REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 186 OF 2000

KIAMBU COUNTY COUNCIL .....PLAINTIFF

VERSUS

COFFEE BOARD OF KENYA & OTHERS .....DEFENDANTS

RULING

Coram: Mwera J

Mwaura for plaintiff

Munene for 2nd defendant

Mburu for 1st defendant

Njoroge court clerk

The following is a composite ruling relating to the 2 applications filed here by the 1st and 2nd defendants and which the parties agreed to be heard and determined together.

The 1st defendant's notice of motion dated 18/10/10 was brought under the now repealed Order 41 rule 4, Order 50 rule 1 of Civil Procedure Rules and section 3A of Civil Procedure Act. It had this main prayer:

i) that there be a stay of execution following the judgement of 9.9.10 until the 1st defendant's appeal is heard.

There was in the grounds contended that a notice of appeal against the said judgement had been filed and served. If the plaintiff proceeded to execute the decree thereof the applicant could suffer substantial

loss. Stay orders would not prejudice the plaintiff and the applicant was ready to furnish security for due performance as the court may direct.

Mary Gitumbi, the legal officer of the 1st defendant board deponed that she presented a copy of the subject judgement to her employer but it was dissatisfied with it whereupon it instructed its lawyers to lodge an appeal. And as the other appeal steps were being taken, this application was timeous filed. The decretal sum of sh. 119,000,000/= plus interest was so large a sum that if paid it could constitute substantial loss to the applicant. The applicant highly doubted if the plaintiff would be able to refund it in the event of a successful appeal. The applicant no longer collected what was once called coffee cess and if the decretal sum is paid the applicant could be financially crippled - a matter which had been acknowledged by the trial court in its judgement. It is a public corporation. The court should grant it stay orders on reasonable conditions, excluding a monetary one. And that the 2nd defendant too had filed a notice of appeal.

Joseph Kuria Kiruthi, the county clerk to the plaintiff council swore an affidavit in reply to the 1st defendant's motion. He asserted that the stay application was not timeously made when it was filed 40 days following delivery of the judgemnt on 9.9.10. There was no explanation for this delay, and even on the day of judgement the 1st defendant did not make an oral application for stay. Further, that on 10/9/10 the plaintiff's counsel wrote to the 1st and 2nd defendants' advocates enclosing a consent by which the defendants could instruct the bank to release the funds held in escrow for onward transmission to the plaintiff. The 1st defendant's lawyer on 16.9.10 replied that he was waiting for instructions. The deponent then got into other subjects, not really relevant to this application eg. regarding lack of merit of the intended appeal and what seemed to constitute evidence given during the trial. But he concluded by claiming that the plaintiff was substantially endowed and in the event the appeal succeeded it could repay the decretal sum.

The 2nd defendant/applicant's notice of motion was dated 8/11/10. It too sought stay of execution orders like the 1st defendant, pending determination of its appeal. It was stated in the grounds that a notice of appeal dated 22.9.10 had been filed and served on the plaintiff. If the execution proceeded this applicant would suffer substantial loss while the plaintiff would suffer no prejudice, with stay orders in place. The applicant would abide by reasonable terms to go with the stay.

In the supporting affidavit by the 2nd defendant it was stated to a large extent irrelevantly, as to the law governing stay – of- execution applications, that if execution proceeds, that will render the applicants' appeal nugatory; the appeal was arguable and that the execution would be contrary to the evidence tendered. And that under the new Constitution the plaintiff will soon cease to exist, so that will render the appeal academic! Be that as it may.
Again, the plaintiff's county clerk, Joseph Kiruthi replied to this application more or less in the same way he did to the 1st defendant, emphasizing that there had been an inordinate and unexplained delay between the delivery of the subject judgment and the filing of this application. Then the deponent went off into aspects that did not appear related to the application before court eg. cess money, audits etc. plus lack of merits of the intended appeal.
On 22.11.10 the 1st defendant filed a supplementary affidavit through its managing director as granted by court. The court was told that when the notice of appeal was filed on 22.9.10 the application for stay was filed on 18/10/10 – 26 days later following a board meeting, and 39 days after delivery of judgement. That the plaintiff had not taxed its bill of costs and so could not move to execute the decree unless that was with the leave of court. Again like other deponents, the managing director delved in other matters not really connected with this matter allegedly on advice of their counsel, regarding cess money, audits, the locus standi ofthe 2nd defendant, and even the abolition of the plaintiff envisaged by the new Constitution! Then the parties submitted.

