



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Miscellaneous Application 13 of 2012**

**SECRETARY BOARD OF GOVERNORS**

**NAMASOLI SECONDARY SCHOOL ..... 1<sup>ST</sup> APPLICANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> APPLICANT**

**V E R S U S**

**DOMINIC MATANGWE MANYASA ..... RESPONDENT**

**RULING**

By a notice of motion dated 13<sup>th</sup> March 2012 the applicants are seeking to be granted leave to appeal out of time against the decision in Mumias CMCC NO. 116 of 2008. The applicants are also seeking an order of stay of execution pending the finalization of this application. The application is supported by the affidavit of **FRANCIS OMULAMA ANGOYA**.

Mr. Onyiso, state counsel, submitted that the trial court was to deliver its judgment on 16<sup>th</sup> of September 2011 but the same was not ready. The date was pushed to 7<sup>th</sup> of October 2011 but once again the judgment was not ready and it was differed to the 18<sup>th</sup> of November 2011 when it was read in the absence of the parties and their advocates. Failure to appeal on time was not deliberate and the appeal has high chances of success. Counsel also urged the court to grant an order of stay of execution as the school's property has been proclaimed and execution would follow.

Mr. Makali, counsel for the respondent opposed the application and submitted that the applicants were aware of the judgment date and have not indicated how they knew about the judgment. On 30<sup>th</sup> of January 2012 the applicants applied for proceedings without giving any reason for that application. This current application was only filed after execution process had begun. An order of stay of execution pending appeal can only be granted after an appeal has been filed. Counsel relied on the cases of **SINGH V RUNDA COFFE ESTATE LTD. [1966] E.A. 263 and KENYA SHELL COMPANY LTD. V KIBIRU & ANOTHER [1986] KLR 410**. It is the contention of the respondent that the appeal will not be rendered nugatory and that there is no evidence to show that the defendant will be unable to refund the decretal amount should the appeal be successful. No security was provided by the applicants.

The proceedings before the lower court show that the respondent herein was the plaintiff in Mumias CMCC 116 of 2008. The case proceeded to full hearing and judgment was delivered on 18<sup>th</sup> November 2011. The plaintiff was awarded a sum of KShs.100,000/= as damages. When the judgment was read the record of the trial court does not show that the parties were present. The plaintiff proceeded and had his costs assessed by the court and execution proceedings commenced. The property of Namasoli Secondary School was proclaimed on the 6<sup>th</sup> of March 2012. The current application was filed on the 13<sup>th</sup> of March 2012. The proceedings of the lower court have not been typed and only handwritten ones were annexed to the application.

It is not clear whether the judgment of the court was communicated to the applicants. It is not also clear whether the defendant after obtaining the judgment notified the applicants about the entry of the judgment as no letter was exhibited to show that indeed the respondent made a demand for the amount awarded by the court before commencing the execution process. The judgment having been entered on

18<sup>th</sup> of November 2011 and there being no decree exhibited by both parties to show when it was issued and taking into account the application was filed about four months later, I do find that there was no unreasonable delay in the filing of the current application. It is not the interest of the court to shut out a party who intends to pursue an appeal. To this end I will grant the prayer for leave to appeal out of time.

The next issue is whether a stay of execution should be granted. To avoid the applicants coming to court with another application I do presume that the prayer for stay of execution shall be pending the hearing and determination of the intended appeal and not pending the hearing and determination of this application inter partes. This is borne on the premise that if the court grants stay of execution pending inter partes hearing, that would not stop the defendant from executing after the application is heard inter partes which has been done. This would necessitate the filing of another application. The applicants herein did not indicate whether they are willing to provide security in the event that they are allowed to appeal out of time. Although it is the applicants' constitutional right to pursue an appeal against the decision of the trial court it is also the respondent's right to enjoy the fruits of his judgment. Counsel for the respondent contends that there is no evidence to establish that the respondent would be unable to refund the decretal sum should it be released to him. The pleadings before the trial court show that the defendant was an employee of the 1<sup>st</sup> applicant and he was summarily dismissed from work after undergoing criminal prosecution, vide Butere Criminal Case no. 65 of 2006. It is not established whether the defendant has procured fresh employment. Taking into account that the applicants are represented by a state counsel who may not be in a position to open a joint account with counsel for the respondent, I do order that the applicants deposit a sum of One hundred and fifty thousand (KShs.150,000/=) within ninety (90) days with counsel for the respondent who should hold the above sum and not to release to the respondent pending the hearing and determination of the intended appeal.

In the end the application dated 13<sup>th</sup> March 2012 is hereby granted. The applicants are granted leave to file the appeal out of time. The said appeal to be filed within fourteen days hereof. An order of stay of execution is hereby granted to the applicants pending the hearing and determination of the appeal subject to the applicants depositing the sum of KShs.150,000/= with counsel for the respondent within 90 days hereof failing which all the orders herein shall be deemed to have lapsed and execution shall take effect. I do order that each party meet his own costs of this application.

**Delivered, dated and signed at Kakamega this 5<sup>th</sup> day of July 2012**

**SAID J. CHITEMBWE  
J U D G E**