



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. 96 OF 2015**

**THE BOARD MANAGEMENT ST. LUKES**

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

**VERSUS**

**KEROKA HYPER STORES LTD .....RESPONDENT**

**RULING**

The appellant herein the **Board of Management St. Lukes Ekware Secondary School** filed a Notice of Motion under **Order 42 Rule 6 (6)** seeking the following orders:-

**(a) Spent**

**(b) Spent**

**(c) That the court be pleased to grant a stay of execution of the decree in Keroka PMCC No. 283 of 2014 till this Appeal is heard and determined.**

**(d) Costs of the application be provided for.**

The above application was supported by a supporting affidavit from Cornelius Moriasi in his capacity as the principal of the appellant school. He deponed that judgment against the appellant was delivered on 8<sup>th</sup> September 2015 in PMCC at Keroka Civil Case No.283 of 2014. He annexed a copy of the said judgment which was marked as M1. He further deponed that upon reading the said judgment, the trial court granted stay for 30 days. That later he made an application for stay of execution and the same was dismissed on the 30<sup>th</sup> day of December 2015. He attached a copy of the application which was marked as M2, that he waited for the proceedings and judgement to be typed which proceedings were supplied to him on 14<sup>th</sup> January 2016.

He further deponed that the respondent has now applied to execute the decree of the lower court by way of committing him to civil jail and has even been issued with summons to arrest him. He annexed a copy of the application for execution and decree marked as **M4** and **M5** respectively. He further deponed that currently the school's enrolment is very low hence the school is not in a position to pay the decree at once. He has further contended that should he be arrested and put in prison, the school

She further contended that the appellant school is run by the board where the principal is the secretary and as such on execution the officers of the managing board are to satisfy the decree not in their Personal capacities but as officers of the Board of management. Hence she contended, that the execution process is

nothing personal about the principal who has sworn in the affidavit.

She further contended that contrary to what the applicant has stated; the appellant school does not depend solely in fees by students but government of Kenya contributes monies to schools and this is a plain fact. The respondent has further contended that if there is any party who is suffering loss it is the respondent who after supplying goods to the appellant school; the Board of Management is now going round to deny the respondent the fruits of this judgement.

When the above matter came before me on 7<sup>th</sup> March 2016 counsel for both parties agreed to argue the above application by way of written submissions. Both parties have now filed their written submissions and I have read the same. Having considered the above application by the appellant, the supporting affidavit and annexures to the said

This application was made on 16<sup>th</sup> January 2016. However the application made to the lower court by the appellant seeking stay of execution was delivered in a ruling dated 30<sup>th</sup> December 2015. The appellant has explained in the present application that he requested for typed copies of proceedings and ruling, in the lower court and the same were only supplied to him in the 14<sup>th</sup> January 2016. Hence, in my humble view the above application by the appellant was made without undue delay.

### **On substantial loss**

Substantial loss occurring to the applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution in **Kenya Shell limited —vs- Benjamin Karuga Kigibu& Ruth Wairimu Karuga [1982-1988] I KAR 1018** the court of Appeal stated that:-

"It is usually a good rite to see if **order 41 Rule 4 (now Order 42 rule 6) of the Civil procedure Rules** can be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay.

Similar sentiments were also echoed in the case of **Bungoma HC. Misc. Application No.42 of 2011 James Wangalwa & Another -vs- Agnes Naliaka Cheseto** that:-

**"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail....."**

In **Antoine Ndiage -vs- African Virtual University [2015] e KLR Gikonyo -J** observed:-

**"So the applicant must show he will totally be ruined in relation to the appeal if he pays over the decretal sum to the respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability by the respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved asking as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the respondent cannot repay the decretal sum if the appeal is successful lies with the applicant, follows after the long age legal adage that he who alleges must proof. Real and urgent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum, should the appeal succeed.**

**.....substantial loss under Order 42 Rule 6 is not in relation to the size of the amount of the decree or judgment because however large or small the judgment debtor is liable to pay for it. The fact that the decree is of a colossal amount will only be useful material if the applicant shows that the respondent is not able to refund such colossal sum of money; it is not that the Respondent should always be a person of straw.**

On the basis of the above, the appellant has established that substantial loss will occur unless stay of execution is made. If anything the appellant has contended on the fact that his personal liberty is at stake as an arrest warrant has already been issued to arrest him in his capacity as the secretary of the appellant school. He has also contended that if the stay is not granted the appellant school may close as that will mean attaching its desks and goods which the appellant school's students are using.

In the case of **Absalom BorarsTarbo Transporters [2013] e KLR** the court held:-

**"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses in their reconciliation which is not a question of discrimination."**

In the instant case, the appellant is also alive to the fact that even where stay is granted it must be in terms and in the form of a security for the due performance of such decree or order as may ultimately be binding on the appellant. The secretary to the appellant school has offered kshs. 50,000 as security in his personal capacity perhaps recognizing the fact that his liberty is at stake.

In my humble view, in the instant case there is room for a stay of execution given the sentiments expressed by the appellant as long as the parties rights are held in almost symmetrical bound. In the circumstances thereof I order that there be a stay of execution of the decree herein in the following conditions:-

1. The appellant school pays half of the decretal sum i.e Ksh 144,565 in an interest earning account in the Kenya Commercial Bank, Nyamira High Court Branch within the next 60 days from today.

Such deposit shall be held as security for performance of the decree which may be ultimately binding on the appellant school

2. Costs of this suit shall be borne in the cause

3. It is so ordered

**Dated and delivered at Nyamira High Court this 5<sup>th</sup> day of August, 2016.**

**C.B. NAGILLAH**

**JUDGE**

In the presence of:-

N/A for Appellant

Obure hold brief for Gesemba for the Respondent

Mercy - Court Clerk

**C.B. NAGILLAH**

**JUDGE**