



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 39 of 2010
MAASAI OSTRICH FARMAPPELLANT
VERSUS
KENGROW LIMITED.....RESPONDENT

R U L I N G

1. Maasai Ostrich Farm Limited who is the appellant, (hereinafter referred to as the applicant), seeks substantively an order of stay of execution of the ruling and order of the Senior Resident Magistrate delivered on 10th February, 2010 pending the hearing and determination of its appeal. The applicant is apprehensive that unless the orders sought are granted, Kengrow Limited who is the respondent herein will proceed to enforce the order in his favour and such enforcement will render the appeal nugatory.
2. Counsel for the applicant citing *Reliance Bank Ltd vs Norlake Investments Ltd (2202) IEA 227* and *Butt vs Rent Restriction Tribunal (Civil Application No. Nai 6 of 1979)*, submitted that the applicant would suffer irreparably if an order of stay of execution pending appeal is not granted.
3. The respondent has objected to the application through a replying affidavit sworn by its Director Rajesh Hiran Andani. The Director swears that the amount of the decree is only Kshs.331,834/= which amount the respondent is capable of refunding should the applicant succeed in its appeal. The respondent's counsel Kariba Mbaabu has also sworn a replying affidavit in which he explains how the decree sought to be stayed arose, and the fact that the applicant took no action after the ruling of the trial magistrate which was delivered on 14th October, 2009 and only filed an application for stay in the lower court on 7th January, 2010 when the process of execution was underway.
4. Counsel for the respondent argued before this court that that there was no order made by the lower court on 10th February, 2010 which was capable of enforcement apart from the order of costs made pursuant to the dismissal of the applicant's counter-claim. Counsel for the respondent pointed out that the appellant has not appealed against the order made by the lower court on 14th October, 2009 or the consequent decree and therefore the order for stay of execution sought by the applicant would not affect the decree and order of 14th October, 2009.
5. I have carefully considered the application, the affidavit in support and in reply as well as the submissions made by counsel and the authorities cited. I find that the order made by the lower court on 14th October, 2009 which is the subject of the decree sought to be executed by the respondent was in the following terms:
 - (i) That the defendant be and is hereby given 30 days either to have the matter transferred to the High Court and/or to bring an order staying these proceedings.
 - (ii) That in default the counterclaim herein shall stand struck out with costs to the plaintiff for want of jurisdiction.
 - (iii) That the plaintiff will have the costs of this application.
6. It is evident from the affidavit sworn on 16th February, 2010 by Grace Kemei the legal officer of the applicant that the ruling of 10th February, 2010 which is the subject of the current appeal was one dismissing an application for stay of execution or decree extracted pursuant to the ruling delivered giving the applicant limited time to comply and dismissal of the application seeking extension of time. The applicant does not appear to have a problem with the order of 14th October, 2009. The issue is the dismissal of the applicant's subsequent application for stay of execution and also the issue of the taxation of the Bill of costs.
7. I think that in the circumstances of this case, it is necessary that the applicant be given an opportunity of being heard on his

appeal before the execution process is finalized. The interest of justice demands that I balance the interest of both parties by issuing a conditional order of stay of execution pending appeal as follows:

- (i) That the applicant shall deposit the full decretal amount into an interest earning account in the joint names of the parties' advocates within 15 days from the date hereof.
- (ii) That the applicant shall pay the Auctioneer's charges which shall either be agreed upon or assessed by the lower court.
- (iii) That the applicant shall file a record of appeal within 90 days from the date hereof.
- (iv) That the order for stay of execution pending appeal shall lapse within 12 months unless otherwise extended by the court. Those shall be the orders of this court.

Dated and delivered this 19th day of March, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant/applicant absent

Mbaabu for the respondent

Eric - Court clerk