



**Akirang'onde Boys Secondary School & 2 others v Akaiga (Appeal
E002 of 2021) [2022] KEELRC 3922 (KLR) (16 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3922 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
APPEAL E002 OF 2021
DKN MARETE, J
SEPTEMBER 16, 2022**

BETWEEN

AKIRANG'ONDU BOYS SECONDARY SCHOOL 1ST APPLICANT

BOM AKIRANG'ONDU SECONDARY SCHOOL 2ND APPLICANT

PRINCIPAL AKIRANG'ONDU BOYS SECONDARY SCHOOL 3RD APPLICANT

AND

DANIEL AKAIGA RESPONDENT

RULING

1. This is an application by way of Notice of Motion dated February 9, 2021 and seeks the following orders of court;
 1. That the Honourable Court be pleased to certify this application as urgent and heard exparte in the 1st instance.
 2. That service of this application be dispensed with in the 1st instance.
 3. That pending hearing and determination of this application, the Honorable court do order a stay of execution and or further proceedings of the orders emanating from the ruling dated September 29, 2020 and that of February 9, 2021 and all other consequential proceedings thereto including but not limited to issuance of a final judgment in MeruCMC ELRC No.42 of 2019 scheduled for the February 25, 2021.
 4. That pending hearing and determination of this appeal, the Honorable Court do order a stay of execution and or further proceedings of the orders emanating from the ruling dated September 29, 2020 and that of February 9, 2021 and all other consequential proceedings thereto including but not limited to issuance of a final judgment in MeruCMC ELRC No.42 of 2019 scheduled for the February 25, 2021.



5. That the applicant/applicant be allowed to file the appeal out of time insofar as it related to the ruling dated September 29, 2021 as per the consolidated draft Memorandum of Appeal.
 6. That the Honourable court do make further and/or alternative orders as necessary not only to achieve the ends of justice but to safeguard the subject matter of the application and the intended appeal.
 7. That costs of this application be provided for.
2. It is grounded thus;
- a) That the Honourable court on the February 9, 2021 proceeded ex-parte with the suit herein subject to this appeal Meru CMC ELRC No.42 of 2019.
 - b) That the applicants/appellants are aware that judgment has been set down for the February 25, 2021.
 - c) That the Honourable court on September 29, 2020, made a ruling relating to entry of judgment in default of defence of January 21, 2020 as against the applicants/appellants.
 - d) That in the said ruling the Honorable court set aside the default judgment on the basis that the applicants/appellants had already filed a defence in response to the claim.
 - e) That the Honorable court proceeded to attach punitive conditions that the applicants/appellants to pay assessed costs of Kshs.10,000.00.
 - f) That despite the default judgment having been obtained irregularly and which ought to have been set aside as a matter of right, the Honourable court attached drastic and punitive conditions that gravely impeded the right to fair trial and the corollary right to be heard of the appellant.
 - g) That on all these occasions the applicants/appellants had not been put to funds being public institutions that had been closed due to the Covid pandemic.
 - h) That on February 9, 2021 when the matter came up for hearing, the Honorable court was moved to give the applicants/appellants further limited time to abide to the conditions issued on September 29, 2020 their validity notwithstanding.
 - i) That the application was dismissed vide a ruling dated February 9, 2021 resulting to the matter proceeding ex-parte on the material date.
 - j) That due to the Covid pandemic situation the applicant was not able to lodge an appeal relating to the ruling dated September 29, 2020 within time.
 - k) That the delay in lodging the appeal is reasonable and excusable and that the respondent does not stand to suffer any prejudice.
 - l) That the applicants appeal raises substantial, arguable issues of law and has overwhelming prospects of success as more specifically set out in the draft Memorandum of Appeal annexed to the supporting affidavit in the Notice of Motion filed herewith.
 - m) That unless the application herewith is certified urgent and heard on priority basis, and stay orders issued before the hearing and determination of the application and/or appeal, the applicant will suffer irreparable loss and its highly meritorious appeal rendered nugatory.
 - n) That in view of the foregoing it is in the interest of justice that;



