

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CIVIL APPEAL NO. 43 OF 2013

(Being an appeal from the ruling and order in Civil Suit No. 395A of 2003 of the Chief Magistrate's Court at Malindi before Hon. D. Ogembo – SRM)

BOARD OF GOVERNOR, MALINDI HIGH SCHOOL..... APPELLANT

VERSUS

KATANA MWAGANDI MENZA RESPONDENT

RULING

1. The appellant's application dated 27th September, 2013 was brought under Order 42 Rule 6(1) of the Civil Procedure Rules, primarily, and it seeks stay of execution pending appeal. The application is supported by the affidavit of Emmanuel Simanya Kitsao the Headmaster of the Malindi High School, against whom warrants of arrest were issued in the Lower Court, in execution of an *ex parte* judgment. The judgment was entered in a suit in which the respondent sued the appellant for damages for unlawful termination of his services.
2. The applicant asserts that substantial loss will be occasioned upon the school and the headmaster if stay is not granted, and that the respondent is a man of straw. The respondent filed a replying affidavit in which he disputes the appellant's assertions. He dismisses the application as an afterthought designed to frustrate his bid to enjoy the fruits of his judgment. Further, he depones that the appellant has not demonstrated how it will suffer substantial loss. The parties agreed to dispose of the application by way of written submissions. I have considered these alongside the application and respective affidavits.
3. Although the parties' submissions appear to dwell at some length on the question whether or not the appellant has an arguable appeal, the relevant criteria for consideration in this application is set in Order 42 rule 6(2) which states:

“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”**
4. While I have no doubt that this application has been timeously brought, the question of substantial loss requires some consideration. In many cases, substantial loss, especially where a monetary decree is involved, has been based on the ability or otherwise of the decree holder to repay any moneys if the appeal succeeds. Indeed in the case of **Kenya Shell Ltd v Benjamin Karuga Kibiru & Another [1988] KAR 1018** the Court of Appeal stated that it is rare to find a case where such ability or inability is not also equivalent to the question whether an appeal will be rendered nugatory. The respondent in this case was a junior member of the staff at the time of dismissal. It is not a far fetched assertion that he may not be able to pay back the decretal sum of

the appeal succeeds.

5. Secondly, a warrant of arrest has been issued against the headmaster of the school personally. He says he has no vote from which to settle the decretal sum. The student body and indeed the entire school stands to suffer if the headmaster is arrested or incarcerated. Not to mention his own personal suffering yet the claim was not a personal liability. I find that the applicant will suffer substantial loss if the stay sought is denied.
6. On the question of security, I note that the appellant is a public institution and an order for security may be difficult for the appellant to comply with, or within good time. Instead, I direct that the appellants take all the necessary steps to ensure that the appeal is prosecuted within 12 months of today's date, failing which the stay I hereby grant under prayer (3) will lapse automatically. Thereafter the respondent will be at liberty to execute.

Costs will abide the outcome of the appeal.

Delivered and signed at Malindi this **20th** day of **March, 2014** in the presence of Mr. Mouko for the applicant/appellant, Mr. Gekanana holding brief for Mr. Gicharu for the respondent.

Court clerk – Samwel

C. W. Meoli

JUDGE