



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 218 OF 2015

ARAFCO AGRICULTURAL INTERGRATION

COMPANY LIMITED.....PLAINTIFF

=VERSUS=

HASSAN BABAKAR OSMAN.....DEFENDANT

R U L I N G

1. What is before me is the Application by the Defendant/Applicant dated 16th May, 2016 in which he is seeking for the following orders:-

(a) THAT pending the hearing and determination of the Application (sic), there be a stay of execution of the orders of the Ruling delivered on 13th May, 2016 pending the Appeal.

(b) THAT the costs of the application be costs in the Appeal.

2. The Application is premised on the grounds that if execution pending appeal is not stayed, the Appellant's appeal will be rendered nugatory and the Defendant's properties "including heavy movable and immovable will be destroyed by the Respondent who has no property on the ground."

3. The Application is also premised on the ground that the Defendant/Applicant will suffer substantial loss if an order staying execution is not granted.

4. In his Affidavit, the Defendant/Applicant deponed that the Ruling of this court substantially concluded at an interlocutory stage the suit; that he has filed an Appeal against the said Ruling and that having invested in the country heavily, he cannot be expected to remove his properties from the suit property within hours.

5. In his Replying Affidavit, the Plaintiff's director deponed that the Applicant has not demonstrated that he has an arguable appeal; that by stating that he has personal properties and machinery on the suit property, he has confirmed that he has been interfering with the Respondent's lease and that the Applicant has not satisfied the conditions for grant of stay of execution pending appeal.

6. The advocates appeared before me on 23rd May, 2016 and made oral submissions.

7. In their submissions, the advocates rehashed their clients' depositions which I have already summarised above. I have considered those submissions and the depositions on record.

8. On 13th May, 2016, I allowed the Plaintiff's Application dated 19th November, 2015.

9. The effect of the orders of 19th November, 2015 were to restrain the Defendant/Applicant or his servants from interfering with the Plaintiff's quiet and peaceful enjoyment of the suit property pending the hearing and determination of the suit.

10. The Defendant has now sought for an order staying those orders pending the hearing and determination of the "application".

11. The prayers in the Application have not only been poorly drafted, but the Application has also been filed under the wrong provisions of the law.

12. The Applicant, in my view, is seeking for an order staying the execution of my orders of 13th May, 2016 pending the hearing and determination of the appeal (not pending the hearing of the Application) pursuant to the provisions of order 42 Rule 6(2) of the Civil Procedure Rules, and not Order 22, 50 and 51 as indicated in the preamble of the Application.

13. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:-

“(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 and that the application has been made without unreasonable delay;

(b) 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.”

14. It is not in dispute that it is the Plaintiff, as a corporate entity, that entered into a Lease agreement with ADC to utilise the suit property for 16 years.

15. If it is true then the Defendant has invested in excess of Kshs.1 billion in the suit premises, then he will not suffer any loss if it turns out that indeed he has the majority shareholding in the company. He will still be entitled in his investment as a shareholder in the Plaintiff's company.

16. In any event, the Defendant has not annexed even a single document to show the movable and the immovable properties that has been put on the suit property.

17. Indeed, there is no evidence by the Defendant to show that he has invested Kshs.1 billion in the suit property as alleged so as to enable the court ascertain if indeed he is likely to suffer substantial loss unless the injunctive order is stayed.

18. As I stated in my Ruling of 13th May, 2016, the Plaintiff owes the Lessor rent arrears in excess of Kshs.10,000,000 and risks being evicted from the suit property.

19. If it is true that the Defendant has invested that heavily in the suit property, it is inconceivable that he is unable to raise the rent that is due and owing to ADC.

20. The Defendant in this matter has also not offered security for the due performance of the order in the event he loses the appeal.

21. In the circumstances, I find and hold that the Defendant/Applicant has not satisfied the conditions for stay of execution of the interlocutory orders pending appeal.

22. For those reasons, I dismiss the Defendant's Application dated 16th May, 2016 with costs.

Dated, signed and delivered in Malindi this 27th day of **May**, 2016.

O. A. Angote

Judge