



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc. Civ. Appli. 719 of 2003**

**ERNIE CAMPBELL & CO. LTD.....APPLICANT**

**VERSUS**

**GITHUNGURI DAIRY PLANT CO. LTD.....1<sup>ST</sup> RESPONDENT**

**GITHUNGURI DAIRY FARMERS**

**CO-OP SOCIETY LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

On 18<sup>th</sup> February 2009, this court granted the applicant's notice of motion dated 25<sup>th</sup> November 2008 in which the applicant had sought to lift the veil incorporation of the 1<sup>st</sup> respondent to enable it make the 2<sup>nd</sup> respondent liable to settle the decree issued in its favour by the court. The respondents were aggrieved by the said ruling of the court and have duly filed notice of their intention to appeal against the said decision to the Court of Appeal. On 4<sup>th</sup> March 2009, the respondents filed notice of motion pursuant to the provisions of Order XLI Rule 4 of the Civil Procedure Rules seeking to stay execution of the said orders issued in favour of the applicant pending the hearing and determination of the intended appeal. The grounds in support of the motion are on the face of the application. The application is supported by the annexed affidavit of Charles Ndichu Mukora, the Chairman of the management committee of the 2<sup>nd</sup> respondent and the Chairman of the board of directors of 1<sup>st</sup> respondent. The application is opposed. Parbat Lalji Halai, a director of the applicant swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard the rival submissions made by Dr. Kamau Kuria for the respondents and by Mr. Kairu for the applicant. I have carefully considered the said rival arguments, including the cited decided cases. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the respondent made a case to entitle this court stay the proceedings herein and the execution of the award pending the hearing and determination of the intended appeal. The principles to be considered by this court in determining whether or not to grant the order staying execution or proceedings are well settled. Under Order XLI Rule 4 (2) of the Civil Procedure Rules, for stay to be granted, the respondents in this case must establish that they would suffer substantial loss and further that they would be ready to provide security for the due performance of the decree. In Butt vs. Rent Restriction Tribunal [1982] KLR 417 at page 419 Madan JA (*as he was then*) held that:

*"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson vs. Church (No.2) 12 Ch D (1879) 454 at p. 459. In the same case, Cotton LJ said at page 458:*

*"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory." "*

In the present application, the respondents crave for this court to exercise its discretion in their favour and grant stay of execution pending the hearing and determination of their appeal without imposing onerous terms as regard security. It was conceded by the applicant that pursuant to Order XLI Rule 4 (2) of the Civil Procedure Rules, the respondent had filed the application to stay proceedings herein without undue delay. The issue that this court will determine is whether the respondents laid sufficient basis that they will suffer substantial loss if stay of execution is not granted. As correctly observed by Dr. Kamau Kuria, what constitutes substantial loss depends to a large extent to the facts of each particular case. In the Tanzanian case of Tanzania Cotton Marketing Board vs. Cogecot Cotton Co. AS [1995-1998] 1EA 312, it was held that for an applicant to prove that he would suffer substantial loss, he must establish that he would suffer a loss that is more substantial than that which will ordinarily be suffered by any judgment debtor who is facing the possibility

of a decree being executed against him. Dr. Kuria submitted that if stay is not granted, the operations of the dairy plant upon which the livelihood of many farmers in Githunguri constituency is dependant, will be grounded to a halt. He submitted that the court should grant stay without any conditions and if it were minded to impose any condition, then it should not impose conditions that may incapacitate the operations of the respondents' dairy plant. On his part, Mr. Kairu urged the court to dismiss the application. He submitted that the applicant was a company with means to refund the decretal sum if the respondents were to succeed in their appeal. Mr. Kairu urged the court to be persuaded by the decision of Emukule J in Gathenge Engineers & Electrical Limited vs. Postal Corporation of Kenya Nairobi HCCC No. 1830 of 2001 (unreported) where he held at page 4 of his ruling that:

*“It is the applicant who must show that the decree-holder is a person of little or no means. If the decree-holder demonstrates that is a safe bet with the decretal sum, and the sum would be refunded to the applicant if the intended appeal succeeds, then an applicant may be said to anticipate no or little loss upon its success on the appeal. The court must thus be satisfied through some evidence on record such as an affidavit that the decretal sum will be safe if the applicant's appeal were successful.”*

This court recently observed in Century Oil Trading Company Ltd vs. Kenya Shell Ltd Nairobi HC Misc.Civil Application No. 1561 of 2007 (unreported) at page 5 of its ruling that:

*“However, I am of the view that where the execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial situation of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears that the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of this appeal so that his appeal is not rendered nugatory and the interest of the respondent who is interested in enjoying the fruits of his judgment.”*

In the present application, the applicant has annexed copies of its audited accounts for the year ending 31<sup>st</sup> December 2007 in a bid to establish that it was not a company that will be unlikely to refund the decretal sum if the respondents' appeal is successful. Weighing the competing interest of the respondents in their desire to preserve the *status quo* pending the hearing and determination of the appeal and the right which has now accrued to the applicant to execute the decree issued in its favour and therefore enjoy the fruits of its judgment, I am of the view that the respondents have established that they would suffer substantial loss in the event that the applicant is allowed to execute the said decree. I will therefore conditionally grant the order sought by the respondents seeking to stay execution of the decree and further stay the proceedings herein pending the hearing and determination of the appeal intended to be filed in the Court of Appeal.

In determining the security that ought to be provided for the due performance of the decree pending the hearing and determination of the appeal, this court is not oblivious to the litigation history in respect of the dispute involving the applicant and the respondents. The decree sought to be executed arose from an award made in favour of the applicant by the arbitrator pursuant to arbitration proceedings conducted when a dispute arose regarding the payment in regard to certain works that the applicant undertook when the respondents commissioned it to construct a dairy plant at Githunguri. The arbitrator rendered his award in 2003.

According to Mr. Kairu the decretal amount plus interest has now escalated to a colossal sum of more than KShs.25 million. I have taken into account the said concern of the applicant in arriving at the figure to be deposited by the respondents as security pending the hearing of the appeal. Dr. Kamau Kuria proposed that the respondents deposit nothing, or if at all a sum not exceeding KShs.2 million. I have weighed the said competing interests of the respondents and the applicant. I direct that the respondents deposit in a joint interest earning account in a reputable bank in the names of counsel for the applicant and counsel for the respondents the sum of KShs.10 million within thirty (30) days of today's date failure of which the stay of proceedings and execution granted herein shall automatically lapse.

The costs of the application shall in any event be paid by the respondents. It is so ordered.

DATED at NAIROBI this 19<sup>TH</sup> day of MARCH 2009.

**L. KIMARU**

**JUDGE**