



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 63 OF 2011

RUKURIRI TEA GROWERS SACCO LTD APPELLANT/APPLICANT

VERSUS

JOSEPH NJIRU KANAMPIU RESPONDENT

RULING

This is an application for stay of the execution of the decree pending the hearing and determination of the appeal in which the applicant is challenging the ruling of the Co-operative Tribunal delivered on 18th May 2011 dismissing his application to set aside the ex-parte judgment given against him on 7th December 2010. He had sought in the application to be allowed the opportunity to file a defence. The respondent is in the process of executing against the applicant's property. The value of the judgment is Kshs.162,934/17 plus the auctioneer's costs which are estimated at kshs.40,000/=. The application has been made under Order 42 Rule 6 of the Civil Procedure Rules. It was served but received no response.

There is no dispute that the application has been made without delay. Before making an order staying the execution of the judgment herein, the court has to be satisfied that substantial loss may result to the applicant unless the order was made. (*New Stanley Hotel Limited versus Arcade Tobacconists Limited [1986] KLR 757*). This is a money decree and the amount in question is not substantial. There was no allegation in the supporting affidavit that if stay is not granted and the appeal eventually succeeds the respondent will not be able to refund the decretal sum. (*Nairobi City Council versus Quardroba Enterprises Ltd, Civil Application number Nai 95 of 2001*). The consequences is that substantial loss has not been demonstrated.

The applicant swore that he will be ready to abide by any conditions that the court may impose. It is important to note that the court does not know the means of the applicant whose responsibility was to offer such security that will ultimately meet the decree.

It should be noted that in dealing with this kind of application the court has to balance the interests of the parties: the respondent has a judgment which he is entitled to execute whereas the applicant is exercising his right to appeal. Considering all the facts of this application I find that the same is not merited. It is hereby dismissed with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF JUNE, 2011.

A.O. MUCHELULE

JUDGE

In the presence of:- Mr. Mogusu for the Applicant.