



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

HCCA NO. 96 OF 2015

THE BOARD OF MANAGEMENT

ST. LUKES EKWARE SECONDARY SCHOOL.....APPELLANT

=VRS=

KEROKA HYPER STORES LTD.....RESPONDENT

**[Being an Appeal from the Judgement of Hon. Kihara (RM) dated the 18th day
of September 2015 in the original KEROKA CC NO. 20 OF 2012]**

RULING

This is a ruling on the appellant's Notice of Motion dated 27th January 2018 which seeks orders as follows: -

“1. (Spent)

- 2. That the court be pleased to issue a temporary stay of execution in Keroka Civil Case No. 283 of 2014 pending the hearing of this application interpartes.**
- 3. That the court be pleased to review its orders made on 11th December 2017.**
- 4. That this case be given a judgement date.**
- 5. That the applicant be allowed to deposit the security in court within the next 5 days.”**

The application which is supported by the affidavit of David Ochwangi Ogata sworn on 24th January 2018 is premised on grounds that the lawyers for the appellant were not invited to court on 11th December 2017, that failure to deposit security was largely contributed to by the actions of the advocate for the respondent; that when the court made the orders of 11th December 2017 it was not seized of the real reasons why the security had not been deposited and further that the appeal was not conditional upon the deposit from security and therefore the appellant is entitled to enjoy all the rights under Order 42. The other grounds are that the appeal was pending judgement and the reason the judgement has not been delivered is not that the dismissal is contrary to the rules of natural justice and the notice to show cause is scheduled to be heard on 6th February 2018 in the lower court.

In opposition the respondent filed a replying affidavit sworn by Florence Obwocha on 7th May 2018. In the affidavit she deposes that the applicant has not raised **“newly discovered matters”** and has not disclosed an error apparent on the face of the record. She deposes that whereas the applicant has complained that there is no judgement he has annexed a judgement to the application. She disputes the allegation by the applicant that her advocate was frustrated by the opening of the account and contends that he in fact travelled from Mombasa to Nyamira for that purpose but the advocate for the appellant did not turn up. She urges this court to find that this matter has been determined and that the judgement ought not to be disturbed in the spirit of the principle that litigation must come to an end. She further deposes that the appellant will suffer no prejudice if this application is dismissed and the judgement is executed and states that the advocate for the appellant has not in any case explained what he did to follow up the judgement which he contends should have been filed on 26th May 2017. She also deposes that the appellant has not explained why it took her so long to file this application. She contends that should the judgement be disturbed it shall seriously prejudice the respondent and therefore it should be dismissed with costs to the respondent.

The application was canvassed by way of written submissions which there is no need to reproduce here. Suffice it to state that I have considered all the material placed before me including the record, ruling and impugned judgement. This court exists to do justice to the parties which of course must be done in deference to Sections 1A and 1B of the Civil Procedure Act.

The applicant herein filed an appeal from the judgement of the lower court delivered on 18th September 2015 seeking to set it aside. Together with that application the appellant filed a Notice of Motion dated 16th January 2016 by which it sought orders to stay that judgement and the resultant decree. That notice of motion was heard and allowed on condition that the decretal sum was to be deposited in an interest earning account in the joint names of the advocates for the parties. That was not done and the Honourable Nagillah J, dismissed the appeal on that account. It is my finding that that was clearly an error apparent on the face of the record as it was the stay of execution but not the appeal that was conditioned upon the deposit of security. In his ruling delivered on 5th August 2016 the judge held: -

“In my humble view, in the instant case there is room for a stay of execution given the sentiments expressed by the appellant as long as the parties’ rights are held in almost symmetrical bound. In the circumstances thereof I order that there be a stay of execution of the decree in the following conditions: -

- 1. The appellant school pays half of the decretal sum i.e. Kshs. 144,565/= in an interest earning account in Kenya Commercial Bank Nyamira High Court Branch within the next 60 days from today. Such deposit shall be held as security for performance of the decree which may be ultimately binding on the appellant school.**
- 2. Costs of this suit shall be borne (sic) in the cause.**
- 3. It is so ordered.”**

Nowhere in that ruling did the judge pronounce that the above conditions were sine qua non to the appeal being heard. Moreover, the appellant’s appeal was challenging the merits of the decision of the lower court and even where a stay is sought and refused or allowed upon a condition which is not fulfilled the appeal was bound to proceed to be heard: only execution would not be stayed. It is my finding therefore that the appeal in this case should have proceeded to be heard on the merits whether or not the security was deposited as in my view that security only affected execution of the decree. To that extent I shall allow the application so that the judgement of Nagilla J, is set aside and the appeal is heard on its merits.

The appellant has sought an order for deposit of the security in court. I am not persuaded that that application has merit and in fact I find it is not made in good faith. If indeed the fulfillment of the condition for stay of execution was frustrated by the respondent, why didn’t counsel for the appellant seek the intervention of the court so as to obtain an alternative means of fulfilling the condition? Why did counsel not seek extension of time to comply with the order? The appellant has not given reasonable explanation for its failure to deposit security as ordered by the court on 5th August 2016 and accordingly I see no good reason to extend the time now. In the premises prayer 2 of the Notice of Motion herein is dismissed.

Prayer 3 which seeks a review of the judgement is granted and a judgement on the merits and based on the submissions by the advocates for the parties shall now be delivered on 8th November 2018.

The costs of this application shall abide the appeal.

It is so ordered.

Signed, dated and Delivered at Nyamira this 12th day of October, 2018.

E. N. MAINA

JUDGE