- I. The Application filed herewith be certified urgent and admitted for hearing on priority basis.
 - II. An interim order of stay of execution and further proceedings emanating from the ruling dated September 29, 2020 and that of February 9, 2021, pending the hearing and determination of the application interpartes so as to preserve the application and of the intended appeal and not to render it an academic exercise.
3. The Claimant/Respondent has not filed a reply to the application.
 4. The Respondent/Applicant in her written submissions dated June 9, 2021 seeks to rely on the authority of *Amal Hauliers Limited v Abdulnasir Abukar Hassan* (2017) eKLR where the decision of the Court of Appeal in *Butt vs. Rent Restriction Tribunal* (1982) KLR 417 offered guidance on how a court should exercise discretion and held that;
 1. “The Power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
 5. Moreover, she submits as follows;

...the applicant had sought for proceedings and ruling which form the basis of this appeal as per annexure ‘EMK 2’ in our supporting affidavit. The same have never been availed and we also wish the court to take judicial notice of the adverse effects of Covid 19 pandemic which the Supreme Court in *William Olotch vs Pan Africa Insurance Co. Ltd* (2020)eKLR found the same to be “reasonable and cogent reasons for inadvertent delay” for pursuing any legal recourse.
 6. Again,

The delay and the extension of time sought relates to the ruling dated September 29, 2020. The same is not inordinate, as the applicant is a public school that was plagued by the ravages of Covid 19 pandemic. The Applicant being a public has to seek directions from the Ministry of Education on whether it was tenable to pay the costs, the legality notwithstanding, despite their compliance with Order 11 and readiness to pursue the suit to its logical conclusion. To this end I rely on the case of *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees* Civil Application No.190 of 2019.



7. It is also her argument that an ouster or absence of stay would render the intended appeal nugatory. In any event, she submits that her appeal is arguable and not frivolous
8. The claimant/Respondents case is that the Attorney General has no *locus standi* to represent the appellant. This is because the *Education Act*, by dint of sections 6,10 and 11 is clear, in that the Board of Management is body corporate with perpetual succession and this essentially means that the institution is a semi-autonomous entity which is capable of suing and being sued since it has its own life as a body corporate.
9. It is also their submission that the application before court is inappropriate, unlawful and defective. It is also misplaced, unfounded and myopic and not based on any tangible factual basis. These are mere allegations, imaginations and fabricated lies.
10. The Claimant/Respondent further submits that this application is frivolous, vexatious, scandalous and malicious and should therefore be dismissed with costs.
11. This court is of a different view from the claimant/Respondent. The circumstances belying the hearing and determination of this matter call for an indulgence of an application with a view to facilitate the appeal. The matter was heard and determined in the absence of the Respondent/Applicant. She now feels oppressed and wishes to appeal so as to achieve her share of justice. This cannot be wished away in all fairness.
12. The Respondent/Applicant meets the threshold for grant of stay of execution in the circumstances. She has demonstrated that non-grant of this application would render her appeal nugatory. Again, the Applicant has demonstrated a case of arguable appeal before the appellate court. This therefore sustains a case for grant of the application.
13. I am therefore inclined to allow the application and orders as follows;
 1. That pending hearing and determination of this application, an order be and is hereby issued for stay of execution and or further proceedings of the orders emanating from the ruling dated September 29, 2020 and that of February 9, 2021 and all other consequential proceedings thereto including but not limited to issuance of a final judgment in Meru CMC ELRC No.42 of 2019 scheduled for the February 25, 2021.
 2. That pending hearing and determination of this appeal, an order be and is hereby issued for stay of execution and or further proceedings of the orders emanating from the ruling dated September 29, 2020 and that of February 9, 2021 and all other consequential proceedings thereto including but not limited to issuance of a final judgment in Meru CMC ELRC No.42 of 2019 scheduled for the February 25, 2021.
 3. That the applicant/applicant be and is hereby allowed to file the appeal out of time insofar as it related to the ruling dated September 29, 2021 as per the consolidated draft Memorandum of Appeal.
 4. That each party shall bear its costs of this application.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF SEPTEMBER 2022

D.K. NJAGI MARETE

JUDGE

Appearances



1. Mr.Kieti instructed by State Law Office for the Applicant
2. Mr. Kobia instructed by Kobia Michubu & Co. Advocates for the Claimant/Respondent.

