

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. E063 OF 2025**

**ROSELYNETTE CHEPKORIR**

**KENDUIWA.....1<sup>ST</sup> APPELLANT/APPLICANT**

**ALFRED KIPROP**

**SONGOK .....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**PETERCREST ACADEMY .....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 27/03/2025, the Applicant seek orders that:

- i. Spent.
- ii. Spent.
- iii. **The Honourable Court be pleased to order stay of execution of the judgment and/or decree of the Court entered on 5<sup>th</sup> March, 2025 by Hon. Rodgers Otieno Adjudicator/Resident Magistrate) in Eldoret SCC. COMM NO. E613 of 2024; PETERCREST ACADEMY VERSUS ROSELYNETTE CHEPKORIR KENDUIWA AND ALFRED KIPROP SONGOK and all other consequential orders emanating**

**therefrom pending the inter-partes hearing and determination of the intended Appeal.**

**iv. Costs be in the cause.**

2. The Application is stated to be brought under **Sections 1A, 1B, 3A, 69(e) and 79 G of the Civil Procedure Act and Orders 42 (6) and 50(1) of the Civil Procedure Rules.** It is premised on the grounds set out thereon and is further supported by the Affidavit jointly sworn by Applicants on the same date.
  
3. In the Affidavit, the Applicants deposed that the Respondent herein instituted the claim herein against them seeking judgment against them in the sum of Kshs.203, 750/= arising out of alleged school fees arrears allegedly outstanding against them and that the Court erroneously entered judgment on 5/03/2025 in **Eldoret Scc Comm No.613 of 2014; Petercrest Academy Versus Roselynette Chepkorir Kenduiwa and Alfred Kiprop Songok** in favour of the Respondent in the following terms;
  - a) Kshs. 198,750/=
  
  - b) Costs
  
  - c) Interest
  
  - d) The sum in (a), (b) and (c) to be paid in 4 installments. The first 3 instalments to be of Kshs. 66,250/= commencing 4/4/2025 and

thereafter on or before 4/4/2025 of every subsequent month until payment in full.

e) The last instalment to be costs of the claim and to be paid in the same manner.

f) In default to pay any one instalment as ordered execution to issue for the balance then outstanding.

4. According to the Applicants the trial Magistrate erroneously entered judgment against them which was hardly based on the correct facts and points of law, that the Magistrate took into consideration extraneous issues that had not been contained in the Respondent's pleadings and that in awarding general damages of Kshs. 203,750/=, the trial Magistrate based his judgment on weak evidence adduced by the Respondent.

5. The Applicants further deposed that they intend to appeal against the said judgment and maintained that they have an arguable appeal with extremely high chances of success. They deposed that the instant application has been made timeously and without undue delay and that they are willing to put up any security for due performance of the decree.

6. The Applicants are apprehensive that should this Court fail to grant the prayers sought then there is real and imminent danger that the Respondent may proceed to execute the said irregular and/ or erroneous judgment thereby subjecting them to irreparable loss and damage.

7. The Applicants contended that should the Court fail stay execution of the said judgment pending hearing and determination of the intended appeal, then it would undoubtedly amount to the curtailment of their right to be heard and fair hearing, as enshrined in **Article 50 (1) of the Constitution of Kenya** and that the intended Appeal may be rendered nugatory should the Respondents proceed to execute the said judgment and or decree.

### **Replying Affidavit**

8. The Application is opposed by the Respondent vide the Replying Affidavit sworn by the Respondent's Advocate, **Peter N. Anassi** on 15<sup>th</sup> April 2025. He deposed in the said Affidavit that the application has be made in bad faith and is filed at the eleventh hour upon the Applicants realizing that the payment of the first installment is imminent and was to commence on 4<sup>th</sup> April 2025, failure to which execution was to issue.
9. He contended that the Applicants were given ample time to settle the award by the trial magistrate and the said award was even broken down to be payable by way of installments and that the Applicants' allegations that the learned trial magistrate took into consideration extraneous issues that had not been pleaded in the Respondent's statement of claim is pure falsehood. He deposed that the trial magistrate never awarded any general damages of Kshs.203,750/= as the Applicant claims and added that the court merely entered judgment in favor of the Respondent against the Applicants herein jointly and severally for Kshs. 198,750/ together with cost and interest to be paid in four equal instalments of Ks. 66,250/- commencing 4<sup>th</sup> April 2025 and that in default of any one instalment execution to issue for the balance then outstanding.

