REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.97 OF 2013

BETWEEN

THE CHAIRMAN, B.O.G. ERONGE

MIXED SECONDARY SCHOOL ……………..………. APPELLANT/APPLICANT

AND

ASKA OBAE ……………………………………..……..…….. RESPONDENT

(Being an appeal from the Ruling of the Hon. Norbert O. Okumu, RM, delivered

on the 16th July, 2013 in Nyamira SRM's court in Nyamira CMCC No.95 of 2012)

RULING

1. This appeal arises from the ruling of the Honourable Norbert O. Okumu, Resident Magistrate at Nyamira Law Courts in Nyamira CMCC No.95 of 2012 delivered on 16th July 2013. The appellant herein was the defendant in the court below while the respondent herein was the plaintiff. The respondent sued the appellant for the sum of Kshs.561,600/= only being the value of goods supplied and delivered to the appellant at the appellant's own request and instance. The respondent also prayed for costs and interests and such further and/or other relief as the honourable court may deem fit. Judgment was entered on 18th June 2012 in favour of the respondent.
2. The appellant is now before this court vide the Notice of Motion dated 31st July 2013 by which it seeks for an order of stay of execution of the subordinate court's orders dated 16th July 2013 and all consequential orders pending the hearing and determination of the appeal herein. The application is supported by the grounds numbered 1 to 12 on the face of the application and by the affidavit in support sworn by Jephtha Nyasetia on 31st July 2013. The chief ground in support of the application is that if the order made by the subordinate court on 16th July 2013 is executed, then the appellant/applicant who is a school shall be grounded. Secondly, the applicant states that the respondent chose the wrong procedure in moving the subordinate court for redress: That the respondent should have moved the court by way of Judicial Review proceedings and not by direct Notice of Motion as per the Notice of Motion dated 31st May 2013. By that application, the Respondent herein asked the court to order that all monies due and payable to the defendant/JD and in particular ERONGE DEB MIXED SECONDARY SCHOOL accruing from the Garnishee to the said Defendant/JD in Account Numbers 1106984307, 1107015790 and 1106982304 with KCB Ltd, Nyamira Branch, or so much of it as may be sufficient to satisfy the decree herein currently standing at Kshs.715,197/= only be paid to the applicant therein with costs of the

Garnishee proceedings.

3. The said Notice of Motion was heard by the Hon. Okumu, Resident Magistrate, and on 3rd June 2013, the Garnishee was ordered to inform the Court, within 7 days of the order, what sum was due to the appellant herein from the various accounts. It was further ordered that if the Garnishee disputed the debt claimed to be due from her to the Defendant/Judgment Debtor then the Garnishee was required to appear before the court on 11th June 2013 on an application by the Plaintiff/Decree Holder that the Garnishee do pay the Plaintiff/Decree Holder the debt due from the Garnishee to the Defendant/Judgment Debtor or so much thereof as may be sufficient to satisfy the Decree together with costs of the Garnishee Proceedings.
4. The trial court issued the orders as prayed on the 16th July 2013 whereby the Garnishee was to forthwith pay the plaintiff/Decree Holder the sum of Kshs.731,997/= and in default thereof, execution was to issue.
5. Consequent upon the order of 16th July 2013, the appellant herein filed a Notice of Motion dated 23rd July 2013 before the lower court, seeking among other orders, an order directing the garnishee herein to allow the appellant to operate its accounts and in particular to allow the appellant to withdraw money in the accounts in order to deposit the decretal sum in court, as per the orders of the trial court made on 16th July 2013. The appellant also wanted the subordinate court to set aside its orders of 16th July 2013 so as to hear the appellant's application dated 31st May 2013 on its merit.
6. The record shows that the appellant appeared before the trial court on the same 23rd July 2013. The application of the same date was certified urgent and orders of stay granted on 16th July 2013 were extended until 30th July 2013. The matter was to be mentioned on 30th July 2013 for directions on depositing of security.
7. On the 31st July 2013, the instant application was filed. The application is opposed vide Notice of Preliminary Objection on the following points of law:-

1. *The instant Notice of Motion Application is pre-mature, misconceived and otherwise bad in law.*
2. *The order appealed against, having been made pursuant to* ***Order 23 Rule 4 of the Civil Procedure Rules, 2010****, same does not attract an automatic right of Appeal. In the premises, the instant Application is devoid of any legal foundation.*
3. *The Honourable Court is devoid of jurisdiction to entertain the instant Appeal, together with the Application founded thereon.*
4. *The instant Appeal together with the Application are barred and/or prohibited by dint of* ***section 75 of the Civil Procedure Act, Chapter 21, Laws of Kenya****, as read together with the provisions of* ***Order 43 Rule 1 (1) (1) of the Civil Procedure Rules, 2010****.*
5. *The instant proceedings/Appeal do not disclose and/or capture any reasonable cause of action.*
6. *The instant Appeal and Application amounts to and/or constitutes abuse of the due process of Court.*
7. *The Appellant/Applicant is non-suited.*

