REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU Civil Appeal 213 of 2009

BOARD OF GOVERNORS ELBURGON SECONDARY SCHOOL……...APPELLANT
VERSUS
JOHN MWAURA KIMANI(Suing through his mother & next friend NAOMI MBUIYU KIMANI).....**RESPONDENT**

RULING

This is an application for stay of execution of orders made by the court below compelling the applicant to readmit the respondent into the latter's school.

The application is premised on the grounds that the applicant being aggrieved by the order of readmission has filed this appeal. That if executed, the order of readmission will have the effect of compounding indiscipline in the school and the applicant will find it extremely difficult to run the school. That the respondent will not be prejudiced as he is not out of school having been admitted to Shiners Boys Secondary School.

In reply, the respondent has averred that the applicant having failed to obey the order to readmit the respondent, ought not to be heard in this application. That the fact that the respondent has been admitted in another school is irrelevant. That as a matter of fact, it is the respondent who is suffering loss and damage by being out of school. That the Principal's own pride is the only reason why the applicant has failed to readmit the respondent.

I have considered these arguments and the two authorities cited.

The respond who had just been admitted to form one class in the applicant's school is alleged to have called one teacher a prostitute. This promptly earned him expulsion. Through his mother as next friend, the respondent moved the Principal Magistrate, Molo in C.M.C.C.No.258 of 2009 for orders of mandatory injunction to compel the applicant to readmit the respondent, general damages, special damages, costs and interests. The learned trial magistrate found for the respondent and although the proceedings or order of that court are not part of the annextures to this application, it is clear to me that the learned trial magistrate directed the applicant to readmit the respondent. It is also clear that the applicant's first application for stay to the learned magistrate was dismissed hence the instant application.

The jurisdiction of this court in respect of its powers to stay the execution of orders, decrees or proceedings is derived from **Order 41 rule 4** of the **Civil Procedure Rules**. The questions to be asked are whether the applicant is likely to suffer substantial loss if the order of stay is not granted; whether the application has been made without delay and whether the applicant has offered security. See **Mukuma** Vs. **Abuoga** (1988) KLR) 645, to which I was referred.

In an application for stay, there are two competing interests. On the one hand, there is the respondent who has judgment whose fruits he should not be deprived of without just cause. On the other hand, the applicant who has challenged the judgment on appeal must also be cushioned to ensure that the appeal is not a mere academic exercise. See **Kenya Shell Ltd**. Vs. **Kibiru & Another** (1986) KLR 410. The applicant describes the loss it stands to suffer if the order of stay is not granted in the following words in the affidavit in support of this application:

"12. …..to seek for a stay of execution of the orders of 25/9/2009 as their enforcement shall greatly undermine discipline among students ……...

20. That unless the order of the lower court are stayed, the running of the school shall be very difficult and enforcing discipline shall become a major huddle."

Like the learned trial magistrate, I find that the applicant has not specifically demonstrated in what manner the enforcement of discipline will be difficult or how it would be difficult to run the school by readmitting the respondent. Without condoning or encouraging indiscipline in the school, the court is simply saying that there must be some loss that will be occasioned to the applicant by the readmission of the respondent. I find as a matter of fact that

there will be no loss or injury to the applicant in the strict meaning of the term. Should this appeal succeed, the respondent shall simply pack his bag and move on with his education elsewhere and while in the applicant's school he will be subject to rules and regulations of the school. On the question of time, I find that this application was brought without delay. The ruling being challenged was delivered on 25th September, 2009 and one month later the applicant formally made an application to the learned magistrate for stay. That application was dismissed on 2nd November, 2009. This application was brought on 4th November, 2009. There was no delay, as I have stated

The applicant has not made any offer as to security. However, the fundamental finding is that there will be no loss to the applicant.

For that reason, this application is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nakuru this 22nd day of January, 2010.

W. OUKO
JUDGE