



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NUMBER 99 OF 2011

KENYA WILDLIFE SERVICES LTD. APPELLANT

VERSUS

DAVID MUTETI. RESPONDENT

RULING

In a suit for compensation, the lower court awarded the Respondent damages. The decretal sum was Ksh.272,034/- with costs and interest. The Defendant/Appellant promptly filed this appeal. At the same time, it filed an application before the trial magistrate seeking a stay of execution of the lower court decree pending the final determination of the appeal.

The record confirms that the lower court granted the stay sought for 30 days but on conditions that: -

a) The appellant/applicant pays and releases to the Respondent/decreed-holder within 30 days the whole judgment sum of Ksh.272,034/-.

b) The parties open a Joint Interest-earning account and deposit in it all the assessed costs and interest accruing therefrom which amounted to Ksh.71,861/-.

The orders of stay once more aggrieved the Appellant who then filed this application even before the 30 days granted by the court expired. The appellant seeks the following orders: -

1. That a stay of execution be granted by this court pending the hearing and determination of the Appellant's appeal.

2. That in the alternative this court do, in the exercise of its powers, review, vary and/or set aside the orders of stay of execution of the lower court dated 20th June 2011 and substitute them with appropriate orders in the interest of justice.

This application is based on the grounds that the execution of the decree by the applicant was premature and therefore unlawful and that the Respondent is made of straw and if the judgment sum of Ksh.272,034/- is paid to him before the determination of the appeal, the likelihood of recovering the same if the appeal succeeds is remote. The appellant also states that it has a good appeal with high chances of

success. Otherwise, the appellant concludes, the appeal if successful will in any case, be rendered nugatory since the Respondents background is otherwise totally unknown.

In response, the Respondent states that the appeal does not have high chances of success. He deposes that although the appellant calls him a man of straw because he earns no monthly salary anywhere, he nevertheless will be able to refund the judgment sum intended to be paid to him under the stay orders. He says that he has a farm at Donyo Sabuk although there is an admission that the farm has no title deed. He further argues that payment of the money to him will not cause any substantial loss to the Appellant and that he has a judgment in his favour whose fruits the Appellant is trying to deprive. The Respondent opposes the judgment sum being deposited in court or bank account, as that will give neither party any benefit.

I have carefully perused and considered the material before me including the arguments in the written submissions of both parties.

It is my view that the fact that the Applicant/Appellant filed a direct application in this court, and not an appeal from the stay of execution order, is not irregular. The applicant sought the intervention of the court through original orders or through a revision of the lower court orders. This is in accordance with order 42, Rule 6 of the Civil Procedure Rules, which gives liberty to this court to consider such application and to make such order thereon as may to it seems just.

I have in passing perused the grounds of appeal and my view is, without making any conclusive decision on them, that they raise arguable issues in the appeal now pending. Secondly, the order to pay the judgment sum directly to the Respondent within 30 days appears to have been made in a hurry and is drastic on its face. The appellant argued that the Respondent's background is not known despite his argument that he is a farmer at Donyo Sabuk. The Respondent admits that he has no title deed to the farm he claims he owns, and if he has, he did not show it to the court to give the court some confidence that he will not disappear into the wide world and become untraceable, which if it happened, would raise the risk of the appellant losing the money, if the appeal is successful.

In this court's view, this was a case where the appellant deserved a stay of execution, which the court indeed recognized and granted. However, the conditions attached to the stay, are without doubt cumbersome and even risky. They are in the circumstances unreasonable and unjust and should be varied by the following orders: -

ORDERS

- 1. A stay of execution of the lower court decree is hereby granted pending the hearing and final determination of this appeal.***
- 2. The Appellant shall deposit in joint interest-earning bank or Sacco account to be operated by the two advocates representing the parties herein, within 30 days of this date, until the appeal is finally decided.***
- 3. The execution of the decree by Garam Investments Auctioneers is ordered stopped and if any property of the Appellant has been taken away, the same shall be returned within 7 days of service of this order upon them.***
- 4. The Thika Court Executive Officer, is hereby directed to urgently trace the lower court case file CMCC No. 915 of 2007 records and send them to this court within 35 days after supplying the Appellant with a certified copy of proceedings, judgment and decree on payment.***
- 5. These orders to be served upon the Executive Officer, Thika Law Courts and Garam Investments Auctioneers within 10 days.***
- 6. Costs of this application, are costs in the cause.***

Dated and delivered at Nairobi this 14th day of February 2012.

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D A ONYANCHA
JUDGE