



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 36 OF 2009

GEORGE ARUNGA.....APPELLANT/RESP

-VERSUS-

KENYA BANKERS COOPERATIVE SAVINGS & CREDIT SOCIETY.....RESPONDENT/APPL

RULING

1. For ruling is a notice of motion dated 16th September, 2010 filed by Kenya Bankers Cooperative Savings & Credit Society the applicant/respondent brought pursuant to Section 3A of the Civil Procedure Act and Order XLI Rule 4 of the old Civil Procedure Rules. It seeks for stay of execution of the judgment and/or decree pending an intended appeal in the Court of Appeal.
2. The application is based on the grounds that; a decree has been issued against the applicant who stands to suffer substantial loss unless the stay is granted; the applicant has already filed an appeal in the Court of Appeal; the applicant/respondent is willing to furnish security and the granting of the application will be in the interest of justice.
3. The application is supported by the affidavit of **Mohamed Said Ali** the Branch Manager of the applicant/respondent in Kisumu. In the said affidavit the said manager depones in part:-
 - **The said sum is large and the respondent may not be able to refund if appeal is successful.**
 - **The applicant is prepared to furnish security in form of banker's bond.**
4. The respondent/appellant **GEORGE ARUNGA SINO** objected to the application through a replying affidavit dated 14th October, 2010 sworn by the respondent. He depones that he is a licensed auctioneer and not "**a man of straw**" as depicted by the applicant/respondent; he deserves fruits of his judgment and the appeal is not likely to succeed.
5. The applicant/respondent has the right of appeal. The success or otherwise of the same is not the arena of this court. The issue for determination is whether or not the conditions as set out in order 41 of the old Civil Procedure now replicated as Order 42 rule 1(2) of the current have been satisfied. There are 3 conditionalities:-

- **The court must be satisfied that substantial loss may result.**
- **The application has been made without undue delay.**
- **Security as the court orders for the due performance of such decree or order has been given.**

6. Judgment herein was delivered on the 18th of June, 2010. The motion before court was filed on 17th September, 2010. A period of 4 months had lapsed at the filing of the same. There was a delay however it may not be deemed to be unreasonable.

7. The amount due is now in excess of Ksh 1 million which is not a small sum. Although the respondent/appellant has says that he is a man of means; the Bank of statements exhibited belong to a company not belong to him as an individual. As to whether he can bind a company or not is clear in law; the company is a legal entity separate from the applicant. It is my view that he cannot commit the company in the manner he purports to; and that indeed in the event a successful appeal and he cannot pay, the applicant/respondent will suffer loss.

However it is not lost to the court that the respondent so far has a judgment in his favour. It is therefore the view of the court that security ought to be given for due performance of the decree of the court.

8. In view of the above reasons; the application succeeds to the extent that; stay is granted on condition that the sum of Kshs 750,000/= be deposited in an interest earning account in the joint names of counsel on record for the parties within the next seven (7) days of the date hereof.

DATED AND DELIVERED IN KISUMU ON THIS 11TH DAY OF MARCH, 2011.

ALI-ARONI

JUDGE

In the presence of:

..... present for Appellant/resp

..... present for Respondent/appl.