



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL CASE NO.20 OF 2013

KERICHO TECHNICAL INSTITUTE.....PLAINTIFF/RESPONDENT

VERSUS

FINMAX COMMUNITY BASED GROUP.....1ST DEFENDANT/APPLICANT

CHAIRMAN.....2ND DEFENDANT/APPLICANT

TREASURER.....3RD DEFENDANT/APPLICANT

SECRETARY.....4TH DEFENDANT/APPLICANT

RULING

1. The Defendants/Applicants filed the Notice of Motion dated 27th April, 2015 seeking the following orders;

a. That this application be certified urgent and service thereof be dispensed with at the first instance.

b. That pending the hearing of this Application interpartes or further orders of the court, this court does grant to the Applicant an order of interim stay of execution of the judgment dated 24th March, 2015 and further amended on 22nd April, 2015 by Hon. Justice J. K. Sergon.

c. That pending the hearing and determination of this Application interpartes or further orders of the court, this court does grant to the Applicant an order of interim stay of execution of the judgment dated 24th March, 2015 and further amended on 22nd April, 2015 by Hon. Justice J.K.Sergon.

d. That there be a stay of execution/further execution/sale or any adverse action in execution of the judgment dated 24th March 2015 and further amended on 22nd April, 2015 by Honourable Justice J.K.Sergon, and all consequential orders arising there from pending the determination of the lodged appeal in Nairobi Court of Appeal.

e. That the proclamation notices and/or warrants arising out of this transaction issued on 24th April, 2015 and any other form of execution from the particular transaction of the said date be declared illegal, null and void for the same were issued in the subsistence of the stay period which was yet to lapse and the auctioneer and/or the Plaintiff/Respondent be condemned to pay costs.

f. That the Defendants/Applicants be at liberty to apply for further orders and/or directions as the Honourable Court may deem just to grant.

g. The costs of this application be provided for.

2. Prayers a-c were granted leaving prayers d-g for determination *vide* this Ruling.

The Defendants/Applicants' Case

3. The Notice of Motion is supported by twelve (12) grounds plus the Supporting Affidavit of Everlyne Ng'eno the Defendants/Applicants company legal officer.

4. A summary of the grounds and supporting affidavit is as follows;

(i) This court's judgment delivered on 24th March, 2015 and further amended on 22nd April, 2015 had been appealed against.

(ii) The appeal is arguable and raises serious triable issues and if stay of execution is not granted the Defendants/Applicants stand to suffer irreparable loss and/or harm considering the amount of money involved.

(iii) The Plaintiff/Respondent has already applied for and has been issued with Proclamation Notices.

(iv) The application was made without delay in view of the fact that there was stay of execution by consent of both parties which stay was to last up to 1st May, 2015.

(v) The Defendants/Applicants were not notified of the Ruling date of 22nd April, 2015. They were aware of the Ruling date of 24th April, 2015 as had been indicated on 22nd April, 2015.

(vi) The Defendants/Applicants are ready and willing to abide by all reasonable conditions that the court may impose including depositing a bank guarantee from a reputable bank.

Further, that the Plaintiff/Respondent is a one man institution engineered on a family basis hence would be difficult to refund any money directly advanced to it.

(vii) The Applicant requested that the affidavit by Samuel K. Sang be struck out.

The Plaintiff/Respondent's Case

5. The Respondent filed a Replying Affidavit through Samuel Kiprono Sang who is one of its directors. He states that the Ruling by Hon. Mr. Justice Serگون on 17th April, 2015 was rescheduled to 22nd April, 2015. Notices to that effect were pinned at the door to the open court No.26 where the Hon. Judge sits (annextures SKS I.)

6. He is not aware of any appeal filed by the Defendants/Applicants. Further, that consent for stay of execution was for thirty (30) days starting on 25th March, 2015 and expiring on 23rd April, 2015.

7. The Respondent avers that the money owing has been pending for seven (7) years and the same should be paid forthwith. That there was no proof that the Applicant was able to deposit the amount decreed. He requested the court to freeze A/c No.0102092191200, Standard Chartered Bank belonging to the Applicant until this amount, is settled.

8. The Respondent states that it is a reputable institution.

The Applicants' Submissions

9. Mr. Akenga relied on the grounds in support of the application. He submitted that the proclamation of the applicants' goods was irregular and should be declared a nullity as stay had not lapsed, by the time the goods were proclaimed.

10. He asked the court to strike out the Replying Affidavit as the deponent had not provided any authority as required under Order 9 of the Civil Procedure Rules.

11. The Applicants are not able to deposit cash as suggested by the Respondent as this would paralyze their operations. They opt to deposit a bank guarantee if the court allows them to.

12. The rest of his submissions are based on the grounds and the supporting and further affidavits.

The Respondent's Submissions

13. Mr. Acholla relied on the Replying Affidavit and submitted that notice for delivery of judgment was issued as contained in the Replying Affidavit.

14. He asked the court to deal with any procedural gaps under Article 159 of the Constitution e.g the Replying Affidavit and the issue of the Proclamation.

15. The rest of the submissions are covered by the Replying Affidavit.

Issue for determination

16. I have considered the application, the affidavits, annexures, and submissions. What I find falling for determination is whether the Defendants/Applicants have met the threshold for grant of stay of execution pending appeal.

17. Order 42 Rule 6 (4) of the Civil Procedure Rules provides;

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

A Notice of Appeal filed under Rule 75 of the Court of Appeal Rules dated 15th April, 2015 was lodged at the Kericho High Court Registry by Nyaundi Tuiyott & Co.Advocates on 28th April, 2015. Under Order 42 Rule 6 (4) of the Civil Procedure Rules once such a notice is issued and filed an appeal is deemed to have been filed in the Court of Appeal.