8. The application is also opposed on the following grounds:-

1. *The instant Notice of Motion Application is pre-mature, misconceived and otherwise bad in law.*
2. *The Order appealed against, having been made pursuant to* ***Order 23 Rule 4 of the Civil Procedure Rules, 2010****, same does not attract an automatic right of Appeal. In the premises, the instant Application is devoid of any legal foundation.*
3. *The Appellant/Applicant is not a Government body and/or organ. Consequently, the proceedings against the Appellant/Applicant are not regulated vide the provisions of the* ***Government proceedings Act, Chapter 40, Laws of Kenya****.*
4. *The instant Application is founded and/or based on misconception and/or misinterpretation of the relevant and applicable laws, including but not limited to the* ***Education Act, Chapter 211, Laws of Kenya****.*
5. *In any event, the Appellant/Applicant has not shown and/or established sufficient cause and/or basis to warrant the grant of the orders sought, whatsoever and/or howsoever.*

6. *The Appellant/Applicant herein, is guilty of mounting a Plethora of Applications challenging the same order both in the Subordinate Court and before this Honourable Court vide* *<u>KISII HCCA NO.78 OF 2013</u>, the latter which has since been dismissed.*
7. *The Appellant/Applicant has not satisfied the requisite conditions to warrant an Order of Stay of Execution pending Appeal.*
8. *The instant Appeal, together with the Application are prohibited vide the provisions of* ***Order 43 Rule 1 (1) (1) of the Civil Procedure Rules, 2010****.*
9. *The instant Application constitutes and/or otherwise amounts to an abuse of the due process of Court.*
10. *The instant Application is otherwise devoid of merits, whatsoever.*

9. I heard submissions in this matter on 7th August 2013. The contention by the appellant/applicant through counsel C.A. Okenye was that since the appellant is a Government Institution, any proceedings against it must be in keeping with the provisions of the **Government Proceedings Act, Chapter 40** of the **Laws of Kenya**, and that since the Hon. the Attorney General was not enjoined in these proceedings the appeal herein has high chances of success. Further, that if the lower court order of 16th July 2013 is executed, then the appellant stands to suffer irreparably, especially because the Respondent is a person of straw who may not be able to refund the decretal amount if the same is released to her. That though the Respondent has a right to enjoy the fruits of her judgment, this court should give a chance to the appellant to exercise its right of appeal. Finally that the Respondent will suffer no prejudice if the order sought is granted. Counsel also submitted that the application has been filed without undue delay. Finally, counsel asked the court not to pay any attention to issues of technicality and to proceed to determine the application on the principle of substantive justice.
10. In response to appellant's counsel's submissions, Mr. Oguttu-Mboya appearing for the Respondent submitted that both the appeal and the application herein are incompetent for failure to include the Garnishee, namely Kenya Commercial Bank, Nyamira Branch.
11. Secondly, counsel argued that the instant application and the appeal are incompetent for the reason that orders made pursuant to **Order 23 Rule 4** of the **Civil Procedure Rules** are not appealable as of right. **Order 23 Rule 4** relates to execution against the garnishee who has not appeared, and that the only rule under **Order 23** which confer an automatic right of appeal is **Rule 7** which relates to a claim of a 3rd party in attachment of debts, and that the appellant is not such a third party.
12. For clarity **Order 23 Rules 4** and **7** provide as follows:-

> **"(4) If the garnishee does not dispute the debt due or claimed to be due**
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> **from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order *nisi*, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No.17 or 18 of Appendix A, as the case may require.**
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> **(7) After hearing the allegations of any third person under such order,**
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> **as in rule 6 mentioned, or of any other person who by the same or**
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> **any subsequent order the court may order to appear, or in case**
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> **of such third person not appearing when ordered, the court may**
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> **order execution for levying the amount due from the garnishee,**
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> **together with the costs of the garnishee proceedings, or order any**

issue or question to be tried or determined according to the preceeding rules of this Order, and may bar the claim of such third person or make such other order as the court shall think fit."

