



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 175 of 2009

KENYA MEAT COMMISSION.....APPELLANT

VERSUS

MUNICIPAL COUNCIL OF MOMBASA.....1ST RESPONDENT

SAFEWAYS LIMITED.....INTERESTED PARTY/RESPONDENT

(Being an appeal against the Ruling and Order of Hon. M.K. Mwangi, Senior Resident Magistrate delivered on 29th September 2009 in CMCC No. 1900 of 2006 - Mombasa)

RULING

By Notice of Motion Application dated 23rd October 2009 brought under Order XLI Rules 3& 4; Oder L Rule 1 and 2; Order XLII of the Civil Procedure rules and Section 3A, 63(e) & 90 of the Civil Procedure Act the Appellant prays for the following orders:

- b. That the honourable Court be pleased to order stay of execution of consent order/Judgment/decision delivered on the 18th May 2007 in CMCC No. 1900 of 2009 (MSA) before Hon. M.K Mwangi SRM and all consequential orders thereto pending hearing interpartes of this application and or hearing and determination of the appeal and/or further orders of this Hounarable court.**
- c. That this Hounarable court be pleased to order stay of execution of the orders/ruling/decision delivered on 29th September 2009 in CMCC No. 1900 of 2009 (MSA) before Hon. M.K Mwangi SRM and all consequential orders thereto pending hearing interpartes of this application and or hearing and determination of the appeal or further orders of this Hounarable court.**
- d. That this Hounarable Court be pleased to order stay of the orders/ ruling delivered on the 16th October 2009 before Hon. T.M Gesora, SRM pending hearing interpartes of this application and or further orders of this Hounarable court.**
- e. That this Honourable Court be pleased to make such orders it deems fit and convenient to meet the ends of justice.**
- f. That the costs of this application be provided for.**

There is an affidavit in support of the Application sworn by Joseph Stanley Nyongesa Nyarotso the Branch Manager Mombasa office of the Appellant dated 23rd October 2009.

The affidavit reiterates the grounds in support of the application which can be summarized as follows:-

- 1. That unless the stay is granted the applicant stands to suffer loss and damages and the intended appeal will be rendered nugatory.**
- 2. That the appellant has already filed Notice of Appeal, Memorandum of Appeal and has applied for certified copies of the proceedings, ex-parte judgment and ruling delivered on the 29th September 2009 and the appellant has an arguable appeal. That leave to file appeal was granted on the 29th September 2009 and the appeal was filed on the 5th October 2009.**
- 3. That the appellant's Mombasa branch office serves as the sole export processing, abattoir for export of meat and meat products by air and sea in the coast region. That unless orders of stay pending appeal are issued the applicant stands to suffer and operations in the cost region will be paralyzed. This will deny the country foreign exchange and many employees will lose their jobs and will also have negative effect on livestock industry.**
- 4. That the sale by the applicants premises on Plot No. MSA/BLOCK 1/258 Makupa Causeway Kibarani in Mombasa was done irregularly hence the appeal.**
- 5. That the appellant is ready to deposit in Court the Decretal sum of kshs. 5,474,571.31 pending hearing and determination of the appeal.**
- 6. That the refrigeration system of the Appellant is valued at over kshs. 50,000,000.**

When the appellant's application come before the court ex-parte on the 29th September 2009 the court granted interim stay of execution of the orders appealed from.

The application is opposed. The interested party through its operations manager Amiritlal P. Devani has filed a replying affidavit dated 22nd November 2009.

The Interested Party states that the appellant has not satisfied the conditions requisite for grant of stay of execution as provided in Order XLI of the Civil procedure rules. That the application is malicious intended to cloud issues and should be struck out. He states that the interested party was the highest bidder in a public auction conducted by M/s Kinyua & Co Auctioneers in which Plot No. MOMBASA/Block 1/258 previously registered in the name of Kenya Meat Commission was sold for non-payment of rates and a decree issued in the suit. That the judgment in the original suit was entered by consent and the result property auctioned for recovery of rates therefore the application has no merit and should be dismissed.

The Interested Party further avers that the necessary legal procedure was followed and the property duly transferred in the name of the Interested Party and is therefore a purchaser for valuable consideration. That the remedy of the appellant lies in damages against the Municipal Council of Mombasa.

The Appellant has filed a supplementary affidavit in reply to issues raised in the interested parties replying affidavit above. The affidavits is sworn by the Legal Officer of the Appellant and is dated 15th January 2010. He states that the appellant and the Municipal Council of Mombasa after advertisement of the suit property in the 'Standard Newspaper' the sum of kshs. 3,332,252 was settled on the 27th March 2009, 7 days before the auction date. That the said public auction was done erroneously as the Appellant had already cleared the rates. He states that the interested party does not hold a good title because the auction was done unprocedurally.

