



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HCCC NO. 542 OF 2009

JOSEPH GITHUA MWANGI..1st PLAINTIFF

NICHOLAS MBIYU KAMAU.....2ND PLAINTIFF

CHARLES NDIRITU WAWERU.....3RD PLAINTIFF

R. W. NGUGI.....4TH PLAINTIFF

**(ON BEHALF OF THEMSELVES AND OTHER 20 EMPLOYEES MBOI-L-KAMITI FARMERS
CO. LTD**

VERSUS

MBO-I KAMITI FARMERS LIMITED.....DEFENDANT

RULING

Before me is a notice of motion dated the 4/11/13. The defendant/applicant has brought the application under section 3A of the Civil Procedure Act and Order 22 rule 22, Order 42 rule (6) of the Civil Procedure Rule, seeking the following orders; that the court be pleased to grant a temporary stay of execution of the court’s decree delivered on the 11/10/13 pending the hearing and final determination of the intended appeal.

The application is based on the following grounds; that the ruling was entered against the defendant on the 11/10/13; that the defendant being dissatisfied with the court decree and award intends to file an appeal in the Court of Appeal and has already filed a notice of appeal and memorandum of appeal. That the defendant has an arguable appeal with overriding chances of success, that the applicant will suffer substantial loss unless the stay of execution orders is made. That the plaintiffs are not persons of known means and if the decretal amount is paid to them the appeal will be rendered nugatory as it will be impossible to recover the decretal sum from the plaintiffs should the appeal succeed and that the application has been made expeditiously and without unreasonable delay.

The application is supported by the affidavit of Stephen Kimani Mihiu the defendant’s secretary and a director of the defendant company. It reiterates what is stated in the grounds. He avers in his affidavit that the applicant is ready and willing to abide with such orders as to security for due performance of the award/decreed as the court may order.

The 2nd plaintiff swore a replying affidavit on behalf of the 1st and 3rd plaintiff. He depones that the

previous application that was rejected was one of stay of execution and that the defendant ought to have provided security in terms of depositing the entire amount in court before filing the current application. That the intended appeal and the notice which is filed out of time and without leave is meant to delay finalization of the matter. That the intended appeal has no chances of success as no memorandum of appeal is annexed to assess the reasons upon which it is based.

When the matter was argued in court the applicant’s counsel stated that they are ready to offer security to of 1/3 of the decretal sum which amounts to 10Million, the respondents counsel on the other hand argued that the entire sum should be deposited as the judgement is 3 years old.

I have considered the averments made, the provisions of the law cited by the applicant. On the 12/4/13 the applicant filed a notice of motion under order 22 rule 22 sections 1A and 3A seeking to stay execution of the decree given on the 12/10/10 and also to set aside the consent order filed on the 6/4/10. This is the application Justice Waweru heard and delivered a ruling on the 11/10/13.

The current application seeks a stay pending the hearing and final determination of an intended appeal. A copy of notice of appeal has been filed dated 1/11/13 and a letter seeking certified copy of proceedings. The application is not res-judicata. The issue I have to determine is whether the applicant is entitled to the stay. I am guided by the provisions of order 42 Rule (6) (2) of the Civil Procedure Rule. Order 42 Rule (6) (2) provides that:

(2) No order for stay of execution shall be made under sub-rule (1) 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.

The applicant fears that if the money is paid it may not recover it from the respondent. I note that the application has been made expeditiously and without unreasonable delay after Justice Waweru ruling dated the 11/10/13. A notice of appeal has been filed, considering the circumstances as explained and noting that it is 3 years since the consent judgment was recorded, I will grant the applicant a stay of execution on condition that it deposits the sum of Kshs.30,000,000/- (30 million) in court within the next 21 days, in default these orders shall lapse. Costs of the application are awarded to the respondent.

Orders accordingly.

Dated, signed and delivered this 20th Day of November 2013.

R. E OUGO

JUDGE

In the presence of:

.....Plaintiff/Respondent

..... Defendant/Applicant

.....Court Clerk