



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL CASE NO. 30 OF 2013

(CONSOLIDATED WITH 31, 32, 34, 35 & 36 OF 2013)

TIBERIO NYAGA..... 1ST APPELLANT

JOHN MURIITHI NJAGI..... 2ND APPELLANT

WAWERU GACUVA..... 3RD APPELLANT

HARRISON NJIRU.....4TH APPELLANT

PATRICK NJERU MUNYI.....5TH APPELLANT

SILVANO NDWIGA.....6TH APPELLANT

VERSUS

NEMBURE FARMERS CO-OP SOCIETY LTD.....RESPONDENT

(Being an Appeal from the Award granted by the Co-operative Society's Tribunal Case No. 65, 64, 68, 71, 72 & 63 of 2008 64 on 18/1/2012)

RULING

This is the Notice of Motion dated 22/11/2013 brought under Order 42 Rule 6(2)(b) of the Civil Procedure Rules where the appellants/applicants in HCA 30, 31, 32, 34, 35 & 36 of 2013 are asking the Court to vary the conditions of stay from **cash deposit** to security deposit. They state that they are peasant farmers and cannot raise the case deposit the Court ordered them to deposit.

The Respondents filed grounds of opposition in all files save for HCA No. 31/2013. The grounds are dated 16/12/2013. The Respondents argue that the application is a Review and ought to have been brought under Section 80 of the Civil Procedure Act. And even if it had been so filed, it does not meet the two conditions under which Review may be granted.

Both Counsels appeared before me on 5/2/2014 and made their oral submissions. I have considered them alongside the application, supporting affidavits and grounds of opposition. It is clear that an application for stay of execution was made before this Court and a Ruling delivered on it on 14/11/2013. This application was filed one week later.

The gist of the application is that the applicants are not in a position to pay the deposit of Shs.150,000/= as one of the conditions of stay of execution. They want the terms varied. To me that is a Review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and not another

application for stay under Order 42 of the Civil Procedure Rules.

I believe the substance of the application is very clear to the Respondent's Counsel even though the application did not come under the correct provisions of the law. Ms. Wairimu has also explained her failure to file and serve the application in respect of HCA NO.31/2013. She had both copies of the application in her file as she made her submissions. Counsel for the Respondents knew the series of these files. It would have been noble of him to contact Ms. Wairimu and inform her he had not received an application for No. 31/2013 in the same series and was taking it that the appellant/applicant therein was depositing the Shs.150,000/= as ordered. That would have worked the magic! Since the Counsel has shown the Court his application, I will proceed to deal with the application in respect of all the files on condition that the application be filed and the ground of opposition which are similar in all files apply also to HCA 31/2013. Under Order 45 Rule 1(b) of the Civil Procedure Rules the conditions for grant of Review are 3 and not 2 viz

I. *Discovery of new or important matter or evidence*

or

II. *Apparent error on the face of the record* *or*

III. *Any other sufficient reason*

The applicants are falling under condition No. (ii) being that they are peasant farmers and cannot afford to raise Shs.150,000/= but they have land whose titles they are ready and willing to deposit in Court. Since I have extensively dealt with the issue of the stay of execution, I will only deal with the element of the variation of the conditions.

This court did consider that the applicants are farmers and they also market their produce. And that is the reason why the Court did not ask each of them to deposit the sum adjudged of them. The deposit would signify a seriousness on their part to this process. In doing so the Court takes into account the fact that it does not also give terms and conditions which are so unreasonable that they would amount to denying the applicants the stay of execution sought. And bearing all this in mind I am inclined to vary the conditions in the following manner.

There shall be stay of execution on condition that each applicant deposits cash Shs.50,000/= in Court together with security of immovable property in the sum of Shs.300,000/=. The Deputy Registrar to assess the security before it is acceptable. The said deposits should be made within 30 days from today.

I also wish to reiterate that there has been no disobedience of Court orders as the interim orders of 1/10/2013 were on 5/12/2013 extended to 5/2/2014 by consent of counsels. Mr. Nsekhe has yet to furnish this court with the Rules directing that this appeal be heard by two Judges. This should be done before the appeal is admitted for hearing.

This Ruling applies to all the related appeals.

Cost in cause.

DELIVERED, SIGNED AND DATED AT EMBU THIS 4TH DAY OF APRIL 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Wairimu for Appellants

Njue CC