There is evidence that such a notice has been filed at the Kericho High Court Registry. There is therefore no doubt that indeed such Notice has been filed, in the Court of Appeal Registry.

18. Order 42 Rule 6 (2) of the Civil Procedure Rules provides for what must be established before an order for stay of execution pending appeal is granted. These conditions are;

(i) That substantial loss may result to the applicant unless the stay is given.

(ii) That the application has been made without unreasonable delay.

*(iii) That security as the Court Orders for the due performance of such decree or Order that is binding on the applicant has been given by the applicant see **Century Oil Trading Company Ltd vs. Kenya Shell Ltd (2003)1 EA 41 and Mediratta v KCB & Others (2006)2 E.A 194.***

19. When approaching this kind of application the court must always bear in mind that there is a successful party who seriously wishes to enjoy the fruits of his or her judgment. It would not be fair to

deny such a party his/her fruits of the success unless the circumstances really warrant it. I wish to examine each of the conditions as set out in paragraph 18 above.

Application being filed without unreasonable delay

20. The judgment appealed against was delivered on 24th March, 2015. The parties entered into a consent of stay of execution for thirty (30) days.

On 10th April, 2015 an application to amend the judgment was heard and Ruling reserved for 17th April 2015, but was not delivered on the said date. It was later delivered on 22nd April, 2015 in the absence of the Defendants/Applicants.

The Application for stay of execution dated 27th April, 2015 was filed on 28th April, 2015.

This was six (6) days of delivery of the amended judgment. I find this period to be quite reasonable.

Will the Defendants/Applicants suffer substantive loss if the order of stay is not granted?

21. At paragraph 16 of the further affidavit, the applicant aver that the 1st Defendant is a community based institution and execution against it before the appeal is heard and determined would stall its activities and in particular cause unemployment and other injuries to its staff.

Mr. Akenga in his submissions stated that executing the judgment now would paralyze the operations of the defendant.

In his response to this the Plaintiff/Respondent at paragraph 21 of the Replying Affidavit deposed that the 1st Defendant/Applicant is a reputable institution and has a strong financial base.

22. From the pleadings and the record it is clear that the 1st Defendant/Applicant is a community based group, and sponsors students for training. The cause of action herein arose out of such an arrangement for the training of students. The principal sum awarded is Kshs.11,261,901.28 besides the costs and interest. Mr. Akenga placed it as Kshs.15 million. This could be correct.

23. The Defendants/Applicants have filed a Notice of Appeal in the Court of Appeal which notice is deemed to be an appeal under the Court of Appeal Rules. The Defendants/Applicants are seeking another opinion from a higher superior court, against the judgment of this Court.

24. Considering its position and the support it gives to the community if its property is proclaimed and later sold it would be brought to its knees and the essential service it offers to the community would be negatively affected. To my mind this would amount to financial substantial loss. See **Zone Constructions Company Ltd vs. Green field B Constructors KSM H.C.C Appeal No.16 of 2000 LLR 7685.**

Provision of Security for due performance of the decree.

25. The Defendants/Applicants have at paragraph 14 of the supporting affidavit indicated their willingness to abide by all reasonable conditions including depositing a bank guarantee, from a reputable bank.

26. On the other hand, the Plaintiff/Respondent has dismissed this and asked that the Defendants/Applicants account no.0102092191200 Standard Chartered Bank (Branch is unknown) be frozen until the full amount is settled.

Its not clear how the freezing of this account would assist in the settling of the decretal sum.

27. I don't think it is for the parties to determine the kind of security to be given. This is at the discretion of the court after considering all the circumstances of the case.

28. Before making the last orders I wish to mention an issue raised by the Defendants/Applicants on the replying affidavit filed herein. I have seen the replying affidavit sworn by Samuel Kiprono Sang. It is said to offend the Provisions of Order 9 of the Civil procedure Rules.

29. A perusal of the record shows that this deponent testified as a witness of the Plaintiff/Respondent on 23rd July, 2014 and he stated that he runs the Kericho Technical Institute as the Managing Director. This fact was never challenged by the Defendants/Applicants. It is not clear what has suddenly changed about the said deponents position. The Plaintiff is not a corporation for it to have a corporation seal.

30. I therefore find no merit in this line of submission. Another issue raised by the Defendant/Applicant was on the ripeness of execution. The record shows that besides applying for execution of decree on 24th April, 2015 there is nothing produced to show that any proclamation or attachment was done by the Plaintiff/Respondent. Thirty (30) days from 24th March, 2015 (excluding Sundays and Public Holidays brings us to 29th April, 2015.) The alleged Proclamation if any was carried out o 24th April,2015 which was premature.

31. After due consideration of the material before me, I find that the Defendants/Applicants have met the necessary requirement for grant of stay of execution pending appeal as provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules. In the circumstances, I grant the stay pending appeal on condition that the Defendants/Applicants deposit Kshs.5 Million in this Court. This should be complied within 30 days from today.

32. Secondly, for the balance of the decretal sum the Defendants/Applicants will deposit in this court a bank guarantee from a reputable bank within seven (7) days.

33. The Defendants/Applicants are hereby directed to fast track the appeal in the Court of Appeal. Costs of the application to abide the appeal.

Dated, signed and delivered in open court this 16th day of June, 2015.

H.I.ONG'UDI

JUDGE

In the presence of

Mr. Siele for Plaintiff- present

Mr. Kirui for Defendant-present

Kipyegon- court assistant