



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

HCCA. NO. 27 OF 2008.

JAMES NDIRANGU NG'ANG'A.....APPELLANT/RESPONDENT

=VERSUS=

BUSIA DAIRY FARMER CO. SOCEITY.....RESPONDENT/APPLICANT

R U L I N G .

JAMES NDIRANGU NG'ANG'A , hereinafter referred to as the Applicant, filed the notice of motion under certificate of urgency dated 14th July, 2014 through M/S. Kiplenge & Kurgat Advocates for an order that the “ appeal stands dismissed” with costs. The application is based on six grounds on the face of the application summarized as follows:-

- a. That after the appeal was filed on 12th November, 2008, a consent order was recorded on 8th January, 2009 for stay of execution on condition that the Appellant deposited in the joint names of the parties advocates Kshs.400,000/=.
- b. That the appeal is yet to be prosecuted and the Appellant has not deposited the money contrary to the consent order of 8th January, 2009.
- c. That the Appellant filed an application for security of costs in which the court ordered Kshs.400,000/= to be deposited in an interest earning account in the joint names of the parties advocates in 21 days, and in default the appeal to stand dismissed.
- d. That the Appellant defaulted and the appeal therefore stands dismissed.

The application is also based on the supporting affidavit of James Ndirangu Ng'ang'a sworn on 14th July, 2014.

The application is opposed by the Appellant, **Busia Dairy Farmers Co-operative Society**, through the replying affidavit of Joseph Vitalis Juma sworn on 22nd July, 2014.

During the hearing of the application on 16th September, 2014, Mr. Kurgat and Mr. Juma advocates for the Respondent/Applicant and Appellant/Respondent respectively made their submissions.

The court has carefully considered the grounds on the face of the application , the supporting and replying affidavits and the annexures thereto. The court has also considered the submission by both counsel and find as follows;

1. That on 27th November, 2013, the court allowed the Respondent's/Applicant's application dated 7th August, 2013 in terms of prayer (a). The order was that the Appellant/Respondent was to provide security for costs by depositing Kshs.400,000/= in an interest earning account in a

Commercial Bank agreed between the parties in the joint names of the parties within 21 days and in default the appeal shall stand dismissed.

2. That the deposit was not done until after 5th March, 2014 as evidenced by the Appellant's/Respondent's counsel's letter of the same date attached to the replying affidavit .
3. That the order giving 21 days within which to make the deposit was made on 27th November, 2013. The 21 days expired on the 18th December, 2013.
4. That though counsel for the Appellant/Respondent has indicated that the then counsel for the Respondent/Applicant had by their conduct agreed to the deposit being made outside the 21 days period, there was no written consent to that effect presented to the court.
5. That the Appellant/Respondent did not apply for and obtain the extension of the time before or after the expiry of the 21 days prescribed by the order of 27th November, 2014 in accordance with Order 50 rule 6 of the Civil Procedure Rules. The court notes that even to date there is no application for extension of time to comply with the order of 27th November, 2013 that has been filed in these proceedings by any of the parties.
6. That Order 42 Rule 14 (3) of Civil Procedure Rules allows the court to dismiss the appeal where an order for security of costs is not complied with within the given period. In the instant case, the order of 27th November, 2013 was self executing in that it stated that the appeal would stand dismissed if the Appellant/Respondent failed to comply with the order in 21 days. The decision of the Court of Appeal in ***Pancras T. Swai –vs- Kenya Breweries Limited (2014) eKLR*** which upheld the decision of the High court which had dismissed an application for review of an order to provide security for costs and dismissal of the suit for failure to comply with the order of security of costs is relevant. However the following six cases cited by the Respondent's/Applicant's counsel relates to instances where injunction orders were issued and the suits dismissed for remaining without being prosecuted for over one year and therefore not relevant to this matter.

- a. ***Bushasha Lucheri v Joseph Langat Sitenei & Anor[2012]eKLR.***
- b. ***David Mbuvi & Anor v Kenya Ports Authority [2014]eKLR***
- c. ***Eliakim Washington Olweny v Wilson Kobor Mutai & Anor[2013] [eKLR.***
- d. ***John Kennedy Monyoncho & Anor v Charles Ukumu Maluki & 4 Others [2014]eKLR***
- e. ***Leah Nyambura Mburu v Barclays of Kenya Ltd [2012]eKLR***
- f. ***Seifudeen Abdallah Bhai v Zainab Mwinyi [2013]eKLR.***

7. That the Appellant/Respondent has not been diligent since filing the appeal as they would otherwise have complied with the orders of 27th November, 2013 within the time given or moved the court for extension of time.

For reasons set out above, it is the finding of this court that the Appellant's/Respondent's appeal stood dismissed at the expiry of 21 days from 27th November, 2013. The application dated 14th July, 2014 is therefore granted in terms of prayer 2 with costs.

S.M. KIBUNJA.

JUDGE.

DATED AND DELIVERED ON 22ND DAY OF OCTOBER, 2014

IN THE PRESENCE OF; RESPONDENT/APPLICANT, Mr. Titus Wanyola/Chairman for Appellant/Respondent/Mr. Juma for Appellant/Respondent and Mr. Okutta for Kurgat for Applicant/Respondent.

JUDGE.