



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL APPEAL NO E029 OF 2021**

**KENYA METHODIST UNIVERSITY.....APPELLANT/APPLICANT**

**VERSUS**

**NELLY WAMORO NJUGUNA.....RESPONDENT**

**RULING**

1. The Notice of Motion Application herein dated 22<sup>nd</sup> January, 2021 principally seek orders that **this honorable court be pleased to stay any further proceedings in Milimani Chief Magistrate’s Civil Case no. 9415 of 2018; Nelly Wamoro Njuguna v Kenya Methodist University including extraction and execution of any decree pending the hearing of this Appeal**

**Costs.**

2. The application is premised on the grounds stated therein and the Supporting Affidavit sworn by Lilian Mutuma. It is stated that the Applicant is aggrieved by the ruling of Honourable M.W Murage (Mrs.) (SRM) delivered on 21<sup>st</sup> January, 2021 in CMCC NO. 9415 OF 2018 and intends to appeal against it. Further that CMCC 9415 of 2018 is still ongoing and the Respondent may proceed to fix a date or extract and enforce a decree against the Applicant. The Applicant is apprehensive that unless the Application is allowed, the Applicant’s Appeal to have its defence admitted on record will be rendered nugatory. It is further stated that the Appeal is arguable and raises triable issues.

3. It is further stated that in the suit before the lower court, interlocutory judgment was entered against the Applicants. That the Applicant filed an Application dated 2<sup>nd</sup> April, 2019 seeking to set aside the interlocutory judgment. That the ruling was delivered on the 18<sup>th</sup> of September, 2019 without notice to parties. That the said ruling required the Applicant to file a defence and pay throw away costs of Kshs. 10,000 within 14 days. It is the Applicant’s contention that they learnt of the ruling on 1<sup>st</sup> of November 2019 when the timelines had already lapsed. That the Applicant complied by paying the throw away costs and filing the defence. That the Applicant further filed an application for extension of time within which to comply with the orders of the court in the ruling which was dismissed on the 21<sup>st</sup> of January, 2021 and thus, technically, the default judgment stood reinstated hence this application.

4. The application is opposed vide the Grounds of Opposition dated 8<sup>th</sup> February, 2021. It is stated that the Applicant has not demonstrated what loss may result if stay is not granted as required under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. That the Applicant has not offered security for the due performance of such decree or order as may be ultimately binding on it and that the Appeal is not arguable. That the Applicant has not demonstrated what steps it has taken to expedite the hearing of the Appeal hence if stay is granted, the Applicant will go to slumber as it has been doing with the suit at the trial court.

5. In reply to the grounds of opposition, the Applicant in its Supplementary Affidavit contends that there is no decree extracted or any threatened execution hence Order 42 Rule 6(2)(b) does not apply. That it has already written to the Executive Officer of the trial court requesting for the Certified Copies of proceedings, the rulings of the court made on 18<sup>th</sup> September, 2020 and 21<sup>st</sup> January, 2021 respectively and it is desirous of prosecuting its Appeal. The Applicant is willing to deposit security for the due performance of the decree.

6. The Application was canvassed by way of written submissions which I have considered.

7. The power to grant a stay of proceedings is a discretionary power and which must be exercised judiciously. As was held in *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*;

**“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the**

**intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”**

8. The court established the threshold for stay of proceedings in **Civil appeal 40 of 2018 Kenya Wildlife Service v James Mutembei [2019] eKLR** by relying on the following passages in *Halsbury’s Law of England, 4th Edition. Vol. 37* page 330 and 332, that:

**“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”**

**“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”**

**“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”**

9. The instant Application was filed on 25<sup>th</sup> of January, 2021, four days after the delivery of the impugned ruling. It was brought expeditiously without undue delay. The Applicant’s defence has not been admitted by the trial court so that if stay of proceedings is not granted, it is likely that the Applicant will be condemned unheard. I equally agree with the Applicant’s assertion that its Appeal will be rendered nugatory if the order for stay of proceedings is not allowed.

10. The Applicant’s intended Appeal according to the Memorandum of Appeal on record is contesting the lower court’s finding that it was properly served with the notice of delivery of the ruling of 18<sup>th</sup> September, 2019 when it found that affixing the notice within the court’s premises is an adequate way to update litigants. The Applicant wishes to argue further that the Magistrate erred in giving undue regard to procedural technicalities at the expense of substantive justice. These are arguable issues.

11. On the other hand, the Respondent has a right to the expeditious disposal of her suit.

12. To balance the competing interests of the parties herein, I allow the application on condition that the Applicant do deposit the sum of Ksh.1,000,000/= in a joint interest earning account of the advocates for the parties or in court within 30 days from the date hereof.

13. The Record of Appeal to be compiled, filed and served and the Appeal to be fixed for directions within 60 days from the date hereof.

14. In default of any of the condition herein above, the Application to stand dismissed.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPT., 2021**

**B. THURANIRA JADEN**

**JUDGE**