



REPUBLIC OF KENYA



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Board of Management, Eldoret Secondary School v Board of Trustees, Good News Church of Africa (Civil Application E084 of 2021) [2023] KECA 261 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KECA 261 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E084 OF 2021
F SICHALE, FA OCHIENG & LA ACHODE, JJA
MARCH 17, 2023

BETWEEN

BOARD OF MANAGEMENT, ELDORET SECONDARY SCHOOL . APPLICANT

AND

BOARD OF TRUSTEES, GOOD NEWS CHURCH OF AFRICA .. RESPONDENT

(An Application for Stay of Proceedings of the Environment and Land Court at Eldoret (Odeny, J) In ELC CASE No 18 OF 2019)

RULING

1. The Board of Management, Eldoret Secondary School (the applicant herein), has vide a motion dated May 27, 2021, brought pursuant to the provisions of Rules 5 (2) (b), 42 (1) of the [Court of Appeal Rules 2010](#) and all other enabling provisions of the law sought the following orders:
 1. Spent.
 2. Spent.
 3. That the orders of stay of proceedings granted in prayer two (2) above be maintained and/or do remain in place and/or in force pending the hearing and determination of the main appeal before this Honourable Court.
 3. That costs of this application be in the main appeal.”
2. The motion is supported by the grounds on the face of the motion and an affidavit sworn by Bharati S Joshi who deponed, *inter alia*, that they were served with an amended plaint by the respondent on March 29, 2019, pursuant to which they filed an application dated February 12, 2020, seeking to amend their defence which application was dismissed by the High Court on November 17, 2020.



3. That thereafter, the applicant filed an application for stay of proceedings pending appeal which application was dismissed by the High Court on April 27, 2021, thus provoking the instant application that is now before us. He further deponed that unless orders of stay of proceedings and/or further proceedings are issued, the respondent was likely to proceed with the hearing of the suit to the detriment of the applicant.
4. The motion was opposed vide a replying affidavit sworn on November 9, 2022, by Isaac Bett the Chairperson of the respondent who deposed, *inter alia*, that the application was incompetent in that no appeal was pending before this Court as they had never been served with a Memorandum of Appeal to date and that further the gist of the applicant's application dated February 12, 2020, was to introduce other parties to the suit albeit disguised as an application for leave to further amend the defence and that further, the respondent had no claim against the intended co-defendant.
5. When the matter came up for plenary hearing on November 14, 2022, Ms Odwa, learned counsel for the applicant sought to rely on her written submissions which she orally highlighted. There was no appearance for the respondent though they had filed written submissions dated November 11, 2022.
6. Briefly, it was submitted for the applicant that it had an arguable appeal for reasons, *inter alia*, that the Court failed to give any reasons for dismissing the applicant's prayer for leave to file additional documents, now that the respondent had filed a supplementary list of documents after the matter had been confirmed for hearing.
7. As to whether the intended appeal would be rendered nugatory, it was submitted that following the dismissal of the application for stay of proceedings pending the determination of the appeal to this Court, there was nothing stopping the matter from proceeding.
8. On the other hand, it was submitted for the respondent that the applicant had not filed a Memorandum of Appeal more than two years after filing and serving the Notice of Appeal and that in absence of an appeal, the orders sought were in vain and unmerited and that in the absence of a substantive appeal, there was nothing to be rendered nugatory.
9. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
10. The applicant's motion is brought under Rule (5) (2) of this Court's Rules. Rule 5 (2) of the Rules, which guides the Court in applications of these nature provides:
 - (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:
 - (a) ...
 - (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."
11. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) to grant an order of stay of execution, injunctions or stay of further proceedings are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle.



12. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. See *Trust Bank Limited and Another vs Investech Bank Limited and 3 others* [2000] eKLR where this Court stated thus;
13. The jurisdiction of the Court under Rule 5 (2) (b) is original and discretionary and it is trite law that to succeed, an applicant has to show firstly that his appeal or intended appeal is arguable, or put another way, it is not frivolous and secondly that unless he is granted a stay, the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case....”
14. Regarding the first limb and as to whether the applicant’s intended appeal is arguable, no draft Memorandum of Appeal has been annexed to the motion for the benefit of this Court’s perusal. Be that as it may the applicant has contended that it had an arguable appeal on the grounds, *inter alia*, that the High Court failed to give any reason for dismissing the applicant’s prayer for leave to file additional documents.
15. A cursory perusal of the applicant’s application dated February 12, 2020, shows the applicant intends to bring another party as a co-defendant while the suit is ongoing. Additionally, the High Court vide its ruling dated November 17, 2020, and contrary to the applicant’s contention noted that the applicant had already amended its defence and counter claim on August 15, 2019, which was on record and that the amendment sought in the instant case was for enjoinder of a co-defendant.
16. Ultimately therefore we are not satisfied that the applicant has an arguable appeal worthy of consideration by this Court. Of course we will not say more regarding this issue lest we embarrass the bench that will be seized of the appeal.
17. As to whether the intended appeal will be rendered nugatory if an order of stay of proceedings is not granted, it has not been demonstrated to the satisfaction of this Court that the applicant will suffer any prejudice if the instant application is not allowed.
18. Additionally, stay of proceedings is a drastic judicial action that should be sparingly and rarely invoked as it may impede the right to access to justice and should only be issued in the clearest of cases and from the circumstances of this case, we are not satisfied that the applicant’s case is one such case.
19. In view of the above, and the applicant having failed to establish the twin principles for consideration in an application under Rule 5 (2) (b) of this Court’s Rules to warrant issuance of orders of stay of proceedings as sought, the applicant’s motion dated May 27, 2021 must fail.
20. The upshot of the foregoing is that the applicant’s motion dated May 27, 2021 is without merit and the same is hereby dismissed in its entirety with costs to the respondent.
21. The interim orders issued on November 14, 2022 are hereby vacated.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF MARCH, 2023.

F SICHALE

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JUDGE OF APPEAL

F A OCHIENG

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JUDGE OF APPEAL



L ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

