



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**H.CA NO.113 OF 2009**

*(Being appeal from the Ruling of the learned Senior Resident Magistrate Hon. Mr. J. O. Oigara sitting in Kimilili SRM Court in Civil Case Mo.62 of 2008 delivered on 18/8/2009)*

**BOARD OF GOVERNORS KIMILILI BOYS HIGH SCHOOL.....APPELLANT/APPLICANT**

**~VRS~**

**LUMUMBA ODOUR OBAYI .....RESPONDENT**

**RULING**

The Applicant was aggrieved by the judgment of the Senior Resident Magistrate Court at Kimilili in which it was ordered to pay Ksh.142,000/= in general damages to the Respondent. He has appealed the decision. Pending the hearing and determination of the appeal, it seeks stay of execution of the decree in the case. The application was brought under Order 16 rule 5 (a) and ( c ) of the Civil Procedure Rules. I agree with Mr. Situma for the Respondent that the application ought to have been under Order 41 rule 4 of the old Rules.

Under Order 41 rule 4, the Applicant has to show that it will suffer substantial loss if stay is not granted. The application has to be brought without unreasonable delay and security for the due performance of the decree has to be furnished. (**Halai & Another v Fornton & Turpin [1963] ltd [1990] KLR 365.**)

No security was furnished. The secretary of the Board of Governors of the Applicant school swore an affidavit to say that if execution is allowed the appeal will be rendered nugatory and the school will suffer irreparably as the Respondent was not a person of means and could not refund the decretal sum. The Respondent swore a replying affidavit to say that he is employed by Murwa Contractors where he earns Ksh.400/= per day and was capable of refunding the decretal sum. No further affidavit was sworn to counter what the Respondent swore regarding his means.

Usually, the court will not stay the execution of a money decree unless it can be shown that the amount in question is substantial and that the judgment creditor has no means to refund the amount in the event that the appeal succeeds. (**Delphis Bank v Caneland Ltd, Civil Applications Nos. Nai 333 and 334 of 1999.**) The amount herein is not substantial and the Respondent has shown he can refund it if the appeal succeeds. It should be pointed out that the burden to show that the Respondent lacks the means to refund the decretal sum was always on the Applicant. I find the burden was not discharged.

Lastly, the Respondent opposed the application on the basis that it was not brought without unreasonable delay. There appears to be no dispute that the judgment of the lower court was entered on

18/8/2009. The appeal was filed on 17/9/2009. The application was filed on 5/10/2010. That is about one year after the appeal was filed. The Applicant states that he went to the subordinate court with the application for stay and did not succeed. The affidavit does not indicate when that application was filed, or dismissed. Whatever the case, after the appeal was filed in this court the Applicant was expected to file the application here. He waited for one year, and that was unreasonable delay. The fact that proceedings of the lower court have been called for from the subordinate court and have not been received is, for the purpose of this application, not important.

The result is that this application has no merit and is dismissed with costs.

Ruling delivered in open court this 7<sup>th</sup> day of November 2011 in the presence of Mr. Khakula for the Applicant and Mr. Situma for the Respondent.

**A. O. MUCHELULE**  
**JUDGE**