



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 79 OF 2013 CONSOLIDATED WITH CAUSE NO. 80 OF 2013

JAMES GATHUMBI NGETHA..... 1ST CLAIMANT

GEOFFREY MUKURIA KARIUKI.....2ND CLAIMANT

VERSUS

**THE BOARD OF GOVERNORS HIRIGA SECONDARY
SCHOOL.....RESPONDENT/APPLICANT**

(Before Hon. Justice Byram Ongaya on Friday 12th June, 2015)

RULING

The court delivered the judgment in this suit on 6.03.2015 by entering judgment in favour of the claimants against the respondent for:

1. The respondent to pay the 1st claimant **Kshs.1,316,493.00** and the 2nd claimant **Kshs.565,593.00** by 1.05.2015 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
2. The respondent to pay the claimants' costs of the suit.

On 13.04.2015 the respondent filed a notice of motion brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010. The substantive prayer in that application was that the honourable court is pleased to order a stay of execution of the judgment of the court made on 6.03.2015 pending the hearing and determination of the appeal. The notice of appeal was lodged on 11.03.2015.

Under Order 42 Rule 6 of the Civil Procedure Rules, 2010 no order of stay of execution pending the hearing and determination of an appeal shall be made 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.

Further, order 42 Rule 6 of the Civil Procedure Rules, 2010 provides that the court may order stay of execution upon sufficient reason.

The **1st issue** is whether the application has been filed within a judicious time. In the present case, there was no dispute between the parties that the application was made without unreasonable delay and the court finds that the applicant filed the application promptly after delivery of the judgment.

The **2nd issue** for determination is whether the applicant has established that substantial loss may result to the applicant unless the order of stay of execution pending appeal is made. It was urged for the applicant that if execution is carried out the respondent's operations would be paralysed as it operates on a budget pegged on prescribed school fees. Since the judgment sum was not factored in the applicant's budget, it would be prejudicial to the operations of the respondent's public school because there would be difficult to meet the recurrent daily needs of the school. The court has considered the replying affidavit of James Gathumbi Ngetha filed on 14.04.2015 and finds that the submission that the school operates on strict approved budgetary provisions as stated in the supporting affidavit of Jacinta Wambui Mwaniki filed on 13.04.2015 has not been denied at all. Thus, on account of the strict approved budgetary provisions upon which the applicant as a public body is bound to operate and the demanding recurrent needs of the school, the court finds that the applicant has established that if execution were to issue, the applicant would suffer substantial loss. While making that finding the court has taken judicial notice of the government budgetary cycle as provided for in the relevant legislation, details and particulars of which are in public domain and which obviously apply to the respondent as a public entity.

The **3rd issue** for determination is whether the applicant is able to give such security as the court will order for the due performance of the decree as the decree may ultimately be binding on the applicant. For the applicant, it was submitted that the applicant has already paid the claimants Kshs. 400,000.00 being part payment of the judgment sum and as ordered by the court on 15.04.2015 when the court made orders for interim stay of execution pending the hearing of the present application. It was urged for the applicant that the court orders that payment of Kshs. 400,000.00 to be sufficient security in the circumstances of this case. In alternative, it was submitted that the court makes orders on sufficient security as shall be just taking all circumstances into account. It was further submitted that the next budget for the respondent will be in January 2016 after schools resume and depositing all the judgment amount into court or interest earning account would have the effect that the other recurrent school provisions would suffer.

For the respondent it was submitted that the sum of Kshs.400, 000.00 already paid was a drop in the sea because it was too little compared to the sum of **Kshs.1, 316,493.00** for 1st respondent and for the 2nd respondent **Kshs.565, 593.00** as ordered by the court in the judgment so that it was not the kind of security that would ultimately meet the decree if the applicant was not successful in the intended appeal.

The court has considered that interest at court rates is running and is to be payable on all outstanding judgment sum in terms of the judgment from the date of the judgment till full payment. It is the court's view that the interest as ordered cushions the respondents in terms of time value of money pending the hearing and determination of the intended appeal. The court has taken into account the Kshs. 400,000.00 already paid to the respondents. In the opinion of the court that money already paid is not sufficient security to satisfy the judgment sum in event the appeal is not successful. As security for due satisfaction of the decree and taking into account the respondents' right to enjoy the fruits of their successful litigation, the court considers that the following terms will meet the balance of justice in this case:

- a. the applicant to pay the claimants a further Kshs.400,000.00 by 1.10.2015 being further part payment of the judgment sum; and
- b. the applicant to file and serve by 1.10.2015 a scheme of arrangement as will be provided for in the claimant's next budget beginning January 2016 that will assure prompt payment of all the outstanding judgment sum should the appeal be unsuccessful.

It was submitted for the respondent that the applicant had not established that it had an arguable appeal as it was held in the case of **Kwa Hola Pharmacy –Versus- Copy Cat Coast Limited(2002)2 KLR 269.** First the court considers that the cited case related to stay of execution by the Court of Appeal and not the trial court that had made the decision like in the instant case. Second, it was submitted for the applicant that it was to be contested in the Court of Appeal that the claimants were not entitled to gratuity and underpayment dues as ordered by the court. For the two reasons, the court finds that the submission as made for the respondents was not a bar to the success of the applicant's case.

In conclusion, the court will allow the application by way of the notice of motion filed on 13.04.2015 with orders as follows:

1. There shall be stay of execution of the decree flowing from the judgment delivered in the suit on 6.03.2015 pending the hearing and determination of the intended appeal but subject to:
 - a. the applicant paying to the claimants a further **Kshs.400,000.00** being further payment of the judgment sum by 1.10.2015; and
 - b. the applicant to file and serve by 1.10.2015 a scheme of arrangement as shall be provided for in the claimant's next budget beginning January 2016 that will assure prompt payment of all the outstanding judgment sum should the appeal be unsuccessful.
2. The costs of the application shall abide the outcome of the intended appeal.

Signed, dated and delivered in court at **Nyeri** this **Friday, 12th June, 2015.**

BYRAM ONGAYA

JUDGE