



**Board of Management Bishop Sulemeti Girls High School - Kakamega & another v Hargreaves Magwaga Vudoyi t/a Vicoma Butcheries (Civil Case E140 of 2024) [2024] KEHC 15698 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15698 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL CASE E140 OF 2024  
SC CHIRCHIR, J  
DECEMBER 5, 2024**

**BETWEEN**

**THE BOARD OF MANAGEMENT BISHOP SULEMETI GIRLS HIGH SCHOOL - KAKAMEGA ..... 1<sup>ST</sup> APPELLANT**

**PRINCIPAL/SECRETARY BOARD OF MANAGEMENT BISHOP SULEMETI GIRLS HIGH SCHOOL KAKAMEGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HARGREAVES MAGWAGA VUDOYI T/A VICOMA BUTCHERIES ..... RESPONDENT**

**RULING**

1. The Appellants' Notice of Motion dated 12/8/2024 seeks for stay pending appeal. It is supported by the grounds appearing on the face of the Application and the supporting affidavit sworn by the 2<sup>nd</sup> Appellant.

**The Applicant's case**

2. It is the applicants' case that they were aggrieved by the Lower Court's ruling in Kakamega CMCC No. E037 of 2024 dismissing their Application to set aside the exparte judgment entered against them. It is further stated that consequently they have filed an appeal against the said ruling and that the appeal has high chance of success.
3. The Applicants further state that they were not aware about the lower court's proceedings until they were alerted by the court through the e-filing system about the delivery of judgment due on 27/05/2024. It is further stated that their application to stay the judgment was ignored, and the court went ahead to deliver the judgment. Their subsequent Application to set aside the said judgment was dismissed, hence the present Appeal.



4. The applicants fault the trial court for failing to consider their draft defence. That their Appeal has high chances of success; that they will suffer substantial loss unless stay is granted; that the Appeal will be rendered nugatory in the event that it succeeds ; that the Application has been made promptly and that they are willingly to comply with any conditions pertaining to severity.
5. They are apprehensive that the respondent will execute the decree , unless stay is granted by this court.

#### **Respondent's case**

6. The Respondent states that the Appeal was filed out of time in any event; that there is no imminent threat of execution. It is further stated that the application is frivolous and is merely intended to deny the Respondent the enjoyment of the fruits of the judgment.
7. The respondent further states that the Applicants' failure to pay the debt ,the subject matter of this Application, has put him in financial constraints, and he is the one who would suffer substantial loss in the event that stay is granted.
8. The Respondent further states that during the court appearance on 26/08/2024 ,through their agent, one Bernard Bulimo, the Applicants admitted their indebtedness and expressed their intention to pay. The Respondent believes that the main reason for the stay is to seek further negotiation and not for purposes of Appeal as alleged.
9. It is further stated that the suit papers was served through the same phone number through which the 2nd Respondent is alleging to have received notification from the court. Consequently, it is stated , the allegation that service was not effected is not true. The Respondent refutes the allegation that service ought to have been effected on the Attorney General, questioning why the Applicants have now appeared through a private legal practitioner and not the Attorney General if indeed they ought to have been represented by the latter.
10. The Respondent further states that the draft defence contains nothing but an admission of the debt and a chance to negotiate settlement.
11. The Respondent states that contrary to the applicants' assertion in their defence, there was indeed a written contract between the parties ; that indeed since filing of suit the Applicants have since made a further payment of Ksh. 100,000, towards settlement of the debt.
12. In a supplementary affidavit filed on 10/09/2024 the Respondent insist that the applicant's advocate is not properly on record as their representation of the applicants began after judgment.
13. The parties made oral submissions.

#### **Applicants' submissions.**

14. Through Ms. Akinyi advocate,the Applicants submit that they stand to suffer substantial loss; they urged the court to strike a balance between the interest of the parties. It is further submitted that the application has been filed without further delay and that if stay is denied, then the appeal would amount to an academic exercise.

#### **Respondent's submission**

15. The Respondent submits that the respondent has sought for the arrest of the chairman of the board of governors and the secretary, and that such a move does not amount to substantial loss to the Applicants.



The Respondent further submits that on the contrary, he is at financial risk as his house rent and child's school fees has not been paid.

16. It is further submitted that even though execution has not began, execution is a lawful process as held by Gikonyo J. in the base of James Lo... & ANO vs. Agnes Chesoto.
17. On the chances of the appeal succeeding , the Respondent argues that the Applicant has admitted the debt; and made payment of 100,000 since the filing of suit; ,that indeed ,they have filed a statement showing that the debt is due and finally, have admitted that there are some negotiations that had gone on.
18. The Respondent further contends that it is not certain as to whether the Applicant is seeking to stay lower orders of 2/7/2024 or of 6/8/2024.
19. It is also submitted that the Respondent is capable of repaying the decretal sum and finally that the applicant has not offered any security.

### **Applicant's response**

20. In response, the Applicant submits that substantial loss is that which needs to be preserved and if execution is allowed to go on, that would constitute substantial loss .
21. The Applicants further point out that what is being appealed against, is the order dismissing the Applicant's application to set aside exparte judgment.
22. The applicant further submits that what is contention is how much is ought and not whether the debt is owed. On security, it is stated that the Applicant is willing to provide any security as may be directed by the court.
23. The parties have relied on a number of Authorities which I have considered.

### **Determination**

24. The principles to be considered when determining a stay of execution pending appeal are set out under Order 42(6) of the Civil procedure Rules. The Applicant must show that it would suffer substantial loss if stay is not granted, that the Applicant has been brought without undue delay, and that the Applicant provides such security as to ensure due performance of the decree or order appealed from.
25. It is now settled however that the applicant must also demonstrate that they have an arguable appeal with high chances of success.

### **Whether the application has been brought without undue delay.**

26. The ruling on the application seeking to set aside the exparte judgment was delivered on 06/08/2024 and the present application was filed on 14/08/2024. Thus the Application was filed on the 8th day after the delivery of the ruling. Therefore there was no delay in bringing the present application.
27. Let me pause here to address what appears to be a misapprehension of procedure by the Respondent. The Respondent has raised a question as to whether the Applicants should be appealing against the order of dismissal of their Application to set aside judgment or the exparte Judgment.
28. The civil procedure rules sets out the procedure of dealing with an exparte judgment. Order 10 Rule 11 provides as follows :”Where judgment has been entered under this order , the court may set aside or vary such judgment and consequential decree or order upon such terms as are just”.



29. The setting aside is essentially to give a party who had not appeared to argue his/her/its case on merit. If the aggrieved party does not succeed in convincing the trial court to set aside then it has a right to appeal against such an order. Thus the steps that have been taken by the Applicant herein is the proper.

### **Whether the Applicant will suffer substantial loss if stay is not granted**

30. What constitutes substantial loss was explained by Justice Gikonyo in the case of James Wangalwa & ANO vs. Agnes Naliaka Chesoto (2012) eKLR that was cited by both parties. The judge held: “No doubt, in law the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties’ here been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal\_\_ the issue of substantial loss is the cornerstone of both jurisdictions. substantial loss is to be prevented by preserving such loss would render the Appeal nugatory”
31. The lower court decree is for ksh. 1,880, 035. The Respondent has argued that he is capable of refunding the amount in the event that the Appeal succeeds. However this submission is negated by his plea of financial deprivation due to the failure of the Applicant to pay his dues. He has indicated that he has been unable to pay his child’s school fees and he is in rent arrears in respect of his residential premises. In the circumstances that I am not convinced that the Respondent is capable of refunding the entire amount in the event that the Appeal succeeds. I hold and find that substantial loss has been established.

### **Whether the appeal is arguable with high chances of success.**

32. I have considered the memorandum of appeal, the draft defence and the applicant’s submissions . On paragraph 3 of the defence, the Applicant denied the existence of a contract between themselves and the Applicant, but goes on to admit in the subsequent paragraph that it paid Ksh. 300,000 in January 2024, and another payment of Ksh. 100,000 after filing of the suit by the respondent. Further the Applicant admits that they did try to enter into negotiations with the Respondent.
33. . Further, attached to the draft defence is a supplier statement for the Respondent authored by the Applicant . The statement does indeed reflect payment of Ksh. 100,000 and 300,000. More significantly however, it indicates that the Respondent is still owed Ksh.1,345,035. Finally, the Applicants’ Advocate did submit that the issue is not whether money is ought, but how much.
34. Thus there is admission of the debt, albeit in part. Nevertheless, to the extent that; the parties are at odds on what is due, then the appeal is arguable.

### **Security**

35. It is well settled that in an Application for stay ,the security in question, must be one that would guarantee due performance of such decree or order as may ultimately be binding on the Applicant . The Applicants have submitted they are ready to comply with such orders on security as may be ordered by this court. In this regard, the supplier statement filed alongside the draft defence indicate that the respondent is still owed Ksh.1,345,035 after the payment of ksh. 100,000, referred to by both parties. This is a fact of admission by the Applicants. This admitted amount is more than half the decretal sum, and in the face of this admission, there is no valid reason as to why the respondent should be denied access to the entire amount.



36. In view of all the foregoing I hereby proceed to make orders as follows:

- a. Pending the hearing and determination of this Appeal, there shall be a stay of execution of the judgment and or decree in Kakamega CMCC No. E037/2024.
- b. The stay is conditional upon the Appellant paying to the Respondent Ksh.940,017.50 being half of the decretal sum within 30 days from the date of this ruling.
- c. The balance of Ksh. 940,017.50 to be deposited in an interest earning account in the joint names of the parties respective Advocates, within 30 days hereof.
- d. In default of (a) and / or (b) above, the order of stay herein shall automatically lapse

**DATED SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS, THIS 5TH DAY OF DECEMBER 2024**

**S. CHIRCHIR**

**JUDGE**

In the presence of:

Godwin Luyundi- Court Assistant

Ms. Kimanthi for Echesa for the Applicants

Mr. Edaki for the respondent.

