



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO.71 OF 1994**

**UKINGONI FARM LIMITED.....APPLICANT/PLAINTIFF**

**VERSUS**

**NGENDELEL KOIYO FARM LTD.....RESPONDENT/DEFENDANT**

**RULING**

The court having entered judgment in favour of the plaintiff and also having dismissed the defendant's counter-claim, the latter filed a notice of appeal to challenge the decision. In the meantime, the parties recorded consent in the following terms, in pertinent part;

**“1. By consent the execution of the decree herein is hereby stayed pending the hearing and final determination of the intended appeal on condition that the taxed costs of Kshs.260,000/= is paid to respondent's advocate in monthly installments of Kshs.50,000/= with effect from 30<sup>th</sup> June 2010.”**

On the 27<sup>th</sup> June 2011 the plaintiff brought an application for orders that the court directs the District Commissioner, Subukia to provide security to Airways Auctioneers and other forms of assistance in effecting execution of the decree. The application was brought on the ground that the defendant had failed to comply with the above consent order while at the same time the defendants have prevented, through their hostility, the execution of the decree by the auctioneers.

The court in granting the application of 27<sup>th</sup> June 2011 ordered that the defendants vacate the suit property within sixty (60) days failing which they would be evicted. The District Commissioner was ordered, in case eviction became necessary to provide security. The defendants have now brought the instant motion dated 24<sup>th</sup> August, 2011 seeking stay of

**“.....execution of the judgment pending the hearing and determination of this application”.**

The application also seeks that the orders issued on 27<sup>th</sup> June 2011 be set aside and/or varied on the following grounds:

- i) the original file was misplaced after the judgment was entered;
- ii) a consent was recorded to stay execution on condition that the defendant paid taxed costs of Kshs.260,000/= by a monthly installment of Kshs.50,000/=;

- iii) due to financial constraints, the defendant defaulted for a few months;
- iv) the defendant was surprised to receive the eviction order issued on 27<sup>th</sup> June, 2011.

In the further affidavit, the defendants have deposed that subsequent to the orders of 27<sup>th</sup> June 2011, they have paid and the plaintiff has accepted Kshs.110,000/= thereby settling the amount in the consent order. They have further deposed that their eviction is imminent as the plaintiff has obtained an eviction order yet their appeal is pending.

The prayer for stay has been spent, the application having been heard *inter partes*. The only prayer falling for consideration is that seeking the setting aside or varying of the orders of eviction issued on 27<sup>th</sup> June, 2011. The application is expressed to be brought under **Order 22 rule 22** of the **Civil Procedure Rules**, which deals with stay of execution in a case where the decree has been sent to another court for execution, clearly not applicable in the situation before me.

The application is opposed by the plaintiff who argues that the defendants were in violation of the consent order having paid only Kshs.150,000/= of the Kshs.260,000/= agreed in the consent. That the defendant having so failed to comply with the consent order, the same lapsed and the plaintiff was at liberty to execute. The court has a wide discretion in an application for setting aside any of its orders.

The consent order in question did not have a default provision. It was payment of the taxed costs by installments pending the final determination of the appeal. Being a consent order, it could only be vacated by the consent of the parties or any other ground upon which a contract can be vacated

Even after the plaintiff filed a replying affidavit in opposition to this application it proceeded to accept the last three installments thereby acknowledging the existence of the consent order or acquiesced.

For the reasons stated the orders of 27<sup>th</sup> June 2011 are hereby set aside as prayed. I make no orders as to costs.

**Dated, Signed and Delivered this 26<sup>th</sup> day of January, 2012.**

**W. OUKO**

**JUDGE**