



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 109 OF 2001

BETWEEN

THIKA COFFEE MILLS LIMITED.....PLAINTIFF

AND

GAKUYU FARMERS CO-OPERATIVE SOCIETY.....1ST DEFENDANT

COFFEE BOARD OF KENYA.....2ND DEFENDANT

CO-OPERATIVE BANK OF KENYA.....3RD DEFENDANT

RULING

1. By a ruling dated 30th May 2019, Kasango J., dismissed the Plaintiff's suit and the 1st Defendant's Counterclaim for want of prosecution following the 1st Defendant's application dated 27th April 2019. Being dissatisfied with the order, the Plaintiff lodged a Notice of Appeal and has now filed an appeal in the Court of Appeal; Civil Appeal No. 281 of 2019 which is now pending determination in that court.

2. What is before this court for consideration is the Plaintiff's Notice of Motion dated 31st May 2019 made, inter alia, under **Order 42 rule 6** of the **Civil Procedure Rules** seeking the following orders:

[4] THAT this Honourable Court be pleased to issue an Order of stay of the ruling delivered by Justice Mary Kasango on 30th May 2019 pending the hearing and determination of this Application and pending the hearing and determination of the intended Appeal.

[5] THAT this Honourable Court be pleased to issue an order directing that the monies held in the joint dollar fixed deposit Account Number 87422-960541-00 held at Standard Chartered Bank Moi Avenue be released forthwith to the Plaintiff/Applicant.

[6] Spent

[7] THAT in the alternative to prayer 5 above, this Honourable Court do issue an Order restraining all parties from withdrawing and or accessing the money deposited in the joint dollar fixed deposit Account Number 87422-960541-00 held at Standard Chartered Bank Moi Avenue pending the hearing and determination of this Application and Appeal.

[8] Spent

[9] THAT in the alternative to the prayers 5, 6 and 7 above, the Honourable Court do issue an Order maintaining the status quo created by the Consent Order dated 30th day of August 2002 pending the hearing and determination of intended Appeal.

[10] THAT this Honourable court makes such further or other orders and/or directions as its deems fit in the interests of justice

3. The application is grounded on the supporting and supplementary affidavit of Pius Mbugua Ngugi sworn on 30th May 2019 and 9th July 2019 respectively. The application is opposed by the 1st Defendant through the affidavit of Maina Mwangi filed on 2nd July 2019. All the parties filed written submissions in support of their respective positions. From the application, depositions and submissions, two issues fall for determination. First, whether the court should issue an order of stay and second, whether the money held in the joint account at Standard

Chartered Bank should be released to the Plaintiff.

4. On the first issue whether the court should stay the ruling issued by Kasango J., on 30th May 2019. In response to the application, both Defendants raised a preliminary point that since the order sought to be stayed is a negative order which does not require any party to do or refrain from doing anything, the court cannot grant an order of stay.

5. This issue is easily resolved by reference to the provisions governing the grant of an order for stay pending appeal set out in **Order 42 Rule 1 and 2 of the Civil Procedure Rules** which provides as follows:

42(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...

(2) No order for stay of execution shall be made under sub-rule (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.

6. The aforesaid provisions contemplate that the order appealed from and which is sought to be stayed is capable of execution. In this case, the order appealed from is the order dismissing the Plaintiffs suit and the 1st Defendant's Counterclaim within no order as to costs. The order was therefore negative in nature and does not give rise to any positive action which can be stayed. In short, there is nothing to be stayed. I will not belabour this point as it has been the subject of determination by binding decisions of the Court of Appeal and other decisions of the High Court.

7. In **Western College of Arts and Applied Sciences v Oranga and Others [1976] 1 KLR 63**, the Court of Appeal observed as follows:

*But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In **Wilson v Church** the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in an application for stay, it is so ordered.*

8. The same position was taken by the Court of Appeal in **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) Civil Application No. NAI 133 of 2015 [2015] eKLR** where Kantai JA., observed that:

*An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in **Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984)** where it was stated: ‘..... an order for stay of execution must be intended to serve a purpose’*

9. As there is nothing to stay as a result of the dismissal of the Plaintiff's suit and Counterclaim, I decline to grant the orders of stay of execution. I now turn to the substantive matter in the application which concerns the monies held in the joint account.

10. The Plaintiff seeks money deposited in the joint account be released to it or that the court grants an order preserving the status quo prior to the consent. The consent giving rise to the joint account is dated 30th August 2020 and provided as follows:

BY CONSENT the sum of money currently held by the 2nd Defendant on account of the 1st Defendant's coffee sale proceeds be paid out by the 2nd Defendant, in the joint names of the Advocates for the Plaintiff, 1st Defendant, 2nd Defendant and 3rd Defendant and such monies be held in a joint interest bearing account in the names of the Advocates aforesaid at Standard Chartered Bank, Moi Avenue or any other bank the parties may agree pending the hearing and determination of the matter. [Emphasis mine]

11. The Plaintiff's position that it is entitled to the money as it was requested by the Government of Kenya to invest in the Quality and Increased Production (IPIQ) Programme intended to increase production and quality of coffee as a foreign exchange earner. Under the Programme, the Plaintiff would advance money to farmers to grow coffee. In addition, it would provide management services into order to meet the objective of IPIQ. The Co-operative Societies who benefitted from the Plaintiff's facilities were required by law to take their coffee for processing to the Plaintiff. In turn, they issued irrevocable instructions to the 2nd Defendant, which was the sole purchaser of Coffee, directing it to pay the Plaintiff the coffee sale proceeds upon receipt. The Plaintiff contends that it filed this suit to safeguard its colossal investment and the money deposited in the account was already due to it as the 2nd Defendant was required to pay it.