13. Counsel also submitted that **section 75 (1)** of the **Civil Procedure Act, Cap 21 Laws of Kenya,** and **Order 43 rule 1 (1)** of the **Civil Procedure Rules,** which provisions give details of the appeals that accrue by right. **Section 75 (1)** of the **Civil Procedure Act** provides as follows:-

"75 (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted –

a. **an order superseding an arbitration where the award has not been completed within the period allowed by the court;**

b. **an order on an award stated in the form of a special case;**

c. **an order modifying or correcting an award;**
d. **an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;**

e. **an order filing or refusing to file an award in an arbitration without the intervention of the court;**

f. **an order under section 64;**
g. **an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;**
h. **any order made under rules from which an appeal is expressly allowed by rules.**

Order 43 Rule 1 (1) of the **Civil Procedure Rules** on the other hand provides as follows:-

"1.(1) An appeal shall lie as of right from the following orders and rules under the provisions of section 75 (1) (h) of the Act –

a. **Order 1 (parties to suits);**
b. **Order 2 (pleadings generally);**
c. **Order 3 (frame and institution of suit);**
d. **Order 4, rule 9 (return of plaint);**
e. **Order 7, rule 12 (exclusion of counterclaim);**
f. **Order 8 (amendment of pleadings);**
g. **Order 10, rule 11 (setting aside judgment in defaultof appearance);**

h. **Order 12, rules 10, 12 and 18 (setting aside judgment or dismissal for non-attendance)."**

14. It is to be noted that apart from what is provided by **Order 43 Rule 1 (1)** as above, only orders emanating from **Order 23 Rule 7** are appealable as of right. This relates to trial of claim of third person in attachment of debts. Counsel submitted that in the instant case, the appellant needed to

obtain leave of the court before instituting the instant appeal, and that such leave ought to have been sought and obtained beforehand. That in any event, such leave must be sought within 14 days from the date the order sought to be appealed against was obtained. Reliance was placed on **Order 43 Rule 1 (3)** of the **Civil Procedure Rules** which provides as follows:-

> **"1(3) An application for leave to appeal under section 75 of the Act**
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> **shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made or within fourteen days from the date of such order."**

It was submitted that the appellant/applicant has not complied with the

above stated provisions.

15. As a fourth ground of objection, counsel for the Respondent submitted that the appellant/applicant is guilty of abuse of court process because of filing more than one application on the same issue. In particular, counsel referred to the Notice of Motion dated 23rd July 2013 which was filed before the lower court, which application was scheduled for mention on 30th July 2013, a day before the instant application was mounted. That the said motion dated 23rd July 2013 is still pending before the lower court or at the very worst, this court has not been told whether the said motion has been withdrawn and/or dealt with in any other way. Counsel also referred to **Kisii HCCA No.78 of 2013 – Eronge Mixed Secondary School –vs- Aska Obae,** which appeal was found to be non-existent.
16. Finally counsel submitted that the appellant/applicant's application for stay must fail on the grounds that the applicant has not demonstrated to this court that it would suffer substantial loss if the order sought is not granted.
17. In this regard, counsel stated that the affidavit in support of the application does not show what substantial loss will accrue to the applicant in case a stay order is not granted. Reliance was placed on the case of **Kenya Shell Limited –vs- Benjamin Karuga Kibiru & another [1982-88] 1 KAR 1018** where it was held that in the absence of demonstrable substantial loss the court should not grant an order for stay. Hancox JA stated the following in part of his judgment:-

> **"It is usually a good rule to see if Order 41 Rule 4 of the Civil**
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> **Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."**

18. I agree with the learned JA that substantial loss is the cornerstone of any application for stay orders, whether such an application is made under the relevant Court of Appeal Rules or under **Rule 6** of **Order 42** of the **Civil Procedure Rules**.
19. Counsel also submitted that allegations that the Respondent is a person of straw have not been substantiated by any averments to that effect in the affidavit of support. In any event, counsel further argues, the appellant seems concerned only with the aspect of execution and not with the judgment itself as such. For these reasons, counsel urged court to dismiss the application.
20. I have read through the entire application including the affidavit in support. I agree with counsel for the Respondent that the appellant/applicant has not demonstrated to this honourable court that the appellant shall suffer substantial loss if the stay order is not granted. I will say, like Hancox JA said in the **Kenya Shell case** (above) that without evidence of substantial loss, there would be no purpose to be served by granting the order of stay. There is no loss that such an order would prevent. On this ground, the application must fail.
21. Secondly, counsel for the Respondent submitted that the appellant/applicant has failed to establish

that there is sufficient cause to warrant the grant of the order sought. Reliance was placed on the case of **Jethwa –vs- Shah T/A Supreme Styles [1989] KLR 198** where the Court of Appeal sitting at Nairobi held, *inter alia*:-

