



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 45 OF 2011**

**IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(4)  
OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS AND  
CONSTITUTION UNDER ARTICLE 22(4), 24, 27, 35, 40, 46, 47, 50 AND 10 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: MSA HCC NO. 652 (OS) OF 1988 AND MSA HCC NO. 41 OF 2009**

**BETWEEN**

**FOUR FARMS LIMITED.....PETITIONER**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....RESPONDENT**

**AND**

- 1. THE REGISTRAR OF TITLES**
- 2. MILFAN DEVELOPERS LIMITED**
- 3. PATBON INVESTMENTS COMPANY LIMITED**
- 4. ALICE GITHERE**
- 5. MARY WACEKE MUIGAI**
- 6. LAURIAN MKALA**
- 7. JANE GITHERE**

8. JOHN NGARA MUGO
9. REGINA WAIRIMU THAARA
10. REV. TEE RUYA NALO
11. KENNEDY MWANGI
12. JANE NJOKI GITAU
13. ANN W. WARUINGE
14. FENOSA HOLDINGS LIMITED
15. GATANNA ENTERPRISES LIMITED
16. JUSTUS MULWA NDUYA
17. ANDREW MUGAMBI
18. NDATAANI ENTERPRISES LTD.....INERESTED PARTIES

### RULING

1. In its Notice of Motion dated 19<sup>th</sup> May, 2015 and filed on 20<sup>th</sup> May, 2015, Four Farm Limited, the Applicant, sought three orders -

- (1) leave to appeal against the Ruling of this court delivered on 7<sup>th</sup> May, 2015 dismissing the Applicant's Reference on a Taxation;
- (2) a stay of execution of the orders issued by this court in that Ruling;
- (3) the costs of the Application be provided for.

2. The Application was supported by the Affidavit of Priscilla Onesmus, counsel for the Applicant, and reiterated in the grounds on the face of the Application –

- (a) the applicant is dissatisfied with the court's finding that the Reference has no merit;
- (b) that the applicant has arguable grounds of appeal on points of law and is therefore deserving of such leave;
- (c) the Respondent would suffer no prejudice if the orders sought herein are granted;
- (d) that the intended appeal would be rendered nugatory and thereby occasion miscarriage of justice;
- (e) it is just and equitable in the circumstances of this case that the orders sought be granted.

3. The application was however opposed by the Interested Party's counsel. In the grounds of opposition dated and filed on 15<sup>th</sup> July, 2015, the Interested Party contends **inter alia** that –

- (a) there is no right of appeal arising in Ruling on Reference under rule 11 of the Advocates

Remuneration Order on the Ruling of 7<sup>th</sup> May, 2015;

- (b) there is therefore no reason for staying the execution;
- (c) the application is frivolous, vexatious and an abuse of the court process;
- (d) the application is being used to delay and forestall recovery of taxed costs, hence abusing the process;
- (e) that the Petitioner's/Applicant's conduct as shown on record so far shows a pattern of intention to cause unwarranted delay.

4. In addition to the Supporting Affidavit and grounds, on the part of the Applicant, and Grounds of Opposition on behalf of the Interested Party counsel filed submissions for and against the Application.

5. The only issues raised by the Application and the Grounds of Opposition is whether the stay of execution should be granted, and if so, on what terms.

6. For the Applicants it was urged that a stay of execution should be granted because it is a general principle to do so. Counsel relied on the decision of the Court of Appeal in **BUTT VS. RENT RESTRICTION TRIBUNAL [1982] KLR 417** in which the court held that –

**“the general principle in granting or refusing a stay is that a stay must be granted so that an appeal may not be rendered nugatory should the appeal reverse the Judge’s discretion. Further a stay may not be refused merely because in the Judge’s opinion a better remedy may become available to the applicant at the end of the proceedings.”**

7. Reliance was also placed upon the decision of Nambuye J (as she then was, now Judge of Appeal), in the case of **REPUBLIC VS. SENATE STUDENTS DISCIPLINARY COMMITTEE, KENYATTA UNIVERSITY & ANOTHER [2008] eKLR** that V.A.T. is not payable upon a Party and Party Bill of Costs.

