



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. CIVIL APPLN. NO. 296 OF 2018

MASTERMIND TOBACCO (K) LTD.....APPLICANT

-VERSUS-

JANE SANGARO OMWENGA.....RESPONDENT

RULING

1. The Applicant herein, **Mastermind Tobacco (K) Ltd**, filed a Notice of Motion dated 30/11/2018 and sought for the following orders: -

1. That this application be certified urgent and heard ex-parte in the first instance for reasons of the urgency.

2. That the Honourable Court be pleased to order stay of execution of the Judgment delivered on 7th November, 2018 by Hon R. Odenyo against the Defendant / Applicant in Migori Chief Magistrates Courts Case No. 2379 of 2015 pending the hearing and determination of this application.

3. That this Honourable Court be pleased to order stay of execution of judgment delivered on 7th November, 2018 by Hon. R. odenyo against the Defendant / Applicant in Migori Chief Magistrate Courts Case No. 2379 of 2015 pending the hearing and determination of this application.

4. That the costs of this application be provided for.

2. The application was supported by the affidavit of **R. M. Mutuma** sworn on 30/11/2018 which detailed the background of the application. It was deponed on behalf of the Applicant that the Applicant had requested for certified copies of the proceedings and judgment to enable it file an appeal but by the time it filed the application none had been provided as the court file was reportedly at the typing pool. To that end, the Applicant did not file the Memorandum of Appeal but a Notice of Appeal which was endorsed by the Deputy Registrar of this Court on 28/11/2018.

3. The Respondent opposed the application by filing a Replying Affidavit which she swore on 07/12/2018. She contended that the Applicant did not place any information before this Court to enable it exercise its discretion and instead filed a very speculative application. She contended that she was a long time farmer and a person of means and she will not have any problem refunding the decretal sum in the event the appeal succeeded. The Respondent prayed that the application be dismissed with costs.

4. Directions were taken and the application was heard by way of written submissions. Both parties filed

their respective submissions on their rival positions and referred to several judicial decisions.

I have carefully considered the application and the submissions as well as the judicial decisions before me. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** gives the conditions precedent to granting a stay of execution order. The conditions are that the Applicant must demonstrate that it will suffer substantial loss unless the order is made, the application is made without any unreasonable delay and the Applicant offers security for the due performance of the decree.

5. The Applicant deponed that it stands to suffer substantial loss and damage since the suit tobacco was claimed by and was released to a third party, Alliance One Tobacco, after the Respondent delivered it to the Applicant. The Applicant further deponed that it was not aware of the financial ability of the Respondent and that it was apprehensive that it may not be able to get a refund of the decretal sum in the event the intended appeal succeeds. The Applicant further expressed its willingness to give any security which this Court may order.

6. On her part, the Respondent deponed that she was admittedly a long time tobacco farmer versed with the financial muscle to refund the decretal sums in the event the appeal is successful.

7. This Court did not have the advantage of the pleadings, proceedings and judgment of the lower court. I am therefore unable to verify various issues raised including whether **DW1 (Patrick Nandi)** admitted that the Respondent was a long time contracted farmer of the Applicant. Without making a final finding on the issue, I preliminarily find that the issue of the suit tobacco having been claimed and released to a third party poses a possibility of the Applicant suffering loss in the event the position is sustained unless a stay order is granted. The application was also filed 23 days post the impugned judgment and the reasons for the intervening period explained. I hence find that there was no unreasonable delay. The Applicant is further willing to offer security for due performance of the decree. I am therefore persuaded that the Applicant has made a good case for the grant of the orders. The Applicant shall however provide security.

8 As I come to the end of this ruling, I must point out that there was serious variance between the interim orders granted by this Court on 03/12/2018 and the orders extracted. It is for good order, fair play and in the interest of justice that the credibility of the Court process is highly protected and preserved. To that end I therefore call upon all parties to be more vigilant when extracting orders of the Court.

9. By striking a balance between the fact that the Respondent is entitled to enjoy the fruits of the judgment on one hand and the fact that the Applicant is also entitled in law to appeal the impugned decision on the other hand, I will make the following orders: -

(a) The Applicant is hereby granted leave to file and serve a Memorandum of Appeal within 10 days of this order.

(b) There be a stay of execution of the decree in Migori CMCC No. 2379 of 2015 pending the determination of the intended appeal on condition that the decretal sum be deposited in an interest earning joint account in the names of the parties' Advocates within 30 days of this order and in default execution do issue.

(c) In the event of compliance, the Applicant shall file and serve the Record of Appeal within 30 days of (b) above and in default the stay of execution order in (b) above shall stand discharged and the Respondent shall be at liberty to levy execution of the decree.

(d) On compliance of (c) above this matter shall be fixed for directions on 30/05/2019.

(e) The Applicant shall pay the Respondents' Counsel Kshs. 20,000/= as costs of the application within 21 days of the date hereof.

(f) This matter is hereby marked as closed.

10. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of March 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open court and in the presence of: -

Mr. Ouma Nicodemus Odhiambo, Counsel instructed by the firm of Messrs. Odhiambo Oronga & Co. Advocates for the Applicant.

Mr. Gembe, Counsel instructed by the firm of Messrs. Gembe Capis Omollo & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant