REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW APPLICATION NO. 1 OF 2015

IN THE MATTER OF AN APPLICATION

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE MINISTRY OF EDUCATION SCIENCE

AND TECHNOLOGY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE SEVENTH-DAY ADVENTIST CHURCH

WESTERN KENYA CONFERENCE.....3RD RESPONDENT

THE SCHOOL COMMITTEE,

KAKIPTUI PRIMARY SCHOOL.....*EX PARTE* APPLICANT

RULING

[1] Before the Court for determination is the Notice of Motion dated **11 October 2017**. It is expressed to have been filed by the 3rd respondent pursuant to the provisions of **Sections 1A, 1B, 3, 3A, 63(e), 75(h)** of the **Civil Procedure Rules** and **Order 43(1)(1)(a a), Order 51(1), 10(1), (2); Order 42 Rule 6** of the **Civil Procedure Rules** and all other enabling provisions of the law. The 3rd respondent thereby seeks that:

> **[a]** the Court be pleased to grant temporary stay of execution of the Judgment made and delivered on **27 July 2017** pending the hearing and determination of the application;
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> **[b]** the Court be pleased to grant stay of execution of the Judgment made and delivered on **17 July 2017** pending the hearing and determination of the appeal; and
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> **[c]** that the costs of the application do abide the outcome of the appeal.

[2] The application was predicated on the grounds that the 3rd respondent is affected by the orders made by the Court; and that the subject

school, namely, **Kakiptui S.D.A. Primary School** against which the orders of **17 July 2017** were made, is under the sponsorship of the 3rd respondent; and that it has filed a Notice of Appeal to the Court of Appeal. It was apprehensive that the 1st and 2nd respondents may execute the order of this Court and have the name of the school changed before the appeal is heard and determined, thereby rendering the appeal nugatory. Accordingly, the 3rd respondent prayed for stay of execution pending the hearing and determination of its appeal to the Court of Appeal.

[3] In support of the application, the 3rd respondent relied on the affidavit of **Christopher K. Misoi**, sworn on **11 October 2017,** in which it was averred, not only that the 3rd respondent is the sponsor of the subject school, but also that the school stands on a parcel of land owned by the 3rd respondent, namely, **L.R. No. Nandi/Kipkaren Salient/400**, which was set aside by the 3rd respondent for that specific purpose. It was further averred that the Church allowed the District Education Board to run the school for the benefit of the public, but retained its role as the sponsor of the school. Thus, the 3rd respondent is aggrieved by the order of Mandamus made herein to compel the 1st respondent to cancel the Certificate of Registration issued in the name of **Kakiptui S.D.A Primary School.**

[4] The 1st and 2nd respondents opposed the application. They relied on the Grounds of Opposition filed herein on **18 September 2019**, in urging for the dismissal of the application dated **11 October 2017** with costs. They contended that:

> **[a]** The Notice of Motion is misconceived, untenable and bad in law and is therefore an abuse of the court process as the prayers sought are untenable;
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> **[b]** The Notice of Motion is incurably defective, incompetent, frivolous, vexatious and devoid of substance;
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> **[c]** The application does not satisfy the requirements for granting stay of execution, as by law established, in that:
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> > **[i]** No security has been offered or provided;
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> > **[ii]** No substantial loss has been demonstrated;
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> > **[iii]** The application was instituted after unreasonable delay;
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> > **[iv]** The intended appeal does not raise any arguable grounds or issues;
> >
> > **[v]** The intended appeal will not be rendered nugatory.
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> **[d]** That the 3rd respondent's intention is to protract this matter unnecessarily with a view of denying the *ex parte* applicant the fruits of its judgment.
>
> **[e]** That the 3rd respondent has come to a court of equity with unclean hands due to non-disclosure and or misrepresentation of material facts.

[5] Pursuant to the directions given herein on **21 October 2020**, the application was canvassed by way of written submissions. The 3rd respondent's submissions were filed by **Mr. Miyienda** on **9 March 2021**, reiterating the contention that the 3rd respondent's appeal raises weighty issues with good chances of success. He posed the question as to what will be the effect of the deregistration on the 3rd respondent's ownership of the land on which the school is situated, and proposed that it is one of the issues to be determined on appeal. Accordingly, **Mr. Miyienda** urged the Court to allow the application and grant the orders sought so as to prevent the appeal from being rendered useless.

[6] On behalf of the 1st and 2nd respondents, written submissions were filed by **Mr. Kuria** on **14 April 2021**. Reference was made therein to **Order 42 Rule 6** of the **Civil Procedure Rules**, in a bid to demonstrate that the 3rd respondent has failed to meet the threshold for stay of execution. Counsel also urged the Court to weigh the need to preserve the subject matter of the intended appeal against the need to not unnecessarily hinder a successful litigant from the fruits of the Judgment passed herein; and to find that the 3rd respondent's interest is lesser in weight. He further faulted the 3rd respondent for its failure to expeditiously prosecute its application and urged the Court to conclude that it is no longer interested in the orders prayed for in the said application. In **Mr. Kuria's** view, therefore, the application is devoid of merits and ought to be dismissed with costs.

