



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 406 OF 2019

THE BOARD OF MANAGEMENT-PUMWANI

GIRLS SECONDARY SCHOOL.....APPELLANT/APPLICANT

-VERSUS-

JOSEPH MBULULA MUTWIKE T/A LATHEMACS

ENGINEERING WORKS.....RESPONDENT

RULING

1. The appellant/applicant has brought the Notice of Motion dated 17th July, 2019. The Motion is supported by the grounds laid out on its body and the facts deponed to in the affidavit of *Florence Tendwa*. The applicant is seeking an order for a stay of execution pending the hearing and determination of the appeal lodged against the ruling and order made by Honourable G.A. Mmasi (Mrs.) (Senior Principal Magistrate) on 1st July, 2019 in CMCC NO. 1964 OF 2015.

2. In her affidavit as mentioned hereinabove, Florence Tendwa asserted inter alia, that unless the order for a stay of execution being sought is granted, the applicant will suffer substantial loss that will negatively impact on its school operations, thereby rendering the appeal nugatory. The deponent further urged this court to allow the application in the interest of justice.

3. The Motion stands opposed by way of the replying affidavit sworn by the respondent. Therein, he averred that sometime on or about 16th September, 2015, judgment was entered in his favour against the applicant in the sum of Kshs.3,804,800/=, following which the said applicant sought to have the judgment set aside and further sought leave to file a statement of defence. The respondent indicated that leave was granted to the applicant to put in its defence but which defence was later struck out at the respondent's request through an application and a summary judgment was entered against the applicant.

4. It was the respondent's assertion that thereafter, he lodged Garnishee proceedings against Co-operative Bank of Kenya Limited and that during their pendency, came to learn that the applicant had moved all its funds held with Co-operative Bank to Kenya Commercial Bank. The respondent added that Garnishee proceedings were later on lodged against Kenya Commercial Bank and ultimately, an order issued to the effect that the sum of Kshs.1,000,000/= be released by the said Bank to the respondent and that the applicant makes proposals regarding payment of the balance of the decretal amount, failing which he is at liberty to execute.

5. It is the respondent's position that the current application is an abuse of the court process and a mere attempt at prejudicing him as well as denying him the enjoyment of the fruits of his judgment. The respondent further stated that the applicant has failed to demonstrate the manner in which it intends to furnish security, adding that the students studying at the applicant school do not stand to be prejudiced in the event that he attaches movable assets belonging to the applicant such as the school bus since there is no correlation between the said assets and the students' right to access free education.

6. The Motion was argued orally before this court, with *Mr. Ngumbi* counsel for the applicant first submitting inter alia, that his client had previously made proposals on payment to the respondent but which proposals were not welcomed by the said respondent, who demanded a much higher sum. That it is at that point that the applicant moved the trial court by way of an application, to which the court ordered that the applicant pays to the respondent the sum of Kshs.2,099,814/= by end of July, 2019 and a further Kshs.400,000/= every month until payment in full.

7. The advocate conveyed his client's apprehension that if the respondent is permitted to proceed with execution of the above order, the applicant will suffer substantial loss, being a public school and urged this court to consider the interest of the applicant as well as its students.

8. In his opposing arguments, *Mr. Mwalimu* counsel for the respondent maintained that the applicant has not demonstrated substantial loss or indicated its willingness to provide security, going further to reiterate that his client is entitled to enjoy the fruits of his judgment. He urged this court to balance the interest of the parties.

9. I have carefully considered the grounds set out on the face of the Motion and the affidavit in support thereof. I have also considered the replying affidavit in opposition thereto as well as the rival oral arguments brought forth by the respective counsels.

10. It is well established that the application concerns itself with a stay of execution. That being the case, the relevant provision as correctly put by the parties is *Order 42, Rule 6 (2)* of the *Civil Procedure Rules*, which Order sets out the conditions to be met by the applicant and considered by this court in determining whether or not to grant the order for a stay sought.

11. The first condition relates to whether the application has been brought without unreasonable delay. The record indicates that the ruling being challenged was delivered on 1st July, 2019 while the Motion was lodged a few weeks later on 17th July, 2019. I am satisfied that the Motion was timeously filed.

12. I now turn to the second condition on substantial loss which has been established as being the cornerstone of any application seeking an order for a stay of execution. This was articulated in *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* in the following manner:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting 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.”

13. From the foregoing, it is clear that the applying party would be required to demonstrate that he or she will suffer irreparably and substantially in the event that the other party proceeds with execution; this is the case since execution is regarded as a lawful process.

14. In the matter now before me, I have been urged to consider the interest of each party. On the one hand, the applicant has addressed me on its fears that should the respondent be granted the leeway to proceed with execution, then its school operations will be hurt. On the other hand, it is apparent that the respondent has a judgment, the fruits of which he is yet to enjoy fully even though the judgment was entered way back in 2015.

15. In addition, I am able to appreciate that the applicant is a public institution offering secondary education to female students and hence it is reasonable to state that its financial position cannot be measured on the same scale as a private school since it largely relies on public funds. I therefore find reasonability in the applicant’s argument that execution could one way or another cripple its operations and possibly prejudice the students. In the circumstances, I am satisfied that the applicant has demonstrated substantial loss.

16. This brings me to the third condition on the provision of security. I noted that the applicant did not directly address this condition in its Motion though Mr. Ngumbi urged this court not to order the applicant to provide security, citing *Order 42, Rule 8* of the *Civil Procedure Rules*. In contrast, Mr. Mwalimu contended that the applicant is a corporate body that does not fall within the definition of a State organ in line with Article 260 of the Constitution and is therefore not exempted from providing security.

17. On the one part, *Article 260* of the *Constitution* defines a State Organ as follows:

“a commission, office, agency or other body established under this Constitution.”

18. On the other part, *Order 42, Rule 8* of the *Civil Procedure Rules* stipulates thus:

“No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.”

19. Further to the above, *Part I* of the *Fourth Schedule* to the *Basic Education Act No. 14 of 2013* provides that the Board of Management constitutes a body corporate capable of, inter alia, suing and being sued.

20. From the foregoing, I am able to ascertain that the applicant is indeed a body corporate by virtue of its being a Board of Management. Going further, I am of the reasoned view that *Order 42, Rule 8 (supra)* would not find its applicability here since the Government is not a party to the suit even though I might mention that the correspondences by the applicant were addressed through the Office of the Attorney General. In the premises, I am convinced that the applicant would not be exempt from providing security. In any event, given the colossal amount involved, it would only be prudent and fair to ensure the provision of security by the applicant.

21. In the end, I find merit in the application and will allow the same on the condition that the applicant deposits Ksh.800,000/= in court within 60 days from today, failure to which the order for stay shall lapse. The costs of this application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 2ND day of OCTOBER, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant/Applicant

.....for the Respondent