



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 162 OF 2017**

**1. KIOKO NGUNGA**  
**2. SADIQ KAKAI**  
**3. KENSAFE DRIVING SCHOOL.....APPELLANTS**

**VERSUS**

**1. EUTYCUS MAINA**  
**2. GEORGE HAMISI GITHII**  
**3. JOSEPHAT NG'ANG'A NGUGI.....RESPONDENTS**

**R U L I N G**

1. Having perused the affidavit of service, I am satisfied that the Respondent were duly served with the application dated 16/8/2017 but opted not to oppose the application in terms of Order 51 Rule 14(1) & (7).

2. Effectively and consequently therefore the application stands unopposed but the applicant/Appellant still bears the duty to meet the pre-requisites for grant of stay pending appeal as set out under Order 42 Rule 6(2).

3. In the application now under consideration, the applicant has set forth some 10 grounds founding the application which in summary are to the effect that; the orders by the trial court concerned and affected one, Kensafe Driving School, when that entry was not a party to the suits, that the activities and operation of the 3<sup>rd</sup> Appellant were exhibited to have been done with the participation of the Respondents who are signatories to the 3<sup>rd</sup> Appellants business accounts and that the orders fully ignored the welfare of the students and pose the damages of having the school closed thereby totally spiriting away the substration of the appeal.

4. On the materials presented, which remain uncontroverted, I entertain no doubt that the only natural consequence that would flow if the orders by the trial court dated 21/7/2017 were to be enforced to the letter is that the school would be muted in its operations, will lose business and even goodwill and reputation pending the determination of the suit.

5. That to this court would not only hurt the 3<sup>rd</sup> Appellant but also the possible takings by the individuals

who are the shareholders of the 3<sup>rd</sup> Appellant in that the loss of business to the company would be the proportionate loss of earnings to the shareholders. That to this court constitutes a proven substantial loss which ought to be prevented and obviated by an order for stay.

6. The second reason I would grant stay is on the basis that from reading of the materials placed before court, it would appear that the disputants, 1<sup>st</sup> & 2<sup>nd</sup> Appellants, on one side and the Respondents on the other side seem to fight over the control of the company. If that be correct, then a question that may arise at the hearing is whether or not there was a jurisdiction in the court to entertain the matter on the basis of the court as defined under the Companies Act 2015.

7. I would award to the Applicants prayer for stay pending appeal but not on *carta blanche*. The orders are stayed but on terms that the operations and business of the 3<sup>rd</sup> Appellant shall be conducted in terms of its Articles of Association and the Law, in that all the shareholders and promoters or subscribers to the Memorandum and Articles of Association shall be involved in each and every expenditure of the company pending the hearing and determination of the Appeal.

8. The Appellant shall file and serve a Record of Appeal within 45 days from today and within 14 days after filling the Record of Appeal have the file to be placed before a judge for the purposes of perusal pursuant to Order 42 Rule 11. Should the Appellant default to comply with any of the foregoing terms, the stay herein granted shall lapse and stand vacated and the appeal itself shall stand dismissed.

9. This appeal shall be mentioned in court on the 17/10/2017 for purposes of confirming compliance and for directions on appeal as the circumstances then shall dictate.

10. As the application was never opposed, it is ordered that costs shall be costs in the Appeal.

**Dated** and delivered at **Mombasa** this **28th** day of **August 2017**.

**P. J. O. OTIENO**

**JUDGE**