The counsels for the parties filed written submissions.

In his submission counsel for the Appellant reiterates the averments in the supporting affidavit and supplementary affidavit of the Appellant. Counsel states that the filing of appeal against the decision of the Lower court does not operate as stay of execution pending appeal. He states that the appellant is ready to provide security for costs in the sum of kshs. 5,474,571.30 the decretal sum plus costs and interest.

Counsel for the appellant submitted various authorities in support of the application.

In the case of **MUKUMA VS. ABUOGA (1988) KLR**. The Court of Appeal held that where a party is exercising his undoubted right of appeal, the Court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard. The Court held that the questions to be decided in determining whether to grant stay of execution is whether substantial loss may result unless the stay is granted; whether the application is made without delay; and whether the applicant has given security.

In opposition to the application counsel for the Interested Party states that the application lacks merit and is abuse of the Court process and should be dismissed with costs. Learned counsel for the interested party states that similar application was made to the lower court and was dismissed. That the property is vested in the Interested Party and the only remedy of the applicant is in damages.

Counsel further states that there is no specific order or ruling that the applicant has extracted on the subject issue based on which the application can be discerned. That there is an inordinate delay in making the application. That there is no order of the 29th September 2009 which is capable of being stayed as the order complained of merely dismissed the applicant's notice of motion dated 22nd July 2009.

Counsel for the Interested Party submitted several authorities in opposition to the application and the copy of the provisions of the Registration of Titles Act.

In the case of **Muliro Vs. Ochieng (1987) KLR** the Court of appeal held “ when the registrar made an order confirming the sale, it become absolute under the civil procedure rules Order XXI Rule 81 (1) so that the appellant's interest in the land comes to an end. No suit or any proceedings to set aside the order could be brought by the applicant.”

I have considered the application, affidavits in support and in opposition and the submissions by counsel.

This is an application for stay of execution and the court is guided by the provisions of order XLI Rule 4. There are 2 requirements which needs to be satisfied by the applicant under sub rule 2 which are:

- a) That 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**
- b) Such security as the Court orders for due performance of such decree or order as may untimely be binding on him has been given by the applicant.**

I am convinced that the applicant herein has satisfied the requirement of paragraph (a) above in that the property subject matter of the suit is a facility where the appellant operates its services from. According to the applicant It serves as the sole export processing, abattoir for export of meat and meat products by air and sea in the coastal region. The result of losing it will as per the applicant submissions lead to loss foreign exchange for the country and many employees will lose their jobs and will also have negative effect on livestock industry. I am convinced that if stay orders are not granted substantial loss will result to the applicant. It is my opinion that the subject property is a property of great importance not only to the appellant but to the Nation.

I also hold that this application was filed without undue delay because the decision of the Lower Court denying stay was issued on the 16th October 2009 while this application was filed on the 23rd October 2009.

The Applicant has also undertaken to provide security in the sum of kshs. 5,474,571.30 the decretal sum plus costs and interest. Therefore the second limb of the requirement for stay of execution orders is satisfied.

I will not need to discuss the merits or otherwise of the case at this stage, this is a matter of the appeal. As stated in the above case of **MUKUMA VS. ABUOGA (1988) KLR.** The (Court of Appeal) what the court needs to consider at this stage is that the applicant is exercising its undoubted right of appeal, the suit property should be preserved so that the appeal is not rendered nugatory.

I am of the opinion that the Appellant has made a case for the granting orders for stay of execution. However I am in agreement with the submissions of the Counsel for the Interested Party that the prayer No. (d) of the Application against the decision of Hon. T.M Gesora dismissing the applicants application cannot be granted because the same was a negative order. You cannot stay a negative order.

I therefore make the following orders:

- a) That there be a stay of execution of consent order /Judgment/decision delivered on the 18th May 2007 in CMCC No. 1900 of 2009 (MSA) before Hon. M.K Mwangi SRM and all consequential orders thereto pending hearing and determination of the appeal.
- b) That there be a stay of execution of consent order/Judgment/decision delivered on the on 29th September 2009 in CMCC No. 1900 of 2009 (MSA) before Hon. M.K Mwangi SRM and all consequential orders thereto pending hearing and determination of the appeal.
- c) THAT the appellant shall deposit the decretal sum of kshs. 5,474,571.30 in a joint interest earning account of the parties advocates within 45 days from the date of delivery of this ruling.
- d) THAT the costs of this application shall be in the appeal.

Dated AND Signed At Nairobi ON This 23RD Day Of AUGUST 2012.

M. K. IBRAHIM

JUDGE

DATED AND Delivered at Mombasa on this 25TH day of SEPTEMBER 2012.

J.W. MWERA

JUDGE

Delivered in the presence of: Both side represented