



JOSEPH MBINDYO1ST PLAINTIFF
DAVID MUNYAO.....2ND PLAINTIFF
ELIUD NTHIWA.....3RD PLAINTIFF
JOHN MUSYOKA.....4TH PLAINTIFF

VERSUS

TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY....DEFENDANT

RULING

The application before me is brought under Order XLI Rule 4 of the Civil Procedure Act. The same was filed on 30/11/2009 under a Certificate of Urgency. Interim orders for stay were granted and the application came for hearing inter-partes on 17/2/2010. This is now the ruling following the inter-partes hearing. Prayers 1, 2 and 3 have therefore been spent and what remains is prayer 3 which seeks for orders that the stay orders be granted while pending the hearing and determination of the Appeal before the Court of Appeal. The same is premised on 4 grounds on its face and supported by the 12 paragraph affidavit of one A.M. Nyachio dated 30/11/2009. The same is opposed vide the replying affidavit of David Munyao Kikuvi dated 11/12/2009. I have considered the application, the said grounds and the rival affidavits.

The law on stay of execution pending Appeal is very clear. I will therefore be very brief for purposes of this ruling. The court does have an unfettered discretion to grant a stay. This discretion though seemingly unfettered must nonetheless be informed or guided

by the provisions of Order XLI Rules 4 (1) and 2. The requirement spelt out under those rules must be fulfilled or appear to be proved.

These conditions if I were to summarise them are:-

- 1. Does the applicant have sufficient cause?**
- 2. Has the applicant established that he will suffer substantial loss if the stay is not granted?**
- 3. Was the application for stay filed timeously?**
- 4. Will the appeal be rendered nugatory if the stay orders are not granted? and finally**
- 5. Has the applicant made an undertaking to furnish the court with security for the due performance of such a decree or order as may ultimately be binding on him?**

I agree with counsel for the Respondent that Order XLI Rule 4 (2) is actually couched in mandatory terms. My understanding of this rule is that a party seeking stay orders must give an undertaking to furnish the court with security for the performance of the decree or order that may be found binding on him unless the court has very good reasons for not asking for the said security.

In this case, there is no doubt the applicant has satisfied the first 4 conditions listed above. It has shown sufficient cause. The appeal was filed timeously; the appeal will be rendered nugatory if the money is paid out to the more than 500 people who would be difficult to trace if a recovery of the money was ordered etc. The amount of money involved is also substantial by any standards and the applicant stands to suffer substantial loss if the entire sum were to be paid out and recovery not made thereafter if such need arises.

My only concern in this matter however, which appears to also be the Respondents' concern is the issue of furnishing the security as per Order XLI Rule 4 (2) of the Civil Procedure Rules. In my view counsel for appellant's submission that the interest accruing on the money is sufficient security does not wash.

In my view, sufficient security must be offered in the absence of which the stay orders will not be merited. Having considered all the material before me, I am satisfied that for orders of stay to issue in this matter, the applicant must deposit some amount of cash in court which would at least be sufficient to cover the costs already taxed and those that might be incurred in future. Costs herein were taxed by consent to the tune of Ksh.2,122,400/=

The decretal amount awarded is Shs.96,800,000/=. The total sum now stands at more than Ksh.200,000,000/=.

I will allow this application and order a stay of execution but on condition that the defendant/applicant deposits Ksh.10 million with the court within 21 days from the date hereof, failure to which the stay order will lapse and the plaintiffs will be at liberty to execute the decree.

The costs of this application will be in the cause. Orders accordingly.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 4th day of March 2010.

In presence of:-Mr. Mutungi and Mr. Githinji for Mr. Okeyo.