> **"1. As the applicant had a money decree against him, besides**
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> **demonstrating that any success in the intended appeal would be rendered nugatory, the applicant had to persuade the court that the respondent was so impecunious that the applicant would never be able to get his money back.**
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> **2.----**
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> **3.The burden of proof as to any particular fact is on the person who**
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> **wishes the court to believe in its existence, unless it is provided by**
>
> **any law that the proof of that fact shall lie on any particular person.**
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> **The burden was on the applicant to prove that the respondent was**
>
> **impecunious."**

22. Reliance was also placed on the case of **Machira T/A Machira & Co. Advocates –vs- East African Standard (No.2) [2002] 2 KLR 63** where the High Court at Nairobi persuasively held that in considering applications of this nature, the court must take into account all material circumstances of the case and not merely the interests of one party; that any subsequent decision in a judicial finding and decision that tends to impede the normal flow of justice by suspending the enjoyment of the consequential orders of such finding or decision can only be rendered in exceptional circumstances and in such a case, a party seeking such suspension must demonstrate that substantial loss will result if the order sought is not granted. And as further stated in both the **Machira** and **Jethwa cases** (above) it is not enough for the applicant to allege that substantial loss will result; he must provide specific details and particulars.
23. In the instant case, which is an application before the High Court and not the Court of Appeal, proof of sufficient cause is not the issue. What is at stake is demonstration of substantial loss and timeliness within which the application is mounted. It is also incumbent upon the applicant to provide security for costs. The applicant in this case has, in my view, not only failed to demonstrate substantial loss but has also not offered any security for costs. I find that the applicant herein was not serious about mounting this application. All that the deponent of the Supporting Affidavit states is that it will be in the interest of justice to grant the orders sought and that to refuse to grant the orders sought herein would be to condemn the applicant unheard. As stated earlier, the applicant must not only allege, but prove substantial loss. The applicant must also show that this application was brought without delay. Neither the grounds on the face of the application nor the averments in the supporting affidavit mention the fact whether application has been brought within time. Finally, there is no mention of the offer of security for costs. As the applicant was required to fulfill all the 3 conditions set out under **Order 42 Rule 6** of the **Civil Procedure Rules**, and having failed to do so, the application must fail.
24. I now return to the grounds of opposition and the Notice of Preliminary Objection. I am satisfied that both the appeal and the instant Notice of Motion are incompetent. The appeal was mounted without leave of the court and that means that any subsequent pleadings in the appeal, such as the instant Notice of Motion have no ground on which to stand. An application premised on an incompetent appeal must fall together with the incompetent appeal. The applicant neither sought nor obtained leave of the court before filing the appeal thereby contravening **section 75 (1)** of the **Civil Procedure Act** and **Order 43 Rule 1 (1)** of the **Civil Procedure Rules**. I also agree with counsel for the Respondent that the applicant herein is guilty of abuse of the process of court by filing more than one application seeking similar orders. The applicant has not even informed the court of the fate of the application dated 23rd July 2013 which was due for mention before the trial

court on 30th July 2013, nor has he mentioned that **Kisii HCCA No.78 of 2013** was struck out on 12th July 2013.

25. In **<u>Halisbury's Laws of England, Fourth Edition Volume 9 at p. 27</u>**, abuse of process of the court may be committed where a party deceives **"the court or the court's officers by deliberately suppressing a fact, or giving false facts …."** Abuse of court process also occurs by **"for instance initiating or carrying on proceedings which are wanting in bona fides or which are frivolous, vexatious or oppressive."** In the instant case, I find the instant application to be frivolous and vexatious since the appellant abandoned a similar application that was pending before a court of competent jurisdiction. Further, the applicant deliberately supported the fact that **HCCA No.78 of 2013** was struck out on 12th July 2013. The instant application was in my view wanting in bona fides.
26. The upshot of what I have said above is that the application dated 31st July 2013 and filed in court on the same day has no merit whatsoever. The application is accordingly dismissed with costs to the Respondent. The appeal which was filed without leave of the court is also struck out with costs to the Respondent.
27. It is so ordered.

Dated and delivered at Kisii this 21st day of August 2013

RUTH NEKOYE SITATI

<u>JUDGE.</u>

<u>In the presence of:</u>

Mr. C.A. Okenye h/b for Z. Mokua for Appellant/Applicant

Mr. Oguttu-Mboya (present) for Respondent

Mr. Bibu - Court Clerk