**10.**He further deposed that the trial magistrate arrived at the award of Kshs.198,750/= after taking into consideration the fact that the Respondent pleaded a sum of Kshs.203,750/= but the Appellants had made a part payment of Kshs.5,000/= while the case was ongoing hence, the Respondent having been found to have proven its claim and judgment was entered in its favor in the pleaded sum of Kshs.203,750/=less the Kshs.5.000/=paid by the Appellants herein on 27<sup>th</sup> August 2024 for their minor by the name Emmanuel Songok leaving a balance of Kshs.198,750/= which is the award the learned trial Magistrate's gave in his judgment. According to Counsel, the Applicants are therefore peddling falsehoods before this Honorable court with a view of obtaining this Honorable Court's sympathy

**11.**He contended that whereas the Appellants' claim that the Respondent will not suffer prejudice if the prayers they seek are granted, the same is misleading as money depreciates unless it is kept in an interest earning account. Furthermore, he deposed that the Respondent is an educational institution that requires money so as to run its affairs. The delay likely to be occasioned to the Respondent will be tantamount to justice denied.

**12.**According to Counsel, it is clear that the Appellants' application is misleading, based on falsehoods and merely meant to prevent the Respondent from enjoying the fruits of a regularly obtained judgment.as such the same ought not to be allowed by this Honorable court.

**13.**Counsel maintained that the Appellants have not demonstrated how they will suffer irreparable loss that cannot be compensated by an award of damages should this Honorable Court fail to issue the order for stay of execution as

sought in their application and in the end, deposed that should this Honorable court allow the Applicant's application, then the same ought to be subject to the Applicants/appellants depositing the decretal sum of Kshs.198,750/= accrued interest of Kshs.2,417.67 and assessed costs of Kshs.45,500/= making a total sum of Kshs.246,667.67 into a joint interest earning account in a reputable commercial Bank, to be held by both advocates for the parties to this appeal, within a stipulated period as directed by this Honorable court.

### **Hearing of the Application**

14. The application was canvassed vide written submissions. The Applicants filed their submission dated 13<sup>th</sup> June 2025 whereas the Respondent filed submissions dated 12<sup>th</sup> June 2025. Upon my perusal of the Applicants Submissions, I noted that Counsel for the Applicants premised his submissions primarily on the substantive issues that relate to the appeal rather than on the issue of stay of execution pending the said appeal that is the subject of this Application. For the reason that the same are out of context and are not relevant to the issues at hand, I find no need to render a summary of the same in this Ruling.

### **Respondent's Submissions**

15. Counsel for the Respondent cited and relied on the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** with regard to the issue of stay of execution.

16. Regarding substantial loss, Counsel submitted that the Applicants have not demonstrated what substantial loss they will suffer should they settle the decretal award in **Eldoret Small Claims Commercial Case No. E613 of**

**2024.** Counsel reiterated the depositions by the Respondent that as opposed to the Applicant it is the institution that stands to suffer loss as well as the reasons given by the Respondent in support of their deposition that in the event that the court is inclined to grant the stay, then it orders that the Applicant deposits the entire decretal amount in an interest earning account.

**17.**Counsel submitted that in any event, the Respondent herein being an educational institution and a going concern at that is very capable of refunding the decretal award should the Applicants succeed in the appeal. In the circumstances, Counsel urged this Court to make a finding that the Applicant has not demonstrated that they will suffer substantial loss should the court decline to issue an order of stay of execution pending appeal. He relied on the case of **Antoine Ndiaye v African Virtual University [2015] KEHC 6783 (KLR).**

**18.**Counsel further submitted that the Applicants on the other hand have filed this application in bad faith and with the mere intention of buying time, that it has been filed at the eleventh hour upon the Applicants realizing that the payment or the first installment was imminent on 4<sup>th</sup> April 2025 and that the Applicants have come to court with unclean hands. That taking into account the fact that the Appellants were given ample time to settle the decretal award by the learned trial magistrate and the said award was even broken down to be payable installments, it is in the interest of justice and fair play that the appellant be allowed to enjoy the fruits of a regularly obtained judgment so as to enable it run its learning institution smoothly.

**19.**Counsel contended that it is trite law that the interests of both the Applicants and the respondent must be taken into account when considering an

application for stay of execution pending appeal and in this regard, relied on **Kan Travellers Company Limited & another v Ndalul & Savola Suing as legal representative of the Estate of the Late Zacharia Wasike) & another (Civil Appeal 149 of 2022) [2023] KEHC 2846(KLR) (31 March 2023) (Ruling).**

20. Counsel further submitted that no just cause has been demonstrated by the Applicants herein. He submitted that the trial magistrate never awarded the sum of Kshs. 203,750/= as the Applicant claims let alone general damages as already explained in the Respondents Replying Affidavit and proceeded to reiterate the Respondents deposition on what the court awarded and how the amount was arrived at. Counsel therefore urged that the Applicants having based their application on misleading facts and falsehoods are not entitled to the equitable relief of stay of execution as the same is tantamount to coming to court with unclean hands. He relied on the case of **Lucase Onginjo Gogo v Naftali Omondi Ambala & 3 others [2015] eKLR** in this regard

21. Regarding delay, Counsel submitted that judgment of the trial Court in Eldoret SCCCOMM NO. E613 was delivered on 5<sup>th</sup> March 2025 and the first installment was due for payment on 4<sup>th</sup> April 2025. Counsel pointed out that the Applicant filed the application seeking stay of execution of the judgment herein on 1<sup>st</sup> April 2025 just 3 days shy from the date of commencement of the payment failure to which execution was to commence. Counsel maintained that clearly there was unreasonable delay in the filing of the instant application and the same was brought in bad faith

with a view of preventing the Respondent from enjoying the fruits of a regularly obtained judgment.

