



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 190/2013

(Before Hon. Justice Hellen Wasilwa on 17th June, 2014)

ELIZABETH KWAMBOKA

KHAEMBA CLAIMANT

-VERSUS-

B.O.G. CARDINAL OTUNGA HIGH SCHOOL & 2 OTHERS
RESPONDENTS

R U L I N G

The application before court is the one dated 28.3.2014. the application is brought under Order 42 Rule 6 of the Civil Procedure Rules and Sections 3A and 63 and (e) of the Civil Procedure Act. The applicant seeks orders for stay of execution of the judgment and decree in this case pending hearing and determination of an appeal filed against the said judgment. The application is grounded on the grounds that:-

(a) That the respondents have been aggrieved by and are dissatisfied by the judgment entered against them in this case.

(b) That the respondents have preferred an appeal to the Court of Appeal against the said judgment.

(c) That the respondents are apprehensive that if execution is done the appeal is likely to rendered nugatory when the same finally succeeds.

(d) That it is just and reasonable to grant the order sought.

The application is supported by the annexed affidavit of Zachary Nyariki and such submissions as offered by the defendants advocate at the hearing.

The applicants are dissatisfied with the judgment of this court dated 28.2.2014. They contend that they have since filed a notice of appeal at the Court of Appeal and that if the appeal is not allowed, the respondents could proceed and execute rendering the intended appeal nugatory. The applicant further contends that they have an arguable appeal and they will suffer prejudice in the event the application is denied and respondents proceed to execute. The applicants have further submitted that they are ready and willing to abide by any conditions set by the court including depositing the decretal amount in court or in a joint interest earning account. It is further their contention that the respondents cannot refund the decretal sum in case the intended appeal succeeds and this will greatly prejudice them.

The respondents opposed this application. They sought to rely on a replying affidavit sworn on 22.4.2014 by Elizabeth Kwamboka and filed on 23.4.2014. The respondents avers that the orders being sought are discretionary and the court should exercise its discretion based on the circumstances of the case and merits of the appeal. They also argue that the applicants have not filed any appeal and only a notice of appeal is on record.

Having considered the submissions of the parties, the issue for determination is whether the application has merit. Under Order 42 rule 6(2) of the Civil Procedure Rules:-

“No Order of stay of execution shall be made under subrule (I) 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 ---”

Given that the applicants filed this application within time and there being proof that they have filed a notice of appeal, I grant orders of stay on condition that the entire decretal sum is deposited in an interest earning account held in the joint names of the parties or their counsels within 30 days. In default execution to issue.

HELLEN WASILWA

JUDGE

17/6/2014

Appearances:-

Ondego h/b Lore for applicants present

N/A for respondent present

CC. Wamache