8. On their part counsel for the Interested Party urged that whether to grant a stay of execution is a discretionary matter depending upon the circumstances of each case. Counsel relied on the decision of the court in **NORTHWOOD SERVICE LIMITED VS. MAC & MORE SOLUTIONLIMITED [2015] eKLR** and the provisions of Order 42 rule 6(1), (6) of the Civil Procedure Rules. It was this counsel’s submission that the Applicant had not satisfied the condition for grant of a stay of execution under those rules.

9. I have considered the respective counsel’s arguments, and render my opinion in the paragraphs following.

10. **Firstly**, as to whether an appeal would rendered nugatory is a ground for a stay of execution under Rule 5(2) (b) of the Court of Appeal Rules 2010, and is available in that court where an appeal has been filed in accordance with the Rules of that court. As a ground for a stay in this court, it fails, and I so hold.

11. **Secondly**, for a stay in this court, an Applicant will comply with the conditions laid down in Order 42 rule 6(2) of the Civil Procedure Rules namely –

**“6(1) There will be sufficient cause;**

**6(2) No order of 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;**
- b. **the application (for stay of execution) has been made without unreasonable delay; and**
- c. **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.”**

12. Though the authority of **BUTT VS. RENT RESTRICTION TRIBUNAL** lays down a principle that leave to appeal should generally be granted lest an appeal be rendered nugatory were the appellate to reverse the Superior Court’s order or decree, this principle does not suggest that such leave is granted as a matter of course. An applicant must show sufficient cause to enable the court to exercise its discretion, particularly where the rules specifically require leave of the court to appeal.

13. An appeal to the Court of Appeal from a Ruling of this court arising from a Reference under Rule 11(3) of the Advocates (Remuneration) Order requires leave of this court to appeal to that court. For this court to grant such leave, the Applicant is required to establish cogent reasons to enable the court to exercise this special jurisdiction. In addition to fulfilling the statutory conditions in Order 42 rule 6(2) (supra), (substantial loss will be suffered by the applicant unless a stay is granted, provision of security, and that the application is brought without unreasonable delay), the court will also need to be satisfied that the jurisdiction is not being invoked to delay or frustrate another litigant who has been awarded costs, nor should the jurisdiction be used for academic purposes nor to satisfy a litigant’s curiosity or idiosyncrasies.

14. Considering the application as a whole, the proposed or intended appeal is purely academic and appears to be for no other purpose than to delay and/or frustrate the Second Interested Party. There is no draft of Intended/Proposed Appeal. It is therefore not possible to discern an existence of any point of law being raised.

15. I agree with counsel for the Second Interested Party that the application herein in so far as it seeks a stay of execution pending the hearing and determination of the intended/proposed appeal is comparable to an application seeking a stay of execution of a monetary decree pending an appeal. In this regard therefore, the Applicant is required to satisfy the court that substantial loss will result if a stay is not granted, and if such loss were established, what security the court would impose to ensure the final decree if the intended appeal is not successful, is satisfied.

16. In **M/S PORTREITZ MATERNITY VS. JAMES KARANGA KABIA (cited in NORTHWOOD SERVICE LIMITED VS. MORE SOLUTION LIMITED [2015]eKLR**, the court said –

**“the right of appeal must be balanced against an equally weighty right of the Plaintiff to enjoy the fruits of the Judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”**

17. In an application for leave to appeal, the court is entitled to assess whether the proposed/intended appeal raises any arguable point. As already stated above, the Applicant has not annexed any draft Memorandum of Appeal. The court is therefore not satisfied as to which points will be taken on appeal. For this reason too, the leave ought not to be granted.

18. In summary, this court is not satisfied that the Applicant will suffer any loss or substantial loss. None has been established. The successful litigant is entitled to fruits of its Judgment, and should not be frustrated by applications veiled as appeals but intended to delay and frustrate a successful litigant. There has been no proof that if the costs were paid, and the appeal were allowed, the Interested Party would be unable to refund.

19. For these reasons, I decline to grant leave to appeal, and the Applicant’s Notice of Motion dated 19<sup>th</sup> May, 2015 and filed on 20<sup>th</sup> May, 2015 is dismissed with costs to the 2<sup>nd</sup> Interested Party.

20. It is so ordered.

**Dated, Signed and Delivered in Mombasa this 15<sup>th</sup> day of March, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Mr. Karega holding brief for Ms. Onesmus for Applicant

Mr. Ngari holding brief for Otieno for 2<sup>nd</sup> Interested Party

Mr. Ngari holding brief for Ms. Lutta for Respondents

Mr. Silas Kaunda Court Assistant