



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT NO.144 OF 2012

ALI ABDALLA DUHMY(CHAIRMAN) & OTHERSPLAINTIFFS

VRS

MOHAMED ABDISHEIKH & OTHERS.....DEFENDANTS

RULING

The application dated 6/7/2015 seeks orders of stay of execution of the judgment of this court delivered on 30/6/2015 pending the hearing and determination of the plaintiff/applicants' intended appeal. It is supported by the affidavit of Shee Athman Omar sworn on the same date. Parties agreed to determine the application by way of written submission.

Applicant's Submissions:

Mr. Haniza, counsel for the applicants maintain that the intended appeal has high chances of success. Unless the orders are granted the appeal will be rendered nugatory. A notice of appeal dated 6/7/2015 was withdrawn and replaced by another one dated 14/7/2015. The plaintiffs are in-charge of the running of the school and the defendants would like to remove them illegally. This is not a money decree and the plaintiffs have been in office for a long time before the judgment was issued. Counsel cited the Case of **Swaya Ltd V Daima Bank Ltd (Nrb Civil Application No.45/2001** and that of **E. A Breweries Ltd V Castle Brewing (K) Ltd – Nrb Milimani Civil Case No.848/1998**.

Respondent's Submissions:

Mr Mutisya, counsel for the respondents maintain that the plaintiffs are clinging to the leadership of Nur Muslim Society illegally. This is a public institution and the current application is meant to delay the defendants from taking over the institution and the current application is meant to delay the defendants from taking over the institution.

Analysis and Determination:

The application is made under Rule 42 of the Civil Procedure Rules. Rule 42 (2) states as follows:

“(2) No order for stay of execution shall be made under sub-rule (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 my ultimately be binding on him has been given by the applicant.”

There are several authorities on the issue of stay of execution pending appeal and I need not re-invent the wheel. In **Kenya Shell Ltd v Kibiru & Another [1986] KLR**, the Court of Appeal held that in considering applications for stay of execution, the court has to balance between the successful litigant who should not be deprived of the fruits of a judgment in his favour and the consideration that execution might render the proposed appeal nugatory. Other parameters for consideration is whether the application for stay of execution has been filed without unreasonable delay (See **Ujgar Singh v Rwanda Coffee Estates Ltd [1966] E. A 263**, whether substantial loss will result to the applicant unless the order of stay is made (see **Silvester V. Chesoni [2002] 1 KLR 867**, and lastly, there is the issue of security.

The dispute herein revolves around Nur Muslim School Society. The institution is being run for the benefit of the society. The dispute between the parties herein relates to the leadership of the institution. It is clear also that there are some income generating properties which help the officials to run the institution. The disputes date way back in 2006. Since that time the applicants have been the ones running the institution. This court held that the election of the plaintiffs to the leadership positions was illegal. That being the case, I do find that staying such a finding would be extending the illegality for some time. The applicants can pursue their appeal and if successful, will be restored to their leadership positions. In any case, elections are to be conducted each year as per the society's Constitution. The intended appeal will not be rendered nugatory. There is no indication that those in leadership position do earn a salary. No substantial loss will be suffered. The applicant would like to cling to their positions even when the court faulted their election.

It is clear that the current application has been brought without delay. However, the denial of stay of execution orders will not render the appeal nugatory. No substantial loss will be suffered. There is no need for any security as there is no money involved. The applicants should humbly vacate the premises and leave out the leadership positions to the defendants while they pursue their appeal.

In the end, I do find that the application dated 6/7/2015 lacks merit and it is hereby dismissed with costs.

Dated, signed and delivered at Malindi this 30th day of June, 2015.

SAID J. CHITEMBWE

JUDGE