



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL APPEAL NO. 41 OF 2015

AGRICULTURAL DEVELOPMENT CORPORATION....APPELLANT

VERSUS

RAO ENGINEERINGRESPONDENT

R U L I N G

1. The application dated 28/1/2016 principally seeks orders that this Honourable Court be pleased to grant orders that there be stay of execution of the Decree in Kitale Chief Magistrate's Court Civil No. 96 of 2014 under any terms and or conditions of stay that this court may find desirable or necessary pending the hearing and determination of this appeal against the said Decree and that orders of the Lower Court disallowing stay pending appeal be overturned or varied to that extend.

2. According to the affidavits in support, the applicant will suffer substantial loss if the judgment sum is paid as the Respondent would not be able to refund the same in the event that the appeal is successful, thus rendering the appeal nugatory. It is further stated that the appeal has been lodged expeditiously and that the appellant is willing to abide with any reasonable terms set by the court.

3. The application is opposed. It is stated in the replying affidavit that the application has no merits and is a delaying tactic meant to deny the Respondent the fruits of the judgment. That this being a monetary claim, the appeal cannot be rendered nugatory. That the applicant has not shown what substantial loss will be suffered if the application is not allowed as the Respondent is capable of refunding the decretal sum if the appeal is allowed.

4. Under **Order 42 rule 6(2)** of the **Civil Procedure Rules 2010** –

“(2) No order for stay of execution shall be made

under subrule (1) unless –

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

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.”

5. The application has been filed without inordinate delay. The judgment of the lower court was delivered on 19/8/2015. The appeal was filed on 10/9/2015 and the application for stay filed on 26/1/2015.

6. The Respondent has not demonstrated that it is capable of refunding the decretal sum if the appeal is successful. As stated by the Court of Appeal in the case of **National Industrial Credit Bank Ltd –vs- Aquinas Francis Wasike & Another Civil Application Nai 238 of 2005 (UR. 144/2005):-**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – See for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

7. To balance the interests of both parties, I allow the application on condition that the judgment sum be deposited in a joint interest earning account of both counsel for the parties herein within 30 days from the date hereof. In default execution to issue.

B. THURANIRA JADEN

JUDGE

Delivered and dated this 23rd day of march 2016.

B. THURANIRA JADEN

JUDGE