



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 119 OF 2018

RAPHAEL ONYANDO.....APPELLANT

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

-VERSUS-

TOM WASHINGTON OMONDIRESPONDENT

FRANK ROBERT ODHIAMBO.....RESPONDENT

PAUL OOKO OGUK.....RESPONDENT

RULING

1. By a Notice of Motion dated 04/02/2019 the Applicants herein sought for the following orders: -

- 1. This application be certified as urgent and it be heard ex parte at the first instance on priority***
- 2. There be an interim stay of execution of the judgment and decree of the subordinate court in Rongo SRMCC No. 224 of 2014 - Tom Washington Omondi Odoyo. Frank Robert Odhiambo & Paul Ooko Oguok v Raphael O. Onyando & South Nyanza Sugar Company Limited, dated and delivered on 16th August, 2018 pending the hearing and determination of this application inter partes.***
- 3. there be a stay of execution of the judgment and decree of the subordinate Court in Rongo SRMCC No. 224 of 2014 - Tom Washington Omondi odoyo, Frank Robert Odhiambo & Paul Ooko Oguok v Raphael O. Onyando & South Nyanza Sugar Company Limited dated and delivered on 16th August 2018 pending the hearing and determination of this appeal.***
- 4. The costs of this application be provided for.***

2. The application was supported by the affidavit of **Maurice Omondi Ng'ayo** sworn on 04/02/2019 which detailed the background of the application.

3. The Respondents opposed the application by filing Grounds of Opposition on 17/02/2019. They contended that the Applicants made a like application before the lower court and a stay of execution of the decree was issued on the condition that the decretal sum be deposited in a joint interest earning account in the names of the Advocates, but the Applicants failed to comply hence they were before this Court with unclean hands.

4. Counsels for the parties requested the Court to determine the application on the basis of what was on record. I have carefully considered the application alongside the opposition. It is true that the Applicants were granted similar orders to those which they are seeking before this Court in the lower court but they failed to comply. That was on 29/11/2018 and the time within which the Applicants were to comply lapsed on 23/01/2019. The Applicants filed an application for enlargement of time to deposit the decretal sum within 21 days and the same was dismissed on 29/01/2019. The Applicants now plead with this Court that they now have a cheque ready in the joint names of the Advocates as security and pray that they be allowed to give such security since they are apprehensive that the Respondents means and material possessions are unknown to them except for the Court decree. The Applicants contend that they are likely to suffer loss if the payments are made and not recovered in the event the appeal succeeds.

5. I have seen a copy of the cheque in the joint names of the Advocates. It is dated 31/01/2019 and it is for Kshs. 2,332,568/25. The Applicants' Counsel forwarded the requisite Account Opening forms to the Respondents' Counsel vide the letter dated 01/02/2019 but it appears that the forms were not acted upon to date.

6. This Court is alive to the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules**. I note that a similar application was made before the lower court but the Applicants failed to comply with the terms. Whereas the Applicants conduct before the lower court must be considered by this Court when exercising its discretion on a like application, I am persuaded that the Applicants demonstrated good faith by inviting the Respondents to open a joint account barely a week after the lapse of the time within which they were to deposit the money. That was also 2 days after the application for enlargement of time was declined by the court.

7. An appeal which raised 28 grounds has already been preferred and only awaits the other processes towards determination. There is a high likelihood that the proceedings before the lower court are by now ready for collection. By striking a balance between the fact that the Respondents are entitled to enjoy the fruits of the judgment on one hand and the fact that the Applicants are also entitled in law to appeal the impugned decision on the other hand, I will make the following orders: -

(a) There be a stay of execution of the decree in Rongo PMCC No. 224 of 2018 pending the determination of this appeal.

(b) Since the Applicants have already prepared the Cheque for the decretal sums in the joint names of the parties' Counsels, the Counsel for the Respondents shall comply with the Applicants' Counsel letter dated 01/02/2019 towards opening of the joint account within 14 days of this order.

(c) In the event that the joint account is not operationalized within 14 days of order (b) above despite compliance by the Respondents' Counsel the stay of execution order in (a) above shall stand discharged and the Respondents shall be at liberty to levy execution of the decree.

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

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

(f) The Applicants shall pay the Respondents' Counsel Kshs. 20,000/= as costs of the application within 14 days of the days hereof.

8. Orders accordingly.

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

A. C. MRIMA

JUDGE

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

Mr. Marvin Odero Counsel instructed by the firm of Messrs. Okong'o Wandago & Co. Advocates for the Appellants/Applicants.

Mr. Okoth Counsel instructed by the firm of Messrs. G. S. Okoth & Company Advocates for the Respondents.

Evelyne Nyauke – Court Assistant