REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 67 OF 2020

THE CHAIRMAN BOARD OF GOVERNORS MBAIKINI HIGH

SCHOOL.....1ST APPELLANT/APPLICANT

THE PRINCIPAL, MBAIKINI HIGH SCHOOL..2ND APPELLANT/APPLICANT

VERSUS

SIMECOR MERCHANTS 2002 LIMITED.....1ST RESPONDENT

MUNYAO MUA.....2ND RESPONDENT

PATRICK MUTULA.....3RD RESPONDENT

(Being an Application for stay of execution in an appeal from the whole Judgment and Decree of Machakos Chief Magistrate's Court in Civil Case No. 201 of 2012 by Hon. B. Bartoo Senior Resident Magistrate dated and delivered on 22nd October 2020).

BETWEEN

SIMECOR MERCHANTS 2002 LIMITED.....PLAINTIFF

VERSUS

THE CHAIRMAN BOARD OF GOVERNORS MBAIKINI

HIGH SCHOOL.....1ST DEFENDANT

THE PRINCIPAL, MBAIKINI HIGH SCHOOL..2ND DEFENDANT

AND

MUNYAO MUA.....1ST THIRD PARTY

PATRICK MUTULA.....2ND THIRD PARTY

RULING

1. By a Motion on Notice dated 19th November, 2020, the applicants herein seek the following orders:

1. SPENT.

2. SPENT

3. This Honorable Court be pleased to grant a stay of execution of the judgement of the Hon. B. Bartoo Senior Resident Magistrate delivered on 22nd October, 2020 pending the hearing and determination of this appeal.

4. Costs of this Application be provided for.

2. The application was supported by an affidavit sworn by **Titus Mutua**, the 2nd appellant herein. According to him, the respondent filed a suit against the appellants on 15th March, 2012 to which the 2nd and 3rd Respondents were thereafter joined as third parties. Following the hearing of the matter, judgement was on 22nd October, 2020 delivered in which case the claim against the 2nd and 3rd Respondents was dismissed with costs and judgement entered in favour of the 1st Respondent in the sum of Kshs 1,700,195.00 a decision which aggrieved the Applicants and provoked this appeal which the Applicants opine is meritorious and raises serious legal issues.

3. It was the apprehension of the Applicants that the 1st Respondent would commence execution any time yet the amount in issue is colossal which amount would have to be paid from the money meant for the students' welfare and upkeep while in school.

4. The application was opposed by an affidavit sworn by **Simon Kitheka**, the 1st Respondent's director who averred that the 1st Respondent had already extracted the decree in the total sum of Kshs 3,259,528/- which was the sum due for payment to the 1st Respondent. The deponent lamented that the purpose of the appeal and the application is to further delay the payment for materials supplied to the appellants in 2010 and 2011 more than 9 years ago with which the Appellant had already constructed buildings at the 1st Respondent's costs.

5. According to the deponent, since it was the 1st Respondent who supplied the said materials, it is capable of refunding the amount owed in the unlikely event that the pending appeal succeeds since the 1st Respondent is a reputable company with ability to reimburse any monies involved in this appeal. On the other hand, it was deposed that the Appellants had not shown that the 1st Respondent was a man of straw who would be unable to refund the said decretal sum hence no substantial loss has been shown. In the deponent's view the pending appeal has no chances of success as the issues the subject of the appeal were not the issues before the trial court where it was admitted that the goods were supplied and received on behalf of the appellants which goods were used for the construction of the buildings in the school and the only reason for non-payment was lack of funds. As the procurement procedures were complied with, it was averred that the pending appeal is wishful thinking and fishing expedition borne out of inability to settle the debt hence both the application and the appeal are hopeless and the application should be dismissed with costs to the 1st Respondent.

6. The 2nd Respondent equally filed a Replying Affidavit opposing the Application filed by the Appellants. In its response, the 2nd Respondent contended that that the Application lacks merit, is vexatious, misleading and ought to be dismissed. In its view, the Appeal subject to the instant application has no chances of success hence it is in vain to grant orders of stay of execution and to continue involving the 2nd Respondent in the matter since the case against him was dismissed. It was averred that in the Memorandum of Appeal dated 17th November, 2020, the Appellants have not raised any issue against the 2nd Respondent and thus it would be unjust and in vain to continue involving the 2nd Respondent in the suit when no orders can be issued against the 2nd Respondent as per the Memorandum of Appeal.

7. The 2nd Respondent deposed that the Appellants herein completely failed to prove their case against the 2nd Respondent in the trial Court wherein he had been joined as the 1st Third Party and the Trial Court rightfully dismissed with costs, the Appellants case against the Third parties for lack of evidence. Therefore, by continuing to unnecessarily involve the 2nd Respondent in this Appeal, the Appellants are causing the 2nd Respondent to incur further unnecessary litigation expenses and yet they have not proved security for costs as a show of good faith and thus should the application be allowed, the Appellants be ordered to release and/or deposit in Court a sum of not less than Kshs.200,000.00 as security for costs on behalf of the 3rd Respondent, since the suit against the Third Parties was dismissed with costs.