22. On the issue of security for costs, Counsel submitted that the Applicants have stated that they are willing to put up any security for the due performance of the decree under any terms that this Honourable Court may deem fit to state. Counsel further submitted that should this Honourable Court be inclined to issue orders of stay of execution, then this Honorable court ought to issue orders directing the Appellant to pay the Respondent half the costs of the suit amounting to Kshs. 22,750/= plus the sum of Kshs. 111,050/= as admitted by the Appellants during the hearing and as can be seen in paragraphs 2 & 6 of the Judgment of the trial court annexed as PNA 1 in the Respondent's Replying Affidavit dated 15/4/2025.

23. Counsel added that the Appellants should also be directed to deposit the disputed sum of Kshs. 87,700/= half the assessed costs of the suit amounting to Kshs. 22,750/= as well as the accrued interest of Kshs. 2,417.67 into a joint interest earning account in a reputable commercial bank to be held by both advocates for the parties to this appeal within the stipulated period as directed by this Honorable Court. Counsel relied on the case of **James Gathitu Mwaura & another v Peter Njarage Mwangi & another [2021] eKLR**.

### **Determination**

24. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order **42 Rule 6(2)** of the **Civil Procedure Rules** which provides as follows:

**No order for stay of execution shall be made under subrule (1) unless—**

**(a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and**

**(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant**

25. The factors to consider in stay pending appeal the court is guided by the decision of the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417, (Supra)**. On the issue of substantial loss, the Court of Appeal decision in **Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018 (Supra)** refers. On the issue of substantial loss, the court associates itself with the holding of Ogola, J in **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 (Supra)**

26. Further, the court does associate itself with the finding in **Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR**, on the issue of security for the due performance of the decree and on whether there has been any delay which can termed to be unreasonable, the court is guided by the decision of the Court of Appeal sitting in Meru in Civil Appeal No. 45 of 2015 **M'ndaka Mbiuki v James Mbaabu Mugwiria [2016] eKLR**. Lastly on whether an Applicant has an

arguable appeal, the court is guided by the decision **Athuman Nusura Juma Vs. Afwa Mohamed Ramadhan** [2016] eKLR

27. From my consideration of the Impugned Judgement, the Memorandum of Appeal, the facts deposed in support of and against the Notice of Motion as well as the submissions, several significant issues emerge. Firstly, the grounds of appeal as listed are on facts and not law contrary to the legal requirement on of that appeals from the Small Claims Court should be on points of law only. Secondly, The Appellant's Memorandum of Appeal, the Notice of Motion and the facts deposed in support of the Motion are inconsistent on what the award of the Small Claims Court that they are Appealing against is.

28. At paragraph 5 of the grounds in support of the Application and paragraph 6 of the Supporting Affidavit, the award has been referred to as General Damages of Ks. 203,750/= At paragraph 3 wherein a copy of the judgement is annexed, it is indicated and indeed from my perusal of the judgement annexed as AKS1, it is clear that the award is for a money decree of Ks. 198,750/= costs and interest.

29. Further to the above, I note from the impugned judgement that the Hon Trial Magistrate observed that there was no dispute and/or contestation over an amount that the Applicants admitted owing being the sum of Ks. 111,050/=. This fact was also deposed by the Respondent in their Replying Affidavit. However, the Applicant failed to disclose this to court in their pleadings and also did not rebut this aspect of the deposition made by the Respondent. This is an act of bad faith on the part of the Applicants who have not come to

court with clean hands to warrant the exercise of the court's discretion in their favor.

**30.** Apart from the above observations, the court has also considered whether the Application has met the threshold of order 42(6)(2). On undue delay, the court is satisfied that the Application was filed timeously. On substantial loss, none has been demonstrated at all by the Applicants. The court notes that the Applicants are willing to deposit security as the court will direct. On whether they have an arguable appeal, my above observations refer and with those facts as they are from their own pleadings, my conclusion is that the Applicants have not sufficiently demonstrated that they have an arguable appeal.

**31.** In light of my findings as above, it is my very considered view that the Applicant's Application lacks merit. The same is therefore dismissed in its entirety with costs to the Respondents.

**Read dated and Signed at ELDORET on 19<sup>th</sup> December 2025**

**E. OMINDE**  
**JUDGE**

