

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 904 OF 2007

ST. ELIZABETH ACADEMY – KAREN LTD.....APPELLANT

VERSUS

SAMUEL MIRANG’A KIMEMIA alias SAMUEL ICHONGA.....RESPONDENT

(From the Original Civil Suit RMCC.182 of 2003 of SRM’s Court at KAJIADO)

R U L I N G

On the 17th January, 2001 Ms. Oganyo Senior Resident Magistrate delivered a ruling in RMCC.182 of 2003 Kajiado in which she granted orders of stay of execution pending appeal under Order XLI Rule 4 and XXI Rule 22 of the Civil Procedure Rules.

The orders were conditional on the Applicant St. Elizabeth Academy – Karen Ltd depositing the decretal sum into an interest earning account in the joint names of the parties. The Applicant who was the Objector in the execution proceedings is aggrieved by the orders made by Ms. Oganyo and has filed a memorandum of appeal against that ruling.

The Applicant now prays that pending the hearing and determination of that appeal the court do stay all execution proceedings relating to that order as well as stay of other proceedings relating to the decree earlier issued on 3rd May, 2007 which was the subject of the objection proceedings. It is contended by the applicant that depositing a decretal sum into court is a horrendous burden which will prejudice the Appellant which in any case contends that it was not a party in the suit and was wrongfully mistaken for the defendant. The Appellant contends that it is ready and willing to provide alternative security other than depositing cash money.

The Respondent Samuel Mirang’a Kimemia alias Samuel Ichonga has sworn a replying affidavit in which it is contended that the intended appeal has no merit, that in any case the security required is to be deposited in an interest earning account in the joint account of both parties and there will therefore be no prejudice to the Applicant.

The conditions under which an order for stay of execution pending appeal can be granted are clearly set out in Order XLI Rule 4(1) & (2) of the Civil Procedure Rules. First the court must be satisfied that there is sufficient cause to justify granting the orders for stay of execution. In this case the fact that the Appellant has filed an appeal which on the face of it does not appear frivolous, is sufficient cause to warrant granting of an order for stay of execution. Nevertheless, an order for stay of execution can only be granted when 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. In this case the order, subject of the complaint is for payment of the decretal sum of Kshs.253,736/= in a joint interest earning account in the names of the Appellant’s and the Respondent’s Advocates within 30 days.

The Applicant has not demonstrated any substantial loss that it is likely to suffer if that order is implemented. The money being deposited in an interest earning account in the joint names of both

parties' advocates, it would be easily available to the successful party. It cannot therefore be said that the Applicant will not be easily restituted if it is successful.

As was stated by Platt J.A. in the case of Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Ruth Wairimu Karuga (Supra) which was cited by the Respondent's Counsel,

“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 forms, is the cornerstone of both jurisdictions for granting a stay.”

I find therefore no justification to grant the prayers sought. Accordingly the application is dismissed with costs.

Dated, signed and delivered this 24th day of April, 2008

H. OKWENGU

JUDGE