



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

**HCC NO. 103 OF 2009**

**ELDORET GRAINS LTD ::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

**=VERSUS=**

**NATIONAL CEREALS & PRODUCE BOARD ::::::::::::::::::::::: DEFENDANT**

**RULING**

On 8th May, 2012, **Hon. Mr. Justice J.R. Karanja** delivered a Judgment in this case. He held that the Defendant was liable to replace 2108 bags of contaminated white maize which the Plaintiff had purchased from the Defendant. In the alternative, the learned Judge ordered the Defendant to pay to the Plaintiff the sum of **Kshs 3,689,000/=** which was the equivalent monetary value of the 2108 bags of maize.

The Defendant was also ordered to pay the costs of the suit.

Being dissatisfied with the Judgment, the defendant filed a Notice of Appeal on 17th May, 2012.

The Defendant has now come to this court, asking for a stay of execution pending the hearing and determination of the appeal.

It is the Defendant's contention that its appeal was arguable. And because the sums involved are substantial, the defendant submitted that if the Plaintiff was allowed to carry on with the process of execution of the Decree, the appeal would thereafter be rendered nugatory.

According to the Defendant, it cannot fail to meet the decretal amount if it was eventually held by the court that the sums set out in the Judgment should be paid to the Plaintiff.

As a sign of its bona fides, the Defendant told this court that it was ready to have the decretal amount deposited in an interest-earning joint account, pending the appeal.

In answer to the application, the Plaintiff submitted that there had been inordinate delay in bringing the application. It was pointed out that whilst the Judgment was delivered on 8th May, 2012, the Defendant waited until July, 2013 before it brought the application.

Secondly, the Plaintiff holds the view that the payment of the decretal amount could not cause any prejudice to the Defendant, as the Plaintiff could easily repay the money if the Defendant's appeal succeeded.

The Plaintiff pointed out that it had originally paid Kshs 35 million to the Defendant, for the purchase of some 20,000 bags of white maize. Thereafter, 2108 bags of maize, which the Plaintiff had

collected from the Defendant, were found to be contaminated and unfit for human consumption. That was the genesis of the case herein.

In those circumstances, the Plaintiff invited this court to find that it had financial ability to repay the money to the Defendant, if the appeal was successful.

In reply to the submissions made by **Mr. Kitiwa**, the learned Advocate for the Plaintiff, the Defendant's lawyer, **Mr. Akenga**, emphasized that the application was not an afterthought. He pointed out that the Notice of Appeal was filed seven (7) days after the Judgment was delivered.

**Mr. Akenga** also informed the court that any delay in filing the application was attributable to the administrative issues which confronted the Defendant, resulting in the absence of any person who could swear the affidavit in support of the application.

Finally, the Defendant asserted that the Plaintiff may have been richer yesterday, but poorer today.

Considering that the appeal is from a decision of this court, it would be completely out of place for me, to purport to assess the strength or weakness of the said appeal. I so hold because any assessment by me could be construed as an attempt to sit on an appeal over a decision of another Judge of concurrent jurisdiction.

However, I note that the Plaintiff did not appear to challenge the Defendant's contention, that the appeal was arguable. I therefore presume that the Plaintiff conceded, that the appeal was arguable.

But why did the Defendant wait for more than 12 months before seeking an order for stay of execution? By waiting for that long, was the Defendant guilty of inordinate delay?

The record shows that the Judgment was delivered on 8th May, 2012, before the High Court at Kitale. On that date, the Defendant was represented, whilst the Plaintiff was absent.

After the Judgment was delivered, the Defendant sought and was granted an order for stay of execution for a period of 30 days.

On 17th May, 2012, the Defendant lodged a Notice of Appeal.

Thereafter, on 21st May, 2012, the Defendant wrote to the learned Deputy Registrar, asking for certified copies of the proceedings and of the Judgment, to enable it compile the Record of Appeal to the Court of Appeal. The letter asking for the certified proceedings and Judgment was copied to the Advocates for the Plaintiff.

On 17th April, 2013, the Plaintiff changed its advocates, from **Chemitei & Company Advocates** to **Gicheru & Company Advocates**.

The Plaintiff's new lawyers filed the Bill of Costs in court on 24th April, 2013. The Bill of Costs was taxed on 14th May, 2013, when the learned taxing master set the 28th of May, 2013 as the date when the Ruling on costs would be made.

However, the Ruling was ultimately delivered on 24th June, 2013. During the delivery of the Ruling, the Defendant's advocate was absent.

It is after the Defendant became aware of the Ruling on taxation that the application for stay of execution was filed, on 15th July, 2013.

In my considered view, the period to be taken into account when determining whether or not there had been inordinate delay is the period from when the Defendant became aware of the Ruling on taxation.

The reason for that is that although the Judgment was delivered on 8th May, 2012, execution could not issue immediately thereafter. Execution of a Decree can only proceed after the Bill of costs had been taxed or after the Decree-Holder has obtained the leave of the court to proceed with execution prior to taxation.

Therefore, had the Defendant sought an order for stay of execution prior to the issuance of the Certificate of Taxation, it could have been premature.

In the circumstances, there was no inordinate delay by the Defendant, in seeking the order for stay of execution.

If the execution is not stayed, would the Defendant suffer irreparable loss?

The Defendant appears to admit that at the time the parties herein entered into their contract, the Plaintiff was a company of financial means. Of course, the Plaintiff demonstrated its financial ability by paying Kshs 35 million to the Defendant.

On its part, the Defendant was able to refund to the Plaintiff over Kshs 15 million, after the plaintiff asked for it. That implies that the Defendant had not simply “eaten away” the money which the Plaintiff had paid over to it. In effect, the Defendant was also a Company with a demonstrable financial ability.

But the said abilities of both companies was as at the year 2008. Neither of the two companies has provided this court with materials to demonstrate their current financial muscles.

Having taken into account all the issues raised, I have come to the conclusion that the Justice of the case calls for an order for stay of execution, coupled with adequate security.

I therefore order that there shall issue forthwith an order for stay of execution pending the hearing and determination of the appeal. The stay shall be conditional upon the defendant providing the decretal amount, including the taxed costs, within the next 30 days. The said sums will then be held in a joint interest-earning account, to which the advocates for the two parties will be signatory.

As regards the costs of the Application, I order that the same shall abide the outcome of the appeal. If the appeal succeeds, the Defendant will have the costs. But if the appeal fails, the costs of this application shall be paid by the Defendant.

Finally, the Defendant will pay the Court Brokers charges for the execution process which has now been stayed. The said costs are to be taxed, unless the same is agreed upon between the Defendant and the Court broker.

**DATED, SIGNED AND DELIVERED AT ELDORET,**

**THIS 17TH DAY OF JANUARY, 2014.**

**FRED A. OCHIENG**

**JUDGE.**