



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**ENVIRONMENT & LAND COURT**  
**CIVIL APPEAL NO.90 OF 2009**

**BOARD OF GOVERNORS KANGUBIRI GIRLS HIGH SCHOOL.....APPELLANT**

**VERSUS**

**JANE WANJIKU MURIITHI & ANOTHER.....RESPONDENTS**

**R U L I N G**

The application before court is dated 27/3/2014. The same is brought under certificate of urgency on grounds that the respondents herein are in the process of executing an order from the judgment read on the 26th June, 2009 which order the applicant have challenged and that the High Court had granted a conditional stay where a sum of Kshs.700,000/= was deposited in a joint interest earning account on 19th October 2009. The matter proceeded by way of written submissions and judgment was delivered on the 21st of February 2014 dismissing the appeal.

The respondents have already commenced the process of execution by issuing warrants of attachment against the applicants and properties of the 1st appellant were proclaimed on 25th March 2014 and a notice of seven days was given to remove the properties for selling if the decretal sum is not paid as at 1st April 2014. The applicants believe that unless the execution of the judgment and decree which has been appealed against is stayed, the applicants are bound to suffer substantial loss owing to the uncertainty of the respondent's ability to refund the decretal amount should the appeal succeed.

The secretary to the Board of Governors is worried that the appellant is a learning institution with over 950 female students and if the proclaimed equipments are sold, the students will drop out of the school denying them an opportunity to learn and hence will be greatly prejudiced. The applicants are able to and willing to provide such security for the due performance of such untimely but binding term as this Honorable Court may order. She believes that it is in the interest of justice that the application for stay filed herewith be certified urgent and heard forthwith.

The applicant prays for a stay of execution of the decree issued on 26/6/2009 in the Nyeri CMCC No.772 of 2006 (Jane Wanjiku & James Muriuki Mwangi -vs- Board of Governors Kangubiri Girls High School and Joseph Mwangi pending the hearing and determination of an appeal in the Court of Appeal.

The application is based on grounds that the applicants/appellants have filed this appeal against the judgment delivered by the Hon. J.K. Sergon J. on the 21st of February 2014 in Nyeri HCC Appeal No.90 of 2009 and that the respondent/decreed holders have already served the applicant/appellant with a proclamation letter by Hippo Auctioneers General Merchants for the attachment of the appellant's goods.

The appellant believes that the appeal raises substantial issues of law and fact as against the decision made by the Hon. J.K. Serگون J. and therefore has very high chances of success. She is apprehensive that if the said execution proceeds, the pending appeal will be rendered nugatory and the applicants/appellants will suffer substantial and irreparable loss particularly in view of the uncertainty that the respondents will be able to refund the decretal sum. Lastly, that this application is brought without delay.

The application is supported by the affidavit of Irene Wangari Macharia the secretary of the Board of Governors and the Deputy Principal Kangubiri Girls High School. She depones *inter alia* that the applicant has filed a notice of appeal in the Court of Appeal and has applied for typed proceedings and believes that the applicant has an arguable appeal. The auctioneers have already proclaimed the property of the school. When the matter was in this court on appeal from the Magistrates' Court this court gave a conditional stay subject to the appellant depositing Kshs.700,000 in a joint interest earning account which money is still in the said account.

Mr. Gathiga Mwangi filed a reply affidavit and grounds of opposition and thereafter both parties made oral submissions. Mr. Gori submitted that the application had been made expeditiously. The applicant had deposited Kshs.700,000 in a joint interest earning account of the advocates on record. He argues that if stay is not granted the appeal if successful will be rendered nugatory as the respondents might not be able to refund the money.

The application was vehemently opposed by Mr Gathiga Mwangi who argues that this court had already given a stay of execution and therefore this application is *resjudicata*. He argued that the applicant had not shown the court that the appeal was arguable as this court has already dismissed an appeal from the lower court. He is of the view that the intended appeal might have little light. The respondent urged the court release half of the decretal sum to the respondent. He requested that the deposited amount to be released to the respondent and the security to be enhanced.

Order 42 rule 6 of the Civil Procedure Rules provides for stay in *case of appeal* and not stay *pending appeal* as provided for in the Court of Appeal Rules. There is a big distinction between a stay in case of appeal in the High Court in respect of appeal filed in the Court of Appeal and stay pending appeal in the Court of Appeal in respect of an appeal filed in the said court. In the former, the High Court can grant a stay of execution or proceedings where it is satisfied that *substantial loss* may result to the applicant unless the order is made, and that such application has been made *without unreasonable delay* and *such security* as ordered by the court for performance of the decree.

This court finds that the appellant has satisfied the condition set out in order 42 rule 6 having brought the application to court expeditiously having deposited security of kshs.700,000 in a joint interest earning account of the advocates.

The court has looked at the decretal amount and the applicant being a public school, the same is likely to suffer substantial loss if stay is not granted.

This court does not agree with Gathiga Mwangi that the application is res-judicata as the appeal in issue is the appeal before the court of appeal and not the High Court. However, this court is not oblivious of the sufferings of the respondent and orders that stay be granted to the applicant for only 90 days from todate. Orders accordingly.

***Dated, signed and delivered on 16th day of May, 2014.***

**A. OMBWAYO**

**JUDGE**