



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 103 OF 2009

ELDORET GRAINS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

NATIONAL CEREALS & PRODUCE BOARD.....DEFENDANT/APPLICANT

RULING

The application for determination of the Notice of Motion dated 21st February, 2014. It is brought under Article 159 (2) (a) of the Constitution, Order 42 Rule 64, Order 51 Rule 1, Order 50 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act and all other enabling provisions of the law.

The Defendant prays for the following Orders;

1. There be stay of attachment and/or sale of the proclaimed properties as the proclamation notice dated 19/2/2014 pending the hearing and determination of this application.
2. That there be interim stay of further execution of the judgment and decree herein pending interpartes hearing and determination of this application.
3. That this honourable court be pleased to enlarge and or extend time to enable the Defendant/Applicant comply with the court's order issued on 17.1.2014 in respect of stay of execution of the judgment and decree pending determination of the appeal filed herein.
4. That such other orders as this court may deem fit to grant.

The application is premised on the following grounds:

1. The Appellant being aggrieved by the judgment delivered by honourable Justice Karanja on 31.5.2012 in Eldoret HCCC No. 103 of 209 appeals against the same to the court of appeal.
2. The Appellant then filed an application for stay of execution in the High Court at Eldoret which application was heard and ruling delivered on 17.1.2014 as follows.

“There be stay of execution for 30 days on condition that the entire decretal sum plus taxed costs is deposited in a joint interest earning account in the names of both counsels on record within the 30 days stay period.”

3. In compliance with the aforesaid court order of 17.1.2014, the application has had to have the amounts transferred though RTGS as it exceeds one million although the process has taken a while

due to bureaucracies involved with the parastatal.

4. The slight delay in having the money deposited was not deliberate as it requires the approval of the board hence could not execute the same in good time.
5. We have since written to the Respondent's Advocates for bank details which has not been availed.
6. The Appellant is still interested in proceeding with the appeal and are ready and willing to abide with honourable court's orders.
7. The delay was not calculated and/or unreasonable and that the Appellant should not be removed from the seat of justice on mere technicalities.
8. It is in the interest of justice that this application be allowed.
9. The Defendant/Applicant is poised to suffer substantial loss damages and prejudice in the event this application is not allowed as the Respondent has commenced execution.

The Supporting Affidavit was sworn by Patrick M. Karanja the acting board secretary of the Defendant on 21st February, 2014 which expounds on the grounds on which this application is based, and a Further Affidavit also sworn by the said Patrick Karanja on 7th March, 2014.

The application is opposed vide a Replying Affidavit sworn by one Ali. A.M Albeity, the administrator of the Plaintiff company on 27th February, 2014. The deponent stated that the ruling of the court on 17th January, 2014 required the Applicant to deposit the decretal sum within 30 days of the ruling. When it failed to do so, the execution proceedings began. According to the Respondent, the Applicant has not demonstrated any good reason why it did not comply with the stated court orders.

The application was canvassed before me on 12th March, 2014. Learned Counsel Mr. Songok and M/s Mbugua submitted on behalf of the Applicant and Respondent respectively.

The main ground advanced in support of the application is that the defendant having been granted a conditional stay pending appeal failed to meet the conditions within the stipulated time and is now seeking the enlargement of the time within which to comply.

The order was given in a ruling delivered on 17th January, 2014 which required the Applicant to provide the decretal amount including the taxed costs within 30 days. The said sum was to be held in a joint interest earning account to which the advocates for the two parties would be signatory.

The Applicant argued that the delay in complying with the said order was not deliberate but was occasioned by the bureaucracy in the accounting system of the Defendant. Any funds that require a release must be approved by the board in line with public finance management policy so as to promote transparency, accountability, equity, fiscal discipline and efficiency in the use of public funds.

The Applicant argued that since the requisite approval has since been done for the money to be transferred into the joint account, it should not be denied justice in pursuing the intended appeal.

The Respondent on the other hand submitted that the Applicant was accorded ample time within which to comply with the court order of 17th January, 2014 but failed to do so. And as the execution process had begun, the same should not be halted. In addition, it submitted that no good reasons were advanced as to why the order was not complied with, reasons wherefore, it urges the court to dismiss the application.

Having considered the respective submissions, I consider the issue for determination to be, whether the court should enlarge time within which the Applicant shall comply with the orders given on 17.1.2014.

By virtue of the provisions of Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, the court, may, in exercise of its discretion, enlarge a fixed period of time for undertaking an action.

Section 95 reads as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed of this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”.

Order 50 Rule 6 on the other hand reads:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

Section 63(e) of the Civil Procedure Act also donates discretionary powers to the court to “ make such other interlocutory orders as may appear to the court to be just and convenient”

The discretionary powers of the court must be exercised judiciously and where the interest of just shall be met. The Applicant must therefore demonstrate that he/she brought the application in good faith and that there are sufficient grounds to warrant the orders sought.

In the instant case, the Acting Board Secretary of the Defendant has given convincing reasons as to why the decretal sum plus the taxed costs could not be deposited in the joint interest earning account on time. This court is also alive to the fact that a public body is accountable to the public for use of its funds in the interest of accountability. This is why the Defendant could not release any funds or transfer the same into the joint account before all the necessary procedures requiring the release of its funds were adhered to. One of these requirements was the approval of its board. Of course the board needed to be summoned which was not a one day event.

In this respect, I have no doubt in my mind that the delay in depositing the amount was not deliberate or was meant to delay the administration of justice.

I also note that, as at now, the sums required to be provided have already been transferred into the account of the Defendant's Advocates. Those sums should however be transferred into a joint account as ordered by the court.

The Applicant has cited Order 42 Rule 64 of the Civil Procedure Rules. The said Order 42 has 35 Rules. That anomaly ought to have been corrected on time. Nevertheless, it does not affect the substance of the application.

In the upshot, I allow the application. I also order that within 14 days of this ruling, the sum of Kshs 3,925,473.00 being held by the Defendants' Advocates be transferred into a joint interest earning account in the names of the advocates for both parties. I give no orders on the prayer for a stay of execution. This is because, the stay of execution pending the hearing and determination of the appeal was to remain in force conditional to the Applicant providing the decretal sum and taxed costs within the 30 days. This period of compliance having been enlarged in this ruling, means that the stay of execution would only cease if the decretal sum is not now deposited in the joint account within 14 days.

Costs of this application shall be borne by the Applicant.

DATED, SIGNED and DELIVERED at ELDORET this 24th day of July 2014.

G.W NGENYE-MACAHRIA

JUDGE

Miss Kipseii holding brief for Songok for Defendant/Applicant

Mr. Wanyonyi holding brief for Kitiwa for Plaintiff/Respondent