[7] I have given due consideration to the application and the response thereto by 1st and 2nd respondents. I have, likewise, taken into account the written submissions filed herein by counsel for the parties, including the authorities cited therein. The brief background to the application is that the *Ex Parte* applicant, **the School Management Committee, Kakiptui Primary School**, filed this Judicial Review application on **3 March 2015** seeking Orders of Certiorari, Mandamus and Prohibition against the respondents, whose effect was to change the sponsorship of **Kakiptui Primary School** from the District Education Board to the Seventh Day Adventist Church; and the re-registration of the school as **Kakiptui S.D.A. Primary School.** This would also entail the cancellation of the Certificate of Registration issued on **7 August 2014** in the name of **Kakiptui S.D.A. Primary School.**

[8] It is noteworthy that the prayer for Certiorari was abandoned on **21 March 2017,** and orders made to that effect. Hence, in the impugned Judgment dated **27 July 2017**, the Court **(Hon. Githua, J.)** came to the following conclusion:

> **"18. Having realized that the certificate aforesaid had been issued irregularly and contrary to the law, the 1st respondent being the regulator of the education sector owed the Kenyan citizens including the applicant's school community a public**

duty to correct any errors or irregularities that may have been committed by its officers in the course of the performance of their duties immediately the errors or irregularities were brought to its attention. The 1st respondent did not have to wait to be sued in order to express its willingness to do what it ought to have done in the first place. It failed to perform its public duty and it is now the duty of this court to compel it to do so.

19. In view of the foregoing, it is my finding that this is a suitable case for the issuance of the remedy of mandamus as sought. I therefore allow the first limb of prayer 2 of the Notice of Motion and direct that an order of mandamus do issue to compel the 1st respondent to cancel the certificate of registration issued on 7th August 2014 in the name of Kakiptui SDA primary school."

[9] In effect, the prayer for Prohibition was declined, granted that the 3rd respondent, which was the target of the prayer, is not a public body. The record further shows that the 3rd respondent filed a Notice of Appeal dated **28 August 2017** on **11 October 2017**; a copy whereof was annexed to the Supporting Affidavit as **Annexure 'D'**. Accordingly, the key issue for determination herein is whether a good case for stay of execution has been made by the 3rd respondent.

[10] On the merits of the application, there is no gainsaying that a successful litigant, such as the plaintiff herein, is entitled to the fruits of his litigation. Hence, in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)** [2002] KLR 63 it was appreciated that**:**

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[11] Nevertheless, **Order 42 Rule 6(1)** of the **Civil Procedure Rules,** does provide for stay, so long as the strictures of that rule are met. It provides that:

"… 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."

[12] In the light of that provision, it is incumbent upon any applicant for stay of execution to demonstrate the risk of substantial loss unless stay is granted; and be ready to furnish such security as the court may order. It must also be plain that the application was brought without unreasonable delay. Counsel for the 1st and 2nd respondent conceded that the instant application was brought without undue delay and therefore there is no need to belabor that consideration. The question to pose, then, is whether the 3rd respondent stands to suffer substantial loss unless an order of stay is granted. The Court will also consider whether, in the circumstances hereof, there is need for security for the due performance of the decree.

[13] With regard to substantial loss, the Court of Appeal held in **Kenya Shell Limited vs. Kibiru** [1986] KLR 410 that:

"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."

[14] In the same vein, **Gachuhi, Ag.JA** (as he then was) at 417 held:

"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

[15] It is significant that this is not a money decree; and that execution herein would, in effect, mean the de-registration of **Kakiptui SDA Primary School**; a school that 3rd respondent claims is situated on its property **L.R. No. Nandi/Kipkaren Salient/400**. A copy of the Certificate of Search annexed to the Supporting Affidavit as **Annexure 'A'** does show that the aforementioned property was registered on **12 March 1979** in the name of **Seventh Day Adventist Church (East Africa) Ltd.** There is no indication that if stay is granted, learning will

be disrupted at the School; or that some other form of prejudice or inconvenience will be suffered by either the *Ex Parte* Applicant or the 1st and 2nd respondents.

[16] Thus, balancing the interests of both sides to the instant application, I am convinced that the interests of justice would best be served by a stay order pending the hearing and determination of the appeal. In the result, I find the application dated **11 October 2017** meritorious. The same is hereby allowed and orders granted as hereunder:

> **[a]** That an order of stay of execution be and is hereby granted staying the execution of the Judgment delivered herein on **27 July 2017** pending the hearing and determination of the intended appeal to the Court of Appeal on condition that the *status quo* now prevailing with regard to the property on which the school is situated be maintained pending the hearing and determination of the appeal.
>
> **[b]** Given the circumstances of this case, I make no order as to costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF JUNE 2021

OLGA SEWE

JUDGE