



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

**CIVIL APPEAL NUMBER 213 OF 2012**

**FORMULA FARM FEEDS LTD.....APPELLANT**

**VERSUS**

**PRIMESOFT SOLUTIONS LTD.....RESPONDENT**

*(Appeal against the ruling delivered by Hon. F. Kombo-Principal Magistrate, Nakuru on 30<sup>th</sup> November 2012)*

**RULING**

1. By a ruling of the trial court delivered on the 30<sup>th</sup> November 2012, the Appellant's defence was struck out and judgment entered for the Respondent(plaintiff) as prayed in the plaint. Being aggrieved by the said ruling the appellant, preferred the present appeal by its Memorandum of Appeal filed on the 9<sup>th</sup> May 2013 but dated 13<sup>th</sup> December 2012. Following the said ruling the Respondent took out execution proceedings of the courts decree, but upon application by the Appellant, on the 26<sup>th</sup> April 2013 the trial court declared the said execution null and void, and denied an order of stay of execution to the appellant. At the time of the denial of stay orders, no appeal had been filed.

2. By this application dated 9<sup>th</sup> May 2013 the Appellant seeks orders of stay of execution pending hearing and determination of the appeal yet to be filed. In the affidavit in support, the applicant states that it has a good defence and prays for a chance to be allowed to defend itself against the respondents claim subject of the appeal where its defence was struck out.

The appellant states that it has deposited a sum of Kshs.250,000/= as security for the due performance of the decree as ordered by the court, that a *prima facie* case has been established and that execution of the decree would render the appeal nugatory should it be successful.

3. In opposing the application, the respondent filed grounds of opposition on the 22<sup>nd</sup> May 2013 stating that the application is defective and devoid of merit as the applicant has not fulfilled requirements under **Order 42 Rule 6 of the Civil Procedure Rules**. No replying affidavit was filed.

It was submitted that the Respondent is able to repay the decretal sum should the appeal be unsuccessful, and the decree being a money decree, no stay of execution orders should to be granted.

4. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** sets down the conditions that the court ought to satisfy itself before granting stay orders; that

*(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 be ultimately be binding on him has been given by the applicant.”*

5. Where execution of money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent have to be considered.

I have considered submissions by both counsel. There is no allegation that the Respondent will be unable to repay the decretal sum if paid.

The appellant in its appeal has raised its fundamental right to be heard on its defence. While it is a condition for orders of execution to be stayed, the court must be satisfied that the appeal has good chances of success.

Citing the case **Charles Budi Okero -vs- National Industrial Credit Bank Ltd**, the court will go outside the conditions found under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** to satisfy itself that the applicant will not be denied its rights to be heard on its defence under the provisions of **Sections 1A and 1B of the Civil Procedure Act**. It is a tenet of Justice.

6. I have perused the grounds upon which the appeal is based, though not trying to determine the merits of the same, it is evident that this application is based on the grounds set therein. There is no doubt that the application was filed without undue delay. On substantial loss, the appellant has not shown what loss it would suffer if application is not allowed, nor that the respondent will be unable to refund the decretal sum, said to being the region of Kshs.433,344/=. Likewise, the respondent has not shown its financial position to persuade the court that it would indeed be able to repay the said sum should the appeal be successful.

To that extent, the court will exercise its discretion and find that no loss would be occasioned to either the applicant or the respondent if an order of stay of execution is not granted.

7. On the more important condition for provision of security for the due performance of the decree, the appellant has already deposited a sum of Kshs.250,000/= in court as ordered on the 10<sup>th</sup> May 2013. It is ready to deposit more should the court order so.

Under **Order 42 Rule 6(2) Civil Procedure Rules**, it is the court that in exercise of its discretion, ought to order what kind of security the applicant should give as may ultimately be binding on the applicant. This ensures that the court's discretion is not fettered. See James **Wangala & Another -vs- Agnes Naliaka Cheseto (2014) e KLR**.

8. The court has noted that the Record of Appeal is yet to be filed since November 2012. The stay order sought, if granted, will keep the respondent out of enjoyment of the decretal sums. I have stated that justice ought to be dispensed to all in equal measure.

The appellant must take positive steps to prosecute the appeal without further and unnecessary delay – and in any event, the Record of Appeal is ordered to be filed within 90 days of this ruling. This direction is being issued pursuant to the discretion of the court and furtherance to the overriding objectives expressed in **Section 1A and 1B of Civil Procedure Act**.

9. For the above reasons, the application dated 9<sup>th</sup> May 2013 is allowed upon the following terms and conditions:

*(1) That the applicant shall provide further security for the due performance of the decree*

*in the sum of Kshs.200,000/=.*

*(2) That the sum of Kshs.250,000/= already deposited in court as security shall be released to the Appellant and together with the additional sum of KShs.200,000/=, making a total of KShs.450,000/= shall, within a period of 45 days from the date of this ruling, be deposited in an interest earning account an reputable Bank, to be agreed upon by the parties, in the joint names of the advocates for the Appellant and the Respondent.*

*(3) That failure to abide by the terms of this ruling the stay within the time frame given, the order of stay shall automatically terminate.*

*(4) That the appellant shall prepare and file the record of Appeal within a period of hundred(100) days from the date hereof failing which the Appeal shall stand dismissed for want of prosecution under the provisions of **Order 42 Rule 35(2)**.*

*(5) Costs of the application shall be costs in the cause.*

**Dated, signed and delivered in open court this 21<sup>st</sup> day of April 2016**

**JANET MULWA**

**JUDGE**