



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC. MISCELLANEOUS CIVIL APPLICATION NO. E007 OF 2021

THE BOARD OF GOVERNORS

UTANGWA DAY SECONDARY SCHOOL *alias* UTANGWA SECONDARY SCHOOL.....APPLICANT

VERSUS

PRISCILAN KATUMI KASANGI *alias* PIRSILA KATUMI KASANGI.....RESPONDENT

RULING

1. The applicant filed an application dated 1st February 2021 and another dated 17th March 2021 seeking similar orders. The application dated 17th March 2021 was filed after execution had commenced.
2. Both applications were brought under Order 40, 42 Rule 6 of the Civil Procedure Rules and section 1A, 1B and 3A of the Civil Procedure Act (cap. 21). The application dated 17/3/2021 has now been spent as interim stay was granted. The first application dated 1/2/2021 seeks the following orders –
 - 1) *(spent)*
 - 2) *Leave be granted to appeal out of time against the judgment delivered in Tawa SPMCC 86 OF 2019 delivered on 09/12/2020 and the attached memorandum of appeal be deemed as duly filed and served within the prescribed time.*
 - 3) *(spent)*
 - 4) *There do issue an order of stay of execution of the judgment herein and the resultant decree pending the hearing and determination of this appeal.*
 - 5) *That the costs be in the appeal.*
3. The application dated 1st February 2021 has grounds on the face of the Notice of Motion that the applicant was intent on appealing but the advocate who previously handled the matter left the firm in disarray without filing the appeal, and that the applicant stood to suffer irreparable loss and damage in the event that the matter proceeded to execution without the appellant being heard in their appeal.
4. The application was filed with a supporting affidavit sworn on 2nd February 2021 by Catherine Njogu advocate for the applicant, which amplifies the grounds of the application.
5. The application has been opposed through a replying affidavit sworn on 24th March 2021 by Priscilla Katumi Kasangi the respondent in which it was deposed that the respondent suffered serious injuries and judgment was delivered on 9/12/2020 and that the applicant was granted stay for 30 days. It was deposed that the allegation that the advocate who handled the matter left the firm of advocates was not supported by evidence.
6. The application proceeded by way of filing written submissions. I have perused and considered the submissions of the applicant filed by counsel M/s Gichimu Mungata & company and the submissions of the respondents filed by Annie W. Thoronjo & company.
7. This is an application for leave to appeal out of time and for stay of execution of decree pending appeal.
8. This court has discretionary power to extend time to file appeal under section 79G of the Civil Procedure Act, and also to stay execution of decree or judgment under Order 42 rule 6 of the Civil Procedure Rules.

9. With regard to leave to file appeal out of time the reasoning in the Court of Appeal in **Mwangi –vs- Kenya Airways Ltd (2003) KLR** is applicable herein. The considerations to be taken by the court in such application include –

- a) The period of delay,*
- b) The reason for the delay,*
- c) The arguability of the appeal,*
- d) The degree of prejudice which would be suffered by the respondent if the extension is granted.*
- e) The importance of compliance with time limits to the particular litigation in issue.*
- f) The effect if any on the administration of justice or public interest if any is involved.*

10. Having considered the totality of the matter, I find that the period of delay herein, is not unduly long, the reason for delay has been explained, and the appeal is arguable. I will thus grant the extension of time sought to appeal out of time.

11. With regard to the request for stay of execution of decree pending appeal, Order 42 Rule 6 of the Civil Procedure Rules applies. The factors to be considered by the court in such application were enumerated in the case of **Butt –vs- Rent Restriction Tribunal**, as being, inter alia, whether –

- a) The appeal is arguable*
- b) The applicant is likely to suffer substantial loss unless the stay order is may,*
- c) The application was made without unreasonable delay*
- d) The applicant has given or is willing to give such security as the court may order due to the performance of decree.*

12. In my view, the appeal herein is arguable. Secondly, the application for stay of execution dated 1st February 2021 was filed without unreasonable delay.

13. With regard to whether the applicant will suffer substantial loss, I note that this is a money decree of about Kshs.1,400,000/= and the grounds of appeal relate to the quantum of damages. Thus though I am of the view that the applicant will suffer substantial loss if the whole amount is recovered through execution, I am of the view that stay of execution is justified only with the condition for payment of part of the decretal sum by the applicant. I will thus grant conditional stay.

14. With regard to security, in my view the amount I will order as a condition for grant of stay of execution will satisfy the requirement for provision of security by the applicant.

15. Consequently, I make the following orders –

- 1) I grant the whole of prayer 2 as requested.*
- 2) Stay of execution of decree or judgment is hereby granted provided the applicant pays the respondent the amount of Kshs,600,000/= as part of the decree within 30 days from today.*
- 3) In default of 2 above, the stay of execution granted herein will automatically lapse.*
- 4) Costs of the application will follow the decision in the appeal.*

DELIVERED, SIGNED & DATED THIS 9TH DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE