



ISAAC NJIRU.....APPELLANT

VERSUS

KAGAARI SOUTH FARMERS CO-OPERATIVE

LIMITED.....RESPONDENT

R U L I N G

1. By a Notice of Motion dated 1st July, 2009, Isaac Njiru, hereinafter referred to as the applicant seeks orders as follows:

- (i) That the Honourable Court do certify this application as urgent and be heard ex parte in the first place.
- (ii) That the Honourable Court be pleased to grant stay of execution in the Co-operative Tribunal Case No. 162 of 2007 pending hearing and determination of this application.
- (iii) That the Honourable Court be pleased to grant stay of execution in the Co-operative Tribunal Case No. 162 of 2007 pending hearing and determination of this application, stay pending appeal.
- (iv) That costs of this application be provided for.

For the purposes of this ruling, the relevant prayers are prayers Nos. (iii) & (iv). It is evident that the prayer No.(iii) is very poorly worded.

2. However, from the grounds on the face of the application, and the affidavit sworn by Issac Njiru in support of the application, it is apparent that the applicant is aggrieved by the ruling of the Co-operative Tribunal delivered on 3rd January, 2009, in which the Tribunal struck out the applicant's amended defence, and entered judgment in favour of the claimant, Kagaari South Farmers Co-operative Limited, in the sum of Kshs.267,264/=.

3. The applicant has lodged an appeal against the ruling of the Tribunal. He seeks an order staying execution (presumably of the Tribunal orders), as he believes that he will suffer substantial loss if the execution is allowed to proceed. This is because the amount claimed is 3 times what was found due to the

claimant pursuant to an inquiry upon which the claim is grounded. The applicant believes that he has a meritorious appeal contending that his amended defence was wrongly struck out.

4. The respondent, Kagaari South Farmers Co-operative Society Limited, has responded to the application through what is entitled “grounds of affirmation”, in which it is contended that the appeal before the Court is an abuse of the Court process. It is further stated that time for appealing has already ran out and the appeal should therefore be dismissed.

5. Mr. Mugo who argued the application on behalf of the applicant submitted that the appeal and the application were filed within time as they were filed within 30 days of the order appealed against. Mr. Mugo further pleaded that the applicant is an old man who would unduly suffer, if committed to civil jail. Mr. Mugo referred to various authorities in support of his submissions.

6. Mr. Mbuthia who appeared for the respondent maintained that the Notice of Motion dated 1st July, 2009 contravenes Order 50 Rule 15(2) of the Civil Procedure Rules which is a mandatory requirement. He further argued that the motion was merely calculated to delay the respondent from reaping the fruits of his judgment.

7. I have given due consideration to the applicant’s motion and the response thereto. Under Order XLI Rule 4(2) of the Civil Procedure Rules, an order for stay of execution pending appeal ought to be granted where the following conditions are complied with.

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

8. In this case the application was brought within 30 days from the date of the order appealed against. The applicant has explained that the lower Court did issue an order of stay of execution for 30 days. The present application is therefore not unduly delayed. The applicant has indicated that he stands to suffer substantial loss as he is required to pay an inflated sum of Kshs.267,264/= contrary to the surcharge summary demand of Kshs.95,622/20 which he was served with.

9. Moreover, in filing grounds of affirmation, there is a presumption that the applicant is not objecting to the application. The grounds set out are however inconsistent with this position. In any case order L Rule 16(1) of the Civil Procedure Rules provides for any respondent who wishes to oppose any motion or other application to file a replying affidavit or a statement of grounds of opposition. There is no provision for the filing of ground of affirmation. The respondent’s “ground of affirmation” is therefore incompetent and is accordingly struck out. Further this being a test suit, it is important that parties be given opportunity to fully exploit the legal process.

10. Accordingly, I will exercise my discretion in the applicant’s favour and issue an order of stay of execution pending appeal on the following conditions:

(a) That the applicant shall deposit a sum of Kshs.50,000/= into Court as security.

(b) That the applicant shall file and serve a Record of Appeal within 4 months from the date hereof and take all necessary action to facilitate the speedy disposal of this appeal.

(c) In the event that the appeal is not disposed of within 12 months from today, the order for stay of execution shall stand discharged unless otherwise extended by the Court.

Those shall be the orders of this Court.

Dated and delivered this 21st day of October, 2009.

H. M. OKWENGU

JUDGE

In the presence of: -

P.N. Mugo for the appellant/applicant

Mbuthia for the respondent

Eric, court clerk