8. The 3rd Respondent, in its Replying Affidavit raised similar issues as raised by the 2nd Respondent.

9. On behalf of the Applicants it was submitted that the application has been brought without unreasonable delay and such security as maybe ordered by the Court. According to the applicants, there is a sufficient cause to grant stay of execution in that since judgment has already been delivered, the 1st Respondent will proceed to execute against the judgment. Should the stay orders be declined pending appeal, this appeal will be rendered nugatory.

10. It was further submitted that substantial loss would ensue from a refusal to grant stay of execution in that if the appeal is successful, the Appellants would be condemned to pay an amount which the 1st Respondent was not entitled to. In the Applicants' view, since, the Appellants have appealed on behalf of a Government institution (Public secondary school) and that the Government through the Attorney General has undertaken the Appeal of the suit (to defend against an injustice meted upon the school), the Applicant should not furnish security as pre-condition for granting stay of execution.

11. It was submitted that the Appellants have raised issues against the 2nd and 3rd Respondents to warrant their continued participation in the Appeal. The Applicants contended that in their memorandum of appeal, they have taken issue with the dismissal of the claim against the Third Parties despite the evidence on record which proved that the 2nd and 3rd Respondents benefitted from part of the purported supply of goods and materials.

12. On the other hand, it was submitted on behalf of the 1st Respondent that The Appellants/Applicants have not demonstrated to this court the loss that they would suffer if execution is not halted. It was submitted that it is the duty of the Applicants to establish that the 1st Respondent is a person of straw, unable to refund even part of the decretal sum. Further, no attempt has been made to establish substantial loss that would be suffered by the Appellants/Applicants herein if the order for stay is not granted.

13. It was therefore submitted that the instant application lacks merit and is misconceived. The same is an abuse of the process of this court and should be dismissed with costs to the Respondents.

14. On behalf of the 2nd and 3rd Respondents it was submitted that a careful consideration of the application does not indicate what substantial loss the applicants stand to suffer should the orders not be granted. It was submitted that the 2nd and 3rd Respondents are employed with considerable income and can sufficiently refund any monies paid to them in the event that the appeal succeed. It was reiterated that the Applicants have not disclosed any arguable appeal as against the 2nd and 3rd Respondents.

Determination

15. I have considered the application, the respective affidavits and the submissions filed as well as the authorities relied upon.

16. Order 42 rule 6(1) and (2) of the ***Civil Procedure Rules*** provides as follows:

> **"(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**
>
> **(2) No order for stay of execution shall be made under subrule (1) unless –**
>
> > **(a) 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; and**
> >
> > **(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."**

17. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is no longer restricted to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. According to section 1A(2) of the ***Civil Procedure Act*** "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

18. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA** on 20/11/09 held *inter alia* that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.

19. The same Judge in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

> **"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case."**

20. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained.

21. In this case, there is no doubt that the Applicant is a school. Execution against it would impact directly on third parties who are students rather that the Applicants herein. It is therefore important that the Court takes into consideration the likely effect of granting the stay of execution. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. Where the decision either way is likely to adversely affect third parties, such as students in this case, that is a factor which must be taken into consideration in arriving at a just decision. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.** This was the position of **Warsame, J** (as he then was) in **Samvir Trustee**

Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

> **"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court…The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner …Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation…At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court."**

22. With respect to the issue whether or not the applicant stands to suffer substantial loss in **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** held that where there is a decree against the applicant in which the amount in contest is colossal and it is shown that if compelled to cough up the same, the Applicant is likely to be destabilised, a stay would be granted destabilized. In the said case the amount in question was Kshs. 4,000,000.00. Therefore, if the applicant were to prove that if compelled to settle the decretal sum it may well fold up hence be disabled in pursuing his otherwise merited appeal, the Court may, while also taking into account the prospects of the Respondent being able to be paid if the appeal were to fail, grant the stay sought. In this case the amount is in excess of Kshs 3,000,000.00. That amount, it is my view that may very well adversely affect learning in the School, damage which even if the Respondents were to refund the sum in question would be irreparable.

23. As was appreciated by the Court of Appeal in **Kenya National Chamber of Commerce and Industry Ltd. vs. Edon Consultants Civil Application No. Nai. 308 of 2000** execution is an expensive and disruptive process and if there is a possibility of the applicant's operations being adversely affected beyond monetary compensation stay ought to be granted.

24. Being a school, it is unlikely that by the time the appeal is heard and determined, it would not be in a position to settle the judgement.

25. As regards the issue of security, the Court of Appeal in **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** where the Court of Appeal expressed itself as follows:

> **"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so…The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it."**

26. In this case, I see no impediment that is likely to be placed on the path of the Respondent in recovering the fruits of his judgement in the event that the appeal does not succeed. On the other hand, substantial loss is likely to occur to the Applicants and their students in the event that the execution proceeds and if the appeal was to succeed.

27. Taking all relevant factors into account and in order not to render the appeal illusory, in the unique circumstances of this case, I hereby grant stay of execution of the decree appealed from pending the hearing and determination of this appeal.

28. The costs of the application will be in the appeal.

29. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13TH DAY OF APRIL, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ayuma for Mr Munene for the Appellant

Miss Mbilo for Mr Mulu for the 1st Respondent

CA Geoffrey