



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**APPEAL NO. 23 OF 2020**

**(Before Hon. Lady Justice Maureen Onyango)**

**KHALSA SCHOOLS.....1<sup>ST</sup> APPELLANT**

**SEBASTIAN CHACK/PRINCIPAL/SECRETARY**

**BOARD OF MANAGEMENT.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CATHERINE MUTAVE PHILIP.....RESPONDENT**

***(Being an appeal from the judgment and decree of Hon. K. I. Orange, Senior Resident Magistrate at Milimani Commercial Courts, Nairobi delivered on 19<sup>th</sup> February 2020 in the CMEL Cause No. 94 of 2019)***

**RULING**

The application before me for determination dated 8<sup>th</sup> October 2020 filed by the Appellant seeks the following orders:-

1. Spent.
2. That this Court be pleased to order stay of execution of the Judgment and/or Decree resulting from the decision of Hon. K. I. Orange (SRM) delivered on 19<sup>th</sup> February 2020 pending the hearing and determination of this Application.
3. That this Court be pleased to order stay of execution of the judgment and/or Decree resulting from the decision of Hon. K. I. Orange (SRM) delivered on 19<sup>th</sup> February, 2020 pending the hearing and final determination of the appeal.
4. That in the alternative to prayer 3 above, this Court be pleased to vary or alter the stay of execution conditions issued by the Lower Court on 11<sup>th</sup> September 2020 on deposit of the decretal sum of Kshs.802,706/- in a joint interest earning account and in its place accept a Bank Guarantee from a reputable bank for the sum of Kshs.802,706/- as adequate security pending the hearing and final determination of the appeal.
5. That the costs of this application abide the outcome of the Appeal.

The grounds in support of the application as set out on the face of the application are that: -

1. That Judgment was entered in this matter on 19<sup>th</sup> February 2020 in the sum of Kshs.688,000/= plus costs and interest in favour of the Respondent herein against the Applicants.
2. That the Applicants being aggrieved by the said judgment filed an Appeal against the said award.
3. That the Applicants then filed an application for stay of execution pending appeal in the Subordinate Court and the Court delivered a Ruling on 11<sup>th</sup> September 2020 directing the Applicants to deposit the full decretal sum in a joint interest earning account in the names of the advocates for the parties within 30 days.

4. That the 1<sup>st</sup> Applicant is unable to comply with the aforesaid order due to budgetary' constraints and the deposit of such a substantial amount will cripple its day to day operations.

5. That the Respondent has applied for execution of the Decree and may have obtained warrants of attachment and may at any time after the lapse of the stay period granted by lower court proclaim the Appellants movable/immovable properties to the detriment and prejudice of the Appellant.

6. That the Applicants have a cogent appeal against the entire judgment with overwhelming chances of success.

7. That if stay of execution is not granted as prayed herein, the Applicants will suffer irreparable loss and damage rendering this Appeal nugatory.

8. That the Applicants stand to suffer substantial and irreparable loss and damage as the Respondents financial status is unknown and there is likelihood that the Applicants will be unable to recover the decretal sum from the Respondent on a successful appeal in the event that the execution process is completed.

9. That the Applicants are ready and willing to furnish security through issuance of a Bank Guarantee from a reputable bank for the entire decretal sum to be deposited in Court.

10. That the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs if this Application is allowed.

11. That this Application has been made without unreasonable/inordinate delay.

12. That this Application ought to be granted in the interests of equity and justice.

Briefly, the applicant pleads that it is unable to deposit the decretal sum due to financial constraints as depositing the amount will cripple it financially. That this has been caused by closure of schools due to COVID pandemic. It has however submitted bank guarantee from I & M Bank Limited for the decretal sum of Kshs.802,706/- valid up to 30<sup>th</sup> October 2021 as security.

The Respondent filed a replying affidavit of JACQUES BULUME opposing the application. He states that the applicant has not complied with orders of the lower court by depositing the entire decretal sum in an interest earning account in the joint names of the advocates for the parties. That the Applicant has not adduced any proof that it is suffering budget constraints.

The Respondent avers that the Applicant has been offering online classes and therefore it is not true that it has cash flow problems. The Respondent further takes issue with the validity date of the Bank guarantee submitted by the Applicant and states that there is no certainty that the appeal will have been determined by the date the bank guarantee lapses. The Respondent further avers that the Bank guarantee does not cover interest, which continues to accrue.

The application was disposed of by way of written submissions.

### **Analysis and Determination**

Stay of execution is provided for in Order 42 Rule 6 of the Civil Procedure Rules as follows: -

#### **Order 42, Rule 6 – Stay in case of appeal**

**(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) 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.**

**(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made,**

to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

**(5) An application for stay of execution may be made**

**informally immediately following the delivery of judgment or ruling.**

**(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.**

In the lower court's ruling delivered on 25<sup>th</sup> September 2020, the court found that the Applicant met the threshold under Order 42 Rule 6 of Civil Procedure Rules. The court specifically found that the Applicant had proved substantial loss and that its appeal would be rendered nugatory should stay not be granted. Further, that the application was made without undue delay.

The only issue for determination is therefore whether this court can review the orders granted by the lower court.

Order 42 Rule 6 provides that the court to which appeal is preferred shall be at liberty, on application being made, to consider an application for stay whether it has been granted or rejected by the lower court, and make such orders as may in the opinion of the court be just.

The court takes judicial notice of the hardships caused to businesses by COVID protocols, specifically the closure of schools and other institutions of learning for a long period during 2020. Many businesses were therefore faced with cash flow problems. It is therefore understandable that the Respondent may not have sufficient funds to deposit.

The court further takes cognizance of the fact that the law does not provide for deposit of cash but of acceptable security.

The claimant's concern that the bank guarantee offered by the Appellant is limited in period to 30<sup>th</sup> October 2021 and to the sum of Kshs.802,706/- which does not take into account accruing interest is however valid.

Having considered all the above factors, I find that a bank security is good security. However, the security must be available and valid up to the date of determination of the appeal.

**For the foregoing reasons, I will allow the application but on terms that the security be operational and valid until the hearing and final determination of the appeal.**

**The Applicant shall pay costs of this application to the Respondent in any event.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF APRIL 2021**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**