’s affidavit and Written Submissions did not point to the substantial loss it was likely to suffer if its application was not granted. It did not also demonstrate that it filed its application without undue delay. The court had to look at the Memorandum of Appeal on the court record and established that it filed the present application about three (3) months after the decision it intended to appeal from was delivered. It did not explain why there was a delay in filing the present application as aforesaid.

24. It did not also indicate its willingness and readiness to abide by the conditions set by the court. Be that as it may, a court has power to impose 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 even where an applicant has not indicated willingness and readiness to deposit the security.

25. From the aforesaid, this court was not satisfied that the Appellant had demonstrated any of the conditions that had been set out in Order 42 Rule 6 (2) of the Civil Procedure Rules. As the Respondent had not indicated that it was averse to it being granted an order for stay of execution pending appeal on condition that he furnished security, this court was of the view that it could not grant the Appellant the said order because doing so would be prosecuting the case on its behalf to the detriment of the Respondent. Notably, our judicial system is adversarial in nature and the court ought not to enter into the arena and prosecute the case on behalf of one (1) party.

#### **DISPOSITION**

26. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion that was dated and filed on 28<sup>th</sup> February 2019 was not merited and the same is hereby dismissed. As the Respondent’s submissions digressed from the submissions relating to the order of a stay of execution pending appeal, costs of the application will be in the cause.

27. It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this **17<sup>th</sup>** day of **December** 2019

**J. KAMAU**

**JUDGE**