



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Case 84 of 2004**

**MOHAMED AYUB KHAMISA**

**SALEEM S. MIYANJI**

**ELIAS ESMAIL as Trustees of**

**MUSLIM KUMBAR JAMAT .....PLAINTIFFS**

**VERSUS**

**THE COAST EDUCATION SOCIETY t/a**

**MOMBASA HIGH SCHOOL .....RESPONDENT**

**R U L I N G**

The defendant herein, took out a notice of motion pursuant to Order XL 1 rule 4 of the Civil Procedure rules in which it sought for an order of Stay of execution pending appeal. The motion is supported by the affidavit of Jones Mwanja Kaveke sworn on 2<sup>nd</sup> May 2008. It is opposed by the plaintiffs who filed the replying affidavit of Saleem S. MiyANJI sworn on 28<sup>th</sup> May 2008. The plaintiffs also filed a list of decided cases which they urged this court to use to guide it on deciding this dispute.

The history leading to the filing of this motion can easily be traced from the ruling this court delivered on 24<sup>th</sup> April 2008. Mr. Justice Maraga, entered Summary judgment in favour of the plaintiffs on 28<sup>th</sup> November 2007. In effect this court gave the plaintiffs vacant possession and mesne profits. By a motion dated 17<sup>th</sup> December 2007, the defendant applied for the aforesaid judgment to be set aside. The motion was dismissed on 24<sup>th</sup> April 2008. Being dissatisfied with the dismissal order, the defendant filed a notice of appeal to express its intention to appeal against the decision in the court of Appeal. Pending the hearing and determination of the intended appeal, the defendant has now taken out the motion dated 2<sup>nd</sup> May 2008, the subject matter of this ruling to seek for an order of stay execution.

It is the submission of Mr. Kenzi, learned advocate for the defendant, that the defendant would suffer substantial loss unless the order is granted. The defendant averred that it would be required to vacate the suit premises which it has known since its inception hence disrupting the smooth running of its school activities. The plaintiffs on the other hand through their advocate, Mrs. Moolraj, urged this court to find that the defendant would suffer no substantial loss because, the defendant could still get alternative premises to run its activities.

I have considered the material presented to this court. I have also taken into account the submissions of learned counsels from both sides. Under Order XLI rule 4 of the Civil Procedure rules three prerequisites are set before granting the order for stay of execution pending appeal namely:

- (i) Applicant must show the substantial loss it would suffer if the order is not granted.

(ii) The court must decide on the provision of security.

(iii) It must be shown that the application for stay of execution pending appeal was filed without unreasonable delay.

Let me start by considering the last condition. The record shows that this court made its decision on 24<sup>th</sup> April 2008. The defendant filed a notice of appeal on 29<sup>th</sup> April 2008. It filed the notice of motion dated 2<sup>nd</sup> May 2008 on the same date. It is apparent that the motion was timeously filed.

Having disposed of the last condition, let me now turn my attention to the first condition on substantial loss. It is clear from the nature of the order given that if an order of stay is not given, the defendant will be required to vacate the premises it occupies. I am convinced that the defendant will require a substantial sum of money to effect the movement to a new premise. It will also require a colossal sum of money to advertise its new site. Great inconvenience will be visited upon the defendant and its clients. In sum, I am satisfied that the defendant will suffer substantial loss.

The last condition is on the provision of security. The plaintiffs have urged this court to direct the defendant to deposit 2 years' rent. The defendant on its part stated that it was ready to abide by any order on security. It is clear from the plaint that the plaintiffs had prayed for mesne profits at double the rent as from 1<sup>st</sup> November 2005 to the date of judgment. By then the rate applicable was Kshs.39,600 per month. Upon entry of judgment, the plaintiffs obtained warrants of attachment to recover Kshs.1,043,640/- as the decretal sum. Having considered all these factors I am convinced that I should order the defendant to deposit a sum of Kshs.1 million as security. Consequently I grant the order for stay of execution pending appeal on condition that the defendant deposits the aforesaid sum of Kshs.1,000,000/- in an interest earning account in the joint names of the advocates or firms of advocates appearing in this case within 45 days from the date hereof. In default, the motion shall stand dismissed. Costs of the motion is given to the plaintiffs.

**Dated and delivered at Mombasa this 24<sup>th</sup> day of July 2008.**

**J. K. SERGON**

**J U D G E**

In open court in the presence of Mr. Kasmani for plaintiff

Mr. Kiume h/b for Kenzi for Applicant.