12. The Plaintiff therefore argues that since the suit has never been heard on merit and in view of the pending appeal, the court should order the money to be held in the joint account pending the hearing and determination of the appeal. It avers that if the appeal is not successful then the court will determine whose money it is.

13. The 1st Defendant submits that the money held in a joint account should be released to the Plaintiff since the money belongs to it and the

suit has now been concluded. It accused the Plaintiff of delaying justice for its members whose coffee proceeds have been held since 30th August 2002 in the joint account. It asserts that the Plaintiff failed to utilize the opportunity to prosecute its matter for close to 20 years to the detriment of the 1st Defendant's members who are peasant farmers who supplied coffee to it and that they should not be denied what is rightfully theirs.

14. The 1st Defendant submits that funds held in the joint account represent the sale proceeds of coffee produced and belonging to the 1st Defendant and that this was acknowledged by all parties herein according to the letter and spirit of the consent. It further submits that following dismissal of the suit, the position regarding ownership of the funds has not changed for they remain the property of the 1st Defendant as the debt alleged to have been owed to the Plaintiff by the 1st Defendant was not proved. The 2nd Defendant submitted that its position as regulator of the coffee industry is that the money be released to the 1st Defendant in the public interest.

15. The 1st Defendant further submits that maintenance of status quo relating to the joint account will equally serve no useful purpose. Further, that substitution of the signatories to the account at this juncture is a round-about way of achieving the *status quo* orders sought and circumventing the fact that the Plaintiff's application lacks merit.

16. I have reflected on the arguments by the parties and it is not lost to the court that the joint account was opened pending the hearing and determination of the suit. The suit and counterclaim have now been dismissed. The result of this position is that neither the Plaintiff nor the 1st Defendant proved their respective claims. The court cannot now engage in an exercise that amounts to subverting the order of dismissal by purporting to determine the claim afresh. The position regarding the money can only be based on the status quo ante for which the consent speaks loudly. It clearly states that, "*the sum of money currently held by the 2nd Defendant on account of the 1st Defendant's coffee sale proceeds be paid out by the 2nd Defendant.*" Nothing could be clearer than this. The money was being held by the 2nd Defendant on account of the 1st Defendant. It is the Plaintiff who was asserting a claim over the said money which claim has now been dismissed.

17. Counsel for the Plaintiff cited ***Republic v University of Nairobi CAK[2002] 2 EA 572*** to support the argument that the court cannot issue any other order other than one prayed for. It was submitted that it is only the Plaintiff who made an application and the court should not issue any other order. I have looked at the decision and it is easily distinguishable as the Court of Appeal was determining an application for stay where the question was whether the appeal was arguable. Further, the case concerned judicial review remedies which are specific in nature.

18. In this case, there is nothing further to determine save for any consequential orders that flow from the dismissal of the suit. Any of the parties would have made the application for release of the funds and the court would still have to make the determination since it is the only matter left for resolution. Dismissing the application only on the account of the fact that the Plaintiff is the one who applied for an order of release, would impose further costs on the party and waste the courts time as either party would return with a similar application for determination. It is therefore in the interests of justice and within the overriding objective for the court to determine the issue of the joint account once and for all.

19. As I stated earlier, the consent is clear that the money belongs to the 1st Defendant. The 2nd Defendant would have paid it but for the intervention by the Plaintiff through this suit which has now been dismissed. Having dismissed the Plaintiff's application for stay aforesaid, granting the Plaintiff's application to maintain the status quo would be allowing the application for stay through the back door.

20. For the reason I have set out above, I now make the following orders:

(a) The Notice of Motion dated 30th May 2019 is dismissed with costs to the Defendants.

(b) The money held in the Joint Dollar Fixed Deposit Account Number 87422-960541-00 held at Standard Chartered Bank Moi Avenue shall be released forthwith to the 1st Defendant.

DATED and DELIVERED at NAIROBI this 26th day of NOVEMBER 2020.

D. S. MAJANJA

JUDGE

Mr Oronga instructed by Odhiambo Oronga and Company Advocates for the Plaintiff.

Mr Kariuki instructed by Sichangi and Company Advocates for the 1st Defendant.

Mr Maweu instructed by Adera and Company Advocates for the 2nd Defendant.

Mr Muthee instructed by Tripleoklaw LLP Advocates for the 3rd Defendant.