REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 144 OF 1999

KIANJAI YOUTH POLYTECHNIC……APPLICANT/APPELLANT

VERSUS

DICKSON KAUBAN THURANIRA……..……RESPONDENT

R U L I N G

The application is dated 10th February, 2005. It seeks stay of execution of this court's decree and orders arising from the judgment of this court dated 29th November, 2004, pending the appeal to the Court of Appeal. Notice of Appeal was said to have been already filed. The decree was to the effect that the applicant do release to the Respondent a motor vehicle log book as well as pay him a total sum of Kshs.200,000/= being special damages.

It was argued for the applicant, by Mr. C. Kairuki, as one of the grounds upon which this court should act, that the applicant is a polytechnic institution which depended on donations from the Government to operate and is not in a position to pay the Kshs.200,000/=awarded. That if execution is not stayed such intended execution would paralyze the institution, leading to 200 students being sent home. That the applicant should be allowed to exercise its right to appeal and execution would interfere with such right and render the appeal nugatory. Mr. Mwanzia in reply said that discretion should not be exercised in favour of the appellant on the grounds that it was guilty of inordinate delay in coming for this relief sought – a period of 64 days and that the decree to be executed is a money decree and mere release of a logbook. That execution would not render the appeal nugatory. That respondent is a man of means and will be in a position to easily refund the Kshs.200,000/= if recovered and return the motor vehicle logbook. That the applicant offered no security for due performance if it eventually loses the appeal.

I have carefully considered the application as well as arguments advanced by both sides. Two principles guide the court in applications of this nature. That an applicant must show that his appeal or intended appeal is arguable or put another way, that it is not frivolous.

Secondly that the success in the intended appeal will be rendered nugatory unless the stay sought is granted. There is also the incidental ground that the applicant should appear to be a person who deserves a favourable discretion by his conduct generally. This would include the fact that he came to court for the relief sought without inordinate delay and other instances that attract or dispel a favourable exercise of the court's discretion which include the applicant's conduct prior to the seeking of the stay.

As the intended appeal is from this court of Appeal, it would not be easy for me to rule as to whether the appeal is frivolous or not and wish to look at the issue with caution. Even then I have looked at the nature of the claim and the judgment delivered by this court and have serious doubts that the appeal would have arguable points, as I leave the issue to the Court of Appeal. I will however quote part of this court

judgment on page 15 of the typed copy: -

> **"…No evidence came from the appellant to show that the contract was irregular. On the other hand even if the appellant would have proved the contract irregular, would the appellant have been allowed to keep the motor vehicle it sold as well as the money it received from the respondent? Would that not have amounted to unjust enrichment? A glance of the defence would show that it was simply composed of mere denials and little is indicated in it that would for example prevent the respondent from being (in the bottom line) allowed to recover its purchase price from the appellant."**

On the other hand the decree and orders to be appealed from were made on 29.11.2004 while this application was first filed on 14th December, 2004 a period of about 15 days. It is the view of the court that the delay itself is not inordinate.

The applicant argued that it is an institution that depends on donations to run and therefore it cannot afford to settle the decree. Mr. Kariuki for the applicant did not seriously claim that the Respondent cannot be able to refund the decretal sum if the appeal succeeds, thus rendering the appeal nugatory. He simply restated the principle that where it is shown that the Respondent will not be able to refund, a stay without conditions should be granted. Although he thought that the Respondent might sell the motor vehicle the subject of the claim if the logbook is released to him, he did not claim that the Respondent is a man of straw. On the other hand the Respondent positively swore that he would definitely repay the sum if he lost the appeal and indicated that part of his properties would be motor vehicle itself. I have observed in practice that the applicants in such application for stay are never sure as to who should show or prove to the court the fact that the Respondent is made of straw. Often applicants assert in their affidavits or arguments that the respondents are not people of means without offering sufficient evidence in support thereof. Others think that the respondents should themselves prove that they are made of substance. In my understanding of this principle it should be the applicant who asserts that the respondent will not be able to refund who should tender acceptable evidence to that end. This should be deponed in the supporting affidavit to be served upon the respondent who will thus accept the assertion or deny the same in a reply to it, also giving evidence that he is not made of straw. In this case before me not only did the Respondent clearly depone that he is a man of means, but the applicant did little to prove otherwise.

It will also be noted that the original case was filed in the lower court as long ago as 1997. The lower court proceedings are replete with instances of delay of the hearing of the case by the present applicant. Infact such conduct at one time led the lower court to proceed exparte against the present applicant after the case was partly heard. Indeed the judgment intended to be appealed against is majorly upholding the primary court's refusal to set aside its partly exparte judgment due to inappropriate conduct of the present applicant before that court. It also did not escape this court's attention that although the appeal from the lower court was filed in 1999, it was not itself brought to a hearing until middle November, 2004, a delay of about five years.

During all that time the Respondent who had proprietary interest in the judgment was prevented from the enjoyment of the fruits thereof. The culprit for the delay was clearly the present applicant who had been noted for inexcusable delay during the hearing of the case in the lower court. It has not escaped this court's attention either that it took a long time before the High Court Appeal was brought to a hearing, a period of about five years.

In conclusion of this issue therefore, and being conscious of the fact that the appellant's right of appeal should not be interfered with, I am not sure that it is not the applicant's further intention to use the order of stay if granted, to further prevent the Respondent from the realization of the decree of this court, the court having noted that the applicant is prone to delay.

It is this court's decision therefore that due to such inappropriate conduct of the applicant and aside of any other grounds for refusing it stay, he is not one who would be entitled to a favourable discretion of stay as sought.

The result is that the application for stay is refused. The costs are to the Respondent.

Dated and delivered at Meru this 14th day of April, 2005

D. A. ONYANCHA

JUDGE