



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 317 OF 2013

DANIEL GACHOKA MUCHIRAAPPELLANT/APPLICANT

VERSUS

AGRICULTURE FINANCE CORPORATION1ST DEFENDANT

VIEWLINE AUCTIONEERS2ND DEFENDANT

**(APPEAL ARISING FROM THE JUDGMENT OF THE CHIEF MAGISTRATE'S COURT AT
KERUGOYA IN CIVIL CASE NO. 62 OF 2013)**

RULING

The appellant herein seeks orders staying execution of the ruling delivered on 2nd July 2013 in Kerugoya C.M. Civil Case No. 62 of 2013 pending appeal. The same is supported by his supporting affidavit dated 20th August 2013.

The application is opposed and MAINGA EVANS the 1st respondent's Legal officer has sworn a lengthy replying affidavit in opposition to the application.

This application involves the Court's powers under **Order 42 Rule 6 (1) of the Civil Procedure Rules** for granting stay pending appeal. That provision provides that no order for stay of execution pending appeal shall be made unless:-

- a. ***The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
- b. ***Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant***

In KENYA SHELL LTD VS KARUGA 1982 – 88 1 K.A.R the Court said the following with regard to what guides the Court in such an application

“It is usually a good rule if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated, if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented – Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money”.

And in **TERESIA KIMANI VS GITHERE INVESTMENTS LTD H.C CIVIL APPEAL NO.**

944 of 2003, Visram J (as he then was) addressed himself as follows in a similar application:-

“ A stay order does not lie as a matter of course just because one has filed an appeal. One has to demonstrate the likelihood of suffering substantial loss if the order is refused. There is no evidence of substantial loss demonstrated in this application. The applicant must also be willing to furnish security. There is no such offer made”.

In this application now before me, the applicant has deponed in his supporting affidavit that he stands to suffer irreparably and that his appeal may be rendered nugatory. He also says he stands to suffer irreparable loss and damages. However, there is no attempt to demonstrate this loss. The law talks of “**substantial loss**” and an applicant seeking a stay order must place before the Court evidence to demonstrate with clarity, the substantial loss that may ensue if the stay is not granted. It is not enough merely to talk of substantial loss or irreparable loss without providing the Court with evidence that will enable it to make a finding that indeed substantial loss will be occasioned to the applicant unless there is a stay. A Court can only act on the basis of material placed before it and it cannot assume such loss unless the applicant adequately demonstrates what loss he will suffer and that it is indeed substantial. I am afraid the applicant in this Court has not laid before me such evidence.

The applicant also talks of his appeal being rendered nugatory if it were to succeed. The 1st respondent herein is a Statutory Corporation established under Cap 323 Laws of Kenya and it is not suggested that it would be unable to satisfy any decree that would follow should the applicant’s appeal succeed.

Finally, no offer of any security has been made by the applicant and although it is the duty of the Court to order such security, it is a good practice for the applicant seeking such a prayer, as a mark of good faith, to make an offer of security in terms of **Order 42 Rule 6 (2) (b)**.

For the foregoing reasons, I find that this application lacks merit and the same is accordingly dismissed with costs.

B.N. OLAO

JUDGE

31ST OCTOBER, 2013

31/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant/Applicant – present

Respondent – absent

COURT: Ruling delivered this 31st day of October 2013 in open Court.

Applicant present in person

No appearance for respondent.

B.N. OLAO

JUDGE

31ST OCTOBER, 2013