The 1st defendant said that it deserved the stay pending appeal (it had filed a notice of appeal) as per the conditions set out in Order 41 rule 4 (2) Civil Procedure Rules. Then the submission veered off to the other areas eg. the synopsis of the case, the evidence in the trial court and then back to the conditions:

a) Substantial Loss: That a sum of sh. 95m was found by the trial court as being coffee cess which on proper accounting or something like that, the 1st defendant would pay to the plaintiff. If paid the plaintiff will not be existence under the new Constitution and so it will not be there to refund the sum in the event the intended appeal succeeded.

b) Unreasonable Delay: It was conceded that the application for stay was filed 39 days after the judgement herein on 9.9.10. It took that long for the applicants' board to meet and instruct its lawyers to proceed with the appeal. And in any case the plaintiff could not have leeway to execute without certified costs or leave of court to so proceed without such certificate. If it may be said here, no evidence was placed before court regarding the alleged board meeting and giving authority after 39 days to the lawyers to appeal. The court may add that it was not clear whether actual execution got underway and the applicant challenged it as being premature due to want of certificate of costs or leave of the court to execute before costs were taxed. But the court heard that the delay to bring this application was not unreasonable.

c) Security: It was advanced that the cess money was in the escrow account where it was held in the joint names of the parties lawyers. It was sufficient security for due performance of the decree in the event the appeal failed. And that there were items of plant and equipment worth over sh. 40 m. to stand as security. It was not claimed that this was 1st defendant's property.

As far as the 3 conditions under Order 42 rule 6 Civil Procedure Rules are concerned, the applicant has alluded to them already. But it added another condition titled:

"SUFFICIENT CAUSE",

That one had been made out based on the facts, background and preconditions stated, to warrant a stay. And further that although not a requirement before this court when considering a stay pending appeal, it should glance at the draft memorandum of appeal and conclude that it raised triable and grave issues of law and fact. A stay ought to issue.

On its part the 2nd defendant submitted that it has joined the 1st applicant to seek stay of execution pending appeal because the plaintiff has sought a release to itself of the sums deposited in an account yet both applicants have filed notices of appeal. Both relied on common grounds and with that the 2nd defendant went into the points forming the basis of the intended appeal(s). The court was urged to grant stay for a reasonable time based on all the circumstances of the case. The sum awarded was in any event lying in a deposit account earning interest and the heavy equipment bought with cess money was in custody of this applicant - not in use. And again it was said that there was no decree in place complete with ascertained costs. So the application to execute was pre-mature.

The plaintiff's position was that it opposed both applications for stay. It was in error to hold as the applicants did that the plaintiff would cease to be under the new Constitution. The party seemed to consider this point irrelevant, and it moved to the provisions of Order 42 (6) Civil Procedure Rules (no longer Order 41 rule 4 (2)) and stated that no substantial loss would be suffered by the 2 applicants in the event the stay sought was not granted. There was no explanation as to why it took some 39 or so days to bring these applications and the applicants had not stated in what form the securities for due performance were being put forth. Some authorities were cited.

Beginning with – the applicable law we have Order 42 rule 6 Civil Procedure Rules (2010)

"6. (1) No appeal or second appeal shall operate as stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been

granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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 reasonable 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.

(3) …… (b)…….”

In brief, whether a stay is sought because of a pending appeal or for other sufficient cause it shall only be granted if:

a) substantial loss is likely to be suffered;

b) the stay application has been made without unreasonable delay; and

c) the applicant posts security for due performance of the decree as the court orders.

In the present case the 2 applicants have filed notices of appeal together with draft memoranda.

The court has noted that the execution sought to be stayed is not following a decree from the judgment of 9.9.10. The 2 applicants were served with a draft of the decree. The 2 letters of 10/9/10 and 13.9.10 from the plaintiff's lawyers to the applicants read in pertinent parts:

“ We refer to the above matter and the Judgement of the court of 29th July 2010 (Hon. Murugi Mugo J) read on the 9th September, 2010 by the Hon Rawal J in favour of our client pursuant to which we enclose a consent letter for your execution instructing the Bank to release the funds held in escrow forthwith and expeditiously to ourselves for onward transmission to our client.”

[Letter of 10/9/2010].
And then:

“ Kindly find enclosed herewith a copy of the draft decree for your approval and/or amendment and to urgently return the same to ourselves for further action.

Take notice that should you fail to approve the said draft decree and return the same to ourselves within the next three (3) days from the date hereof we shall proceed to have the same approved by

the Deputy Registrar."

And with these two letters, the applicants told the court that there was execution in the process which this court should stay. Clearly there is no execution in the offing yet the applicants urged the court to find that the plaintiff had a decree it intended to execute even before taxation or without leave of the court to do so before taxation. There is none of the above. Clearly they did not return the draft decree approved with or without amendments. If they did, that was not disclosed to the court. And none approved by the registrar is on the file either . Even if there was there is no application by the plaintiff to execute and no warrants of attachment and sale are on the file either. So what is this that particularly the 1st defendant claimed in the grounds:

"(b) The plaintiff/respondent may proceed to enforce and execute the said decision/decree/order or any part thereof any time now, rendering the intended appeal by the applicant nugatory (sic)?"

There is no basis for the two applications by the defendants. There is no decree in the course of being executed and so the applications are premature. The law mandates:

" 6. (1) No appeal or second appeal shall operate as a stay of execution ……. under a decree or order ……."

Yet the applicants went on to argue that the plaintiff was about to execute a decree which would cause them substantial loss in the event this court refused to grant them stay orders.

There is no decree and if getting to the deposit funds is what worried the applicants, such money could only be released by consent of all parties, since it appears that that was how the escrow account was opened and the money was deposited. That
account did not become part of the matter Mugo J determined in her judgement. On this point alone, the stay orders could be refused and they are hereby refused.

If the court were minded to consider granting the stay it would have gone on to deal with the 3 conditions above as mandated by Order 42 (6) Civil Procedure Rules and only if there could have been a decree/order to execute. But it can be stated that the stay could also have been refused on the following grounds:

i) Substantial Loss: None was demonstrated here. Neither applicant placed before this court audited accounts to demonstrate that the decretal sum if paid could cripple their operations. Yes. The judgment sum put at about sh. 113m by the 1st defendant in its affidavit, is by all means a very large sum. But a very substantial sum in what context of financial standing or capacity? Would such a bare claim attract this court's discretion to grant a stay? Surely, such a claim should be backed with substance and neither applicant provided it.

Moving to the 3rd (iii) condition – security for due performance of the decree: The law states that an applicant should furnish such security as the court may order. But a prudent applicant will do well to propose of his own to the court and the respondent what will be attractive, as security. The applicants here spoke of the deposit in the bank (escrow) and that the 2nd defendant had in his possession or control many machines and plant bought by cess money (worth over sh. 40m) which could as well act as security.

The court was left with an impression that the bank deposit was subject to the parties signature and or consent to withdraw/utilize while the machinery and plaint intended to benefit coffee farmers in their operations should not be pledged or in a way kept idle as a security and not be put to work at all. In essence the applicants proposed no security even as the court is enjoined by law to consider and order on this.

ii) Unreasonable Delay: The law requires that an applicant for stay should make its application in that regard without unreasonable delay following the subject decree/order to be stayed.

The 2 applicants here readily conceded that they filed their respective stay applications some 39 days after the subject judgement. But none of them offered any sort of explanation about this. The time of delay was over a month and we have innumerable authorities on this aspect of delay some which state that even one day's delay ought to be explained. Nothing was put forth here and again on this account the court would have been inclined to refuse the prayer for stay.

In sum the 2 applications herein are dismissed with costs.

Delivered on 21.2.11.

J. W. MWERA

JUDGE