



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
MISCELLANEOUS APPLICATION 6 OF 2007

EUNICE MUTHONI KARUGA

AGNES MUMBI KARUGA

DISHON KARUGA MBURIA.....PLAINTIFFS/RESPONDENTS

VERSUS

NATIONAL IRRIGATION BOARD.....DEFENDANT/APPLICANT

RULING

This is the Notice of Motion dated 25/11/2010 brought Section 2A and 1A and Order XLI Rule 4 (old Civil Procedure Rules). The Defendant/applicant seeks stay of execution of the decree herein pending the hearing and final determination of an appeal to the Court of Appeal. It also prays for costs of the application.

The main ground is that the Applicant stands to suffer substantial loss in the event that execution of the decree proceeds. The same is supported by the affidavit of one Eng. Daniel Barasa the General Manager of the Applicant herein. He says the Applicant is a parastatal and has no money to pay Shs.500,000/= as ordered. He further says the Applicant does not own any land to give to the Respondent.

That if execution proceeds and the Appeal eventually succeeds it will be impossible to recover the money if paid to the Respondent. It is ready to give security. The application is opposed by the plaintiff/Respondent citing delay. A notice of Appeal was filed but no appeal has been lodged to date. There is no application by the Applicant before the court of appeal asking to be allowed to file appeal out of time. Mr. Kahiga argues that the Applicant has not shown that he will suffer substantial loss if the order of stay is not granted.

He further says the application is supported by an affidavit sworn by an unauthorized person. He cited the cases of;

1. DELPHIS BANK LTD HCCC NO. 82/2003 &

2. KENYA SHELL LTD VS KIBIRU & ANOTHER [1986] KLR 410, 415.

In response Ms. Mburu submitted that they paid for proceedings on 23/5/2011 and they were collected in March 2012.

The Applicant is praying to be granted stay of execution of a decree pending the hearing and final determination of an appeal to the Civil Appeal. First of all it must be established that indeed there is an appeal filed by the Applicant herein in the Court of Appeal. Annexed to the application marked (DB1) is a Notice of Appeal to the Court of Appeal dated 27/10/2010. Under Rule 82(1) of the Court Appeal Rules, one has to lodge an appeal within 60 days of the lodging of the Notice of Appeal. It appears that since the lodging of the said Notice on 27/10/2010 the applicant has not lodged his Appeal over 1 ½ years down the line.

There is no draft of the Memorandum of Appeal; no number of the Appeal or even draft of an application seeking leave to file appeal out of time annexed to the application herein. The Applicant has not filed any certificate of delay from the Deputy Registrar of this court showing that proceedings were applied for on time but the Court delayed in supplying them as is envisaged under the proviso to Rule 82(1) of the Court of Appeal Rules.

It was the duty of the Applicant to demonstrate to this Court that indeed there is a valid appeal or intended appeal by him pending before the Court of Appeal and that as a result the stay if not granted, the said appeal would be rendered nugatory. Ref. **ELIJAH NYAWIRI VS JACKSON OYUNGU & ANOTHER, KISUMU HCCA NO. 116/2001 – RULING ON 27/7/2005 UR.**

Ms. Mburu for the Applicant submitted that they were supplied with proceedings in March 2012. This application was argued before me on 16/6/2012. If the Applicant was serious they would have done something between that time and the time the application was heard to show that an appeal had been lodged in the Court of Appeal.

It is only after establishing the pendency of an appeal that the court can now move to deal with the conditions for staying of execution. I am unable to do so because of the failure by the Applicant to demonstrate the existence of an appeal in the Court of Appeal. And for that reason, I find no merits in the application dated 25/11/2010 which I dismiss with costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 18TH DAY OF JULY 2012.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Mungai for Kahiga for Respondent p

Ms. L.G. Kimani for Defendant